

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Chehil, 2008 NSSC 357

**Date:**20081219

**Docket:**277168

**Registry:** Halifax

**Between:**

Her Majesty the Queen

Plaintiff

v.

Mandeep Singh Chehil

Defendant

**Revised Decision:** The release date of the decision, as shown in the right hand corner above, has been corrected from 20081020 to 20081219.

**Judge:** The Honourable Justice Simon J. MacDonald

**Heard:** October 20, 21, 2008 in Halifax, Nova Scotia

**Last Written Brief:** November 10, 2008

**Written Decision:** December 19, 2008

**Counsel:** Stanley MacDonald, for the Applicant  
Susan Bour, for the Respondent

**By the Court:**

**INTRODUCTION:**

[1] Mr. Chehil stands before the court charged that he: on or about the 16<sup>th</sup> day of November, 2005 at or near Goffs, Halifax Regional Municipality, Province of Nova Scotia, did unlawfully have in his possession for the purpose of trafficking, cocaine, a substance included in Schedule 1 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said **Act**.

**FACTS:**

[2] On November 16, 2005 members of the R.C.M.P “Criminal Interdiction Team”(C.I.T.) were on duty at Halifax International Airport near Goffs, Halifax Regional Municipality, Nova Scotia. They were operating as part of Operation Jetway.

[3] Operation Jetway is an R.C.M. P. program designed to curtail, amongst other things, drug trafficking. It is used at airports, bus terminals and train stations.

Police officers use certain indicators such as behaviour, demeanor, dress and other visible characteristics of travellers in order to identify and arrest drug couriers or people carrying weapons associated with crime or other contraband which may be indicative of criminal activity.

[4] At about 9:15 a.m. that date Corporal Greg Fraser and Cst. Wendy Ruby attended the Westjet Airlines office at Halifax Airport to view the passenger manifest for arriving flights. They were looking in particular for a Westjet flight originating in Vancouver and travelling to Halifax. This was purely a domestic flight. It should be noted that they did not have a search warrant nor permission of any passengers. They did have the permission of Westjet to look at the manifest.

[5] The officers found the second last purchase was a one-way ticket paid by cash shortly before departure and the passenger had only one checked bag.

Corporal Fraser said that having made those observations and based on his experience and training he formed reasonable suspicion that Mr. Chehil who was the passenger, was a drug courier in possession of drugs.

[6] The officers obtained the luggage claim ticket number for the luggage which allegedly belonged to Mr. Chehil. They then requested Cst. Daigle and police dog “Boris” to meet them at the “airside” in the baggage section of Halifax Airport.

“Airside” is a secure area whcih the travelling public are not allowed to enter.

When Mr. Chehil’s flight arrived the baggage was removed from the aircraft in the normal fashion by airport personnel and taken directly to the baggage area on the “airside” of the terminal.

[7] Once inside the “airside” baggage area of the terminal, Mr. Chehil’s bag, along with nine others was selected by the Jetway team and removed to a separate area. At that time, police dog Boris was taken to the bags in order to sniff them. Police dog Boris indicated the presence of narcotics on two pieces of luggage. One was identified as Mr. Chehils and the other was a cooler belonging to another passenger on the flight.

[8] Mr. Chehil’s checked bag was then placed on the luggage carousel in the usual fashion with other flight luggage and it was moved out into the public baggage retrieval area.

[9] Cst. Andy Pattison was with the C.I.T. team and he was waiting on the passenger side of the terminal. He was advised by Corporal Fraser about police dog Boris' findings. He observed Mr. Chehil picking up luggage from the luggage carousel. Cst. Pattison approached Mr. Chehil, produced his police identification and engaged him in conversation.

[10] Shortly thereafter Mr. Chehil was arrested for possession of a controlled substance, and given his Charter Rights. Cst. Pattison took Mr. Chehil and his luggage to the offices of the Canadian Border Services Agency.

[11] At the offices of the Canadian Border Services Agency Mr. Chehil's suitcase was broken open by Cst. Ruby without Mr. Chehil's consent and inside was found a knapsack.

[12] The knapsack was opened by Cst. Ruby, who found three kilograms of cocaine inside it.

[13] Mr. Chehil brings this application for a Charter remedy claiming his right to be free from unreasonable search and seizure in accordance with s. 8 of the

Charter, his right to be free from arbitrary detention in accordance with s. 9 of the Charter and his right to counsel under s. 10 (a) and (b) of the Charter. He requests the remedy of exclusion of any improperly seized evidence in accordance with s. 24(2) of the Charter.

**ISSUES:**

- 1) Was Mr. Chehil subjected to an unreasonable search and seizure within the meaning of Section 8 of the **Canadian Charter of Rights and Freedoms (Charter)** when his personal information contained in the electronic records of Westjet Airlines was viewed without a warrant by the R.C.M.P.?
  
- 2) Was Mr. Chehil subjected to an unreasonable search and seizure pursuant to Section 8 of the Charter when his luggage was removed along with nine other pieces of luggage upon its arrival in Halifax Airport by the police?

- 3) Was Mr. Chehil subjected to an unreasonable search and seizure pursuant to Section 8 of the Charter when his luggage was “sniffed” by police service dog Boris?
- 4) Was Mr. Chehil arbitrarily detained pursuant to Section 9 of the Charter during his initial encounter with the police?
- 5) Was Mr. Chehil denied his right to his counsel in violation of Sections 10(a) and Section 10(b) of the Charter during his initial detention by the police?
- 6) Did the police arrest Mr. Chehil without reasonable grounds in violation of Section 9 of the Charter?
- 7) Was the arrest by the police an arbitrary detention contrary to Section 9 of the Charter?

8) Was Mr. Chehil subjected to an unreasonable search and seizure in violation of Section 8 of the Charter following his arrest when his bag was broken open by the police and the contents seized by them?

[14] The applicant argues if there was a violation of any of the Charter issues enumerated the seized evidence should be excluded in accordance with Section 24.2 of the Charter.

**RELEVANT LEGISLATION:**

[15] The relevant portions of the **Canadian Charter of Rights and Freedoms** state as follows:

s.8 - **Search and Seizure** - Everyone has the right to be secure against unreasonable search or seizure.

s.9 - **Arbitrary Detention** - Everyone has the right not to be arbitrarily detained or imprisoned.



s.10 - Everyone has the right on arrest or detention

- a) to be informed promptly of the reasons therefore;
- b) to retain and instruct counsel without delay and to be informed of that right; and
- c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

s.24(2) - Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[16] Section 495 of the Criminal Code is relevant to this application as well and it states as follow:

495(1) A peace officer may arrest without warrant

a) A person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence;

b) a person whom he finds committing a criminal offence, or

c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found;

2) A peace officer shall not arrest a person without warrant for

a) an indictable offence mentioned in section 483;

b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

c) an offence punishable on summary conviction

in any case where;

d) he has reasonable and probable grounds to believe that the public interest, having regard to all the circumstances including the need to

i) establish the identity of the person,

ii) secure or preserve evidence of or relating to the offence, or

iii) prevent the continuation or repetition of the offence or the commission of another offence,

May be..... satisfied without so arresting the person, and

e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend in court in order to be dealt with according to law.

**DISCUSSION AND ANALYSIS:**

[17] I find from the evidence that Corporal Greg Fraser was the officer in charge of the C.I.T. at Halifax Airport. He and Cst. Rubey attended at the Westjet Offices located there on November 16, 2005 at about 9:00 a.m.

[18] I conclude from the evidence that they attended to look at the computer screens and to check the passenger manifest for any passengers flying into Halifax on the late flight leaving Vancouver November 15, 2005.

[19] It was after a review of the manifest that they came to the conclusion Mr. Chehil was at the bottom of the list of persons having purchased a ticket on that particular flight. Upon further review of the manifest they found out he had

boarded in Vancouver as a walk-up and paid cash for a one way fare from Vancouver to Halifax.

[20] The C.I.T. based upon their training and experiences with persons travelling after purchasing a last minute ticket, travelling alone and travelling from a source city like Vancouver concluded that there were indications the team should investigate further, because Mr. Chehil could possibly be a drug courier.

[21] They then obtained the baggage number of Mr. Chehil's checked piece of luggage from the manifest screen and returned to their office. Corporal Fraser called a meeting of the C.I.T. team to discuss his suspicions.

[22] In my view, the personal information conveyed to the Westjet offices by Mr. Chehil and placed in the computer manifest upon his purchasing a ticket is subject to the provisions of the **Personal Information, Protection, and Electronic Documents Act**, 2005 c. 5 (PIPEDA).

[23] Sections 3, 4(1) (a) and Section 2 (1) state as follows:

(3) The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

4.(1) This Part applies to every organization in respect of personal information that

a) the organization collects, uses or discloses in the course of commercial activities, or

2. (1) The definitions in this subsection apply in this Part.

“Commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

“Personal information” means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.

[24] I find Westjet is a business providing a commercial service. In this particular case it provided a seat on a flight from Vancouver to Halifax to Mr. Chehil. This was done by his paying for a ticket and providing Westjet with his personal information.

[25] The crown argues the police request for information from Westjet was properly made and falls squarely within the exceptions outlined in PIPEDA as it was “for the purpose of enforcing any law of Canada, a Province, or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing such law...”quoting from Section 7(3) (c.1) ii of PIPEDA.

[26] Schedule 1, paragraph 4.3, Principle 3 of PIPEDA provides that consent is usually required from the individual before personal information can be disclosed by a commercial organization. However in certain circumstances disclosure of such information may take place without the consent or knowledge of the individual pursuant to Section 7 (3) which states as follows:

7 (3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is...

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the procedure of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that:

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province.

[27] The Crown also argues Mr. Chehil or a member of the travelling public should be aware of Westjet's position on the collection, use of personal information, disclosure of personal information and the retention of such information. Crown points to the primary policy on Westjet's website, Exhibit VD13 at pages 3 and 7 under the of "Requirements of Government authorities" and especially as follows:

"Because of the nature of the airline industry, and concerns with respect to safety and security, there may be situations in which Westjet is required by legal authorities to collect, use or disclose personal information about you, particularly when you are travelling with us, without your knowledge or consent. Information



that we are required to collect by government authorities in either the U.S. or Canada or both, depending on your boarding location and destination, may include, as required by such authorities, your full name, date of birth, citizenship, gender, passport number and country of issuance, U.S. Visa number, Resident Alien card number, the means by which you paid for your flight, details as to how it was booked, and any other personal information collected by us as set out in this policy or as required by such government authority.”

[28] There was no evidence before me of any subpoena or search warrant to search the Westjet manifest.

[29] I am also satisfied, based upon Re: S.C. 2006 ONCJ 343, that there must be some “legal authority” to obtain personal information or a manifest of Westjet.

[30] I find the RCMP did not request permission or state their “legal authority” when they went to review the list of passengers travelling on the Westjet flight from Vancouver to Halifax on November 16, 2005. They had no suspicions Mr. Chehil or anyone on that flight was involved in any criminal activity. Cpl. Fraser and Cst. Ruby were simply there on what has been called a “fishing expedition” to see what they could find.

[31] Mr. Jeff Plimmer who is head of the Corporate Security Department for Westjet reviewed Exhibit VD-13, VD13-A and VD-14. VD-13 was the privacy

policy posted on the website of Westjet telling potential passengers what they may or may not expect the airlines to do with personal information provided. VD-13A dealt with the internal policy to help guide employees in dealing with police requests for information on passengers. VD-14 was in fact the reservation record of Mr. Chehil. This information was on Westjet's Airline manifest and displayed on several screens with different types of information obtained from its customers.

[32] Mr. Plimmer indicated the following minimal personal information on all passengers would be included on the manifest: 1) the passenger's name, 2) when and where the ticket was purchased, 3) ticket number, 4) if the ticket was a one-way ticket or return ticket, 5) how the ticket was paid for, be it cash or credit card, 6) if the passenger was travelling alone or with someone else, 7) the passengers' telephone numbers, 8) the passengers' luggage numbers, if he or she had luggage, and 9) the number of pieces of luggage the passenger would be travelling with.

[33] Mr. Plimmer went on to say that on the last full page of the manifest screen under comments and history, there could also be contained such personal information as whether or not the passenger had a disability and the nature of that

disability; whether the passenger required oxygen or had an allergy. It might also contain reasons for the passenger's travel, such as bereavement.

[34] On cross-examination Mr. Plimmer also stated the ticket agent was free to put any comments he or she felt relevant. For example, the ticket agent could record that a passenger was of the Catholic faith and did not want to sit next to a Muslim. He said there was a very wide range of comments, and he used the expression "unlimited" relating to a passenger's profile information that could be contained in that particular section.

[35] At page 7 of VD13, the paragraph entitled "Requirements of Government Authorities" seems to emphasize that Westjet would only collect and disclose what is required by law and nothing more.

[36] Both Cpl. Fraser and Mr. Plimmer said Westjet gave them permission to look at manifests but they were not allowed to make hard copies and would require a warrant in order to do so. Cpl. Fraser testified Air Canada and other airlines required a search warrant before they would be allowed to look at the manifests.

[37] Mr. Plimmer told the court the Privacy Policy as contained in VD13 was conveyed to the police and they had knowledge of it. He said he explained the reasons why he could or could not give police information. He said each case was decided on its own after a request was made by the police.

[38] I conclude from the evidence that the C.I.T. Team were at the Westjet offices in Halifax on a daily basis and could review the manifest of any member of the travelling public arriving in Halifax Airport on Westjet if they wished. I find they would just go in and look randomly at a passenger's name and record. This, Mr. Plimmer said himself, was against Westjet's policy. He said the only reason C.I.T. should look at the manifest would be if they were on an active investigation, that is if they had a target. Then Westjet would have to be informed and give permission. He specifically stated a fishing expedition was not permitted to allow the police to review a passenger's manifest.

[39] Mr. Plimmer said the police were aware of this procedure and he went on to say in cross-examination that in order to review the manifest the police must convey to Westjet that it was either a matter of national security, an active

investigation or in the administration of law. This was not done here I find. The police did not have permission in this instance as required to review Mr. Chehil's manifest. They needed some lawful authority.

[40] Mr. Plimmer further commented that the police are always investigating potential crimes. I conclude from his evidence that if the police were doing a review of all the passenger names and manifests as a general investigation of possession, for the purpose of trafficking that would itself not be sufficient because he would classify it as a fishing expedition. He would not agree to it.

[41] It should be noted Westjet staff themselves at Halifax Airport did not follow their own procedures.

[42] There is no doubt the search of the Westjet manifest in their offices at Halifax Airport was a warrantless search. Thus, a further inquiry as to whether or not it was reasonable must be made.

[43] In considering whether or not the police search of the Westjet flight manifest was reasonable, the court in **R. v. Mahon** [2004] 3 S.C.R. 59 in discussing a warrantless search said at paragraph 36 as follows:

“...Such searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in **R. v. Collins**, [1987] 1 S.C.R. 265. Under **Collins**, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable (p. 278). The Crown bears the burden of demonstrating, on the balance of probabilities, that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner: **R. V. Buhay**, [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 32.”

[44] In **R. v. Plant** [1993] 3 S.C.R. 281, Sopinka J., in discussing whether or not searches of computerized records violated Section 8 of the Charter, said the following at page 212:

“Some indication of the parameters of the protection afforded by s. 8 with respect to informational privacy can be derived from the following passage from the reasons of LaForest J. in *Dyment*, supra, at p. 256, commenting on the Report of the Task Force on Privacy and Computers:

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or to be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained, and the seriousness of the crime being investigated, allow for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement. It is, then, necessary to apply this contextual approach to the facts of the case at bar.”

[45] In **Plant**, after a review of the evidence the court concluded the records of the appellant dealing with electricity consumption didn’t reveal either intimate details of a person’s private life or his “biographical core of personal information”. Also, the relationship between the appellant and the commission could not be characterized as a relationship of confidence, and there was an accessibility of information to the public.

[46] The Court held Section 8 of the Charter seeks 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...[including] information which tends to reveal intimate details of the lifestyle and personal choices of the individual”.

[47] I find in this case, the facts are significantly different than those in **R. v.**

**Plant.** I conclude the details one could find on the manifest which the RCMP reviewed in the Westjet offices at Halifax Airport on the date in question could contain and reveal intimate details about both the lifestyle and/or personal choices of a member of the travelling public.

[48] I find it could include 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.

[49] I conclude the manifest screen as described by Mr. Plimmer could reveal physical disabilities of a passenger, possible mental disabilities, allergies, religious affiliation and a passengers’ attitude toward other religious affiliations. The Westjet manifest could contain a wide range of very personal information from health, religion, reasons for travelling and with whom. As the court heard, the information contained on the manifest about a passenger could be unlimited. This information was not available to the public.



[50] It is my view that a citizen who is travelling via an airline such as Westjet in making a reservation would conclude the information which he/she provides to Westjet in obtaining a ticket would be personal and confidential between the passenger and Westjet. A member of the travelling public would have a reasonable expectation of privacy. I say this even having considered the policy statements in V.D.13.

[51] As can be seen by PIPEDA, Westjet is bound to keep private information confidential. Thus, the information provided is regarded as personal and confidential information and meets the requirements discussed in **R. v. Plant**, Supra.

[52] It must be remembered that in this particular instance Cpl. Greg Fraser and Cst. Ruby simply went into the private offices of Westjet and started reviewing the manifest of the Westjet flight in question without asking or obtaining consent from anyone at that time. I conclude that reviewing Westjet flight manifests became routine over time, and C.I.T. wouldn't seek permission, on each occasion.

[53] It might be a fair comment to say the officers had assumed they had permission to look at the manifest from their daily discussions and associations with the staff at Westjet. However, in my mind that is not a satisfactory answer to the problem. There were certain obligations upon the RCMP officers in reviewing the manifest which were legislated under PIPEDA and applied when they went to look at this manifest without a warrant. Mr. Plimmer said Westjet put a protocol on procedures in place for the police to follow in order to see manifests. The police were aware of the procedure they had to follow. I find they didn't do so in this case, but rather cavalierly walked into Westjet and simply started looking at manifests.

[54] It is troubling that both the RCMP and Westjet knew in order to obtain a hard copy of the manifest a proper warrant would be required in order to have it disclosed. I accept Cpl. Fraser's evidence that Air Canada required the police to obtain a search warrant before information on a manifest or related screens could be viewed. I accept his evidence in that regard over Mr. Plimmer's evidence, when he indicated Air Canada would release the same information.

[55] One has to wonder if this method of reviewing manifests has not just become a cozy arrangement between Westjet and the RCMP, whereby making hand-written notes but not obtaining a hard copy was simply done to avoid the judicial scrutiny which would be required prior to the issuance of a warrant.

[56] I conclude that what has transpired between Westjet and the police was actually an artificial distinction in order to avoid the legal requirements of privacy which is mandated by PIPEDA.

[57] I find on the facts here that when the RCMP attended the Westjet office and reviewed the computer screens showing the flight manifest containing Mr. Chehil's personal information, the airline had no lawful authority which would allow them to disclose the personal information of Mr. Chehil, and the police did not comply with the standards required under Section 7 (3) of PIPEDA.

[58] I conclude from the evidence of Cpl. Fraser that when C.I.T. approached Westjet they wanted to review the personal information of all passengers on the flight from Vancouver to Halifax. There is no evidence they had reasonable and probable grounds to actually suspect anyone on that flight of committing an

offence, but rather they wanted to determine if any of the passengers met the broad profile which they had created under what is known as the “Jetway” Program.

[59] There is no evidence before me the RCMP indicated to Westjet staff they wanted to look at Mr. Chehil’s personal information because they suspected him of a specific crime, nor were they investigating a particular crime. They were there under general duties and PIPEDA applied.

[60] I find the “gathering intelligence” aspect of Section 7 does not apply because it’s obvious on the evidence Cpl. Fraser was reviewing the manifest, not in order to gather intelligence on any particular individual or criminal organization as part of any particular, on-going intelligence operation, but rather to look at the manifest to check persons on a flight and hope something might turn up on someone which would give them suspicion to proceed further.

[61] In **R. v. Law** [2002] 1 S.C.R. 227 the Supreme Court of Canada adopted a liberal approach to the protection of privacy.

[62] In **R. v. Buhay** [2003] 1 S.C.R. 631 the Supreme Court of Canada, although discussing the privacy of a locker in a bus depot spoke about the reasonable expectation of privacy. **Arbour, J.** said at paragraph 18 as follows:

18. “Section 8 of the Charter protects the right to be secure against unreasonable search and seizure. To establish an infringement of s. 8, the person raising the claim must first establish that he or she had a reasonable expectation of privacy in the thing searched or seized (**Hunter v. Southam Inc.**, [1984] 2 S.C.R. 145, at p. 159; Edwards, [1996] 1 S.C.R. 128, at para. 30). Reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances (see, for example, Edwards, at para. 31, and **R. v. Wong**, [1990] 3 S.C.R. 36, at p. 62). The factors to be considered in assessing the totality of the circumstances include, but are not restricted to the accused’s presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy, and the objective reasonableness of the expectation (Edwards, at para. 45).”

[63] In **R. v. Tessling** [2004] 3 S.C.R. 432, a case involving different facts wherein the police were using a thermal imaging device to take a picture of the accused’s home from an aircraft, **Binnie, J.** made the following comments at paragraphs 17 & 18:

17. “At the same time, social and economic life creates competing demands. The community wants privacy but it also insists on protection. Safety, security and the suppression of crime are legitimate countervailing concerns. Thus s. 8 of the Charter accepts the validity of reasonable searches and seizures. A balance must be struck, as held in **Hunter v. Southam**, *supra*, at pp. 159-60, per Dickson J.:

“...an assessment must be made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.”

18. The notion of the “balance” was also canvassed by Sopinka J. in advocating a “contextual approach” in **R. v. Plant**, [1993] 3 S.C.R. 281, at p. 293:

“State is subject to constitutionally permissible limitations. First, “not every form of examination conducted by the government will constitute a ‘search’ for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a ‘search’ within the meaning of s. 8”; Evans, *supra*, at para 11. It is only “[i]f the police activity invades a reasonable expectation of privacy, [that] the activity is a search”; **R. v. Wise**, [1992] 1 S.C.R. 527, at p. 533. Second, as the language of s. 8 implies, even those investigations that are “searches” are permissible if they are “reasonable”. A search will not offend s. 8 if it is authorized by a reasonable law and carried out in a reasonable manner: **R. v. Caslake**, [1998] 1 S.C.R. 51; [page 443] **R v. Collins**, [1987] 1 S.C.R. 265.”

[64] I feel in an open and free society as we have today members of the travelling public should have every reason to expect to go about their travel without unrestricted surveillance by the police. Surely when a citizen makes a plane reservation he or she is making it with an expectation of privacy between themselves and the airline company. He or she does not expect the police or agents of the state would be surreptitiously reviewing or analysing their every movement.

This is not the same situation where a member of the traveling public is in the public area of an airport where there are all sorts of cameras and surveillance and his expectation of privacy is greatly diminished.

[65] It must be remembered this search of the Westjet manifest was done in their private office. The only role Halifax Airport plays in this matter is that Westjet offices are located there.

[66] I agree with Newbury, J.J.A. who said in **R. v. Truong** [2002] BCCA 97 at para 9...

1. Security is of course an exception. Searches are authorized by the **Aeronautics Act**, R.S.C. 1985, c.A-2 and the Aerodrome Security Regulation, S.O.R./87-452 and the Air Carrier Security Regulations, S.O.R./87-707, discussed in **R. v. Sandu**, [1992] B.C.J. No. 913 (B.C.S.C.); appeal dismissed, [1993] B.C.J. No. 1279 (B.C.C.A). No such statutory power exists in relation to investigations for contraband.

[67] It is my view the police ought not to just randomly be able to go through and peruse manifest documents on private citizens who make plane reservations, as Mr. Chehil did, on a whim or on a fishing expedition without the proper legal authorization.

[68] I suggest to allow the police, the RCMP in this case, to obtain the information on a manifest such as they did would seriously diminish the degree of privacy which citizens should reasonably expect to enjoy in a free society.

[69] In the case of **R. v. Caslake** (1998), 121 ccc (3<sup>rd</sup>) (97) Supreme Court of Canada was discussing a search incidental to an arrest, but applicable to this particular matter are the comments of Lamer, C.J. at para. 12:

12. "In order to be reasonable, searches and seizures must be authorized by law. The reason for this requirement is clear: under both the Charter and the common law, agents of the state can only enter onto or confiscate someone's property when the law specifically permits them to do so. Otherwise, they are constrained by the same rules regarding trespass and theft as everyone else. There are three ways in which a search can fail to meet this requirement. First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search. If they cannot do so, the search cannot be said to be authorized by law. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. For example, s. 487 of the Criminal Code, R.S.C. 1985, c. C-46, [page 106] authorizes searches, but only with a warrant issued by a justice on the basis of a sworn information setting out reasonable and probable grounds. A failure to meet one of these requirements will result in a search which has not been authorized by law. Third, and in the same vein, the scope of the search is limited to the area and to those items for which the law has granted the authority to search. To the extent that a search exceeds these limits, it is not authorized by law."



[70] There can be no doubt courts have held that the principal purpose of s.8 of the Charter is to protect an individual's privacy interests, especially against unreasonable intrusions by the state.

[71] As I assess the totality of the circumstances as discussed in Buhay (Supra) I find Mr. Chehil's s.8 Charter rights were violated when the R.C.M.P. C.I.T. team viewed the manifest at Westjet and copied information from it.

[72] It must be remembered that in all of this the police arbitrarily, as they probably did whenever they wanted to, looked through private manifest records of a private company, in a private office, unknown to the traveling public, without their consent, obtained the information which, in their mind, gave them suspicion to move further in this matter. From this information all the rest of the crown's case evolved.

[73] I must now move on to consider s.24(2) of the *Charter* and determine whether or not the evidence ought to be excluded. The court is aware that evidence obtained in violation of s.8 of the *Charter* will not be excluded unless having

regard to all the circumstances its admission will bring the administration of justice into disrepute.

[74] In *R. v Collins* (1987) 33 C.C.C. (3<sup>rd</sup>) 1, the Supreme Court of Canada set forth three factors that should be considered in determining whether or not the evidence ought to be excluded. They are:

- (1) the effect of admitting the evidence on the fairness of subsequent trial,
- (2) the seriousness of the violation of the charter and,
- (3) the effect of the excluding of the evidence on the administration of justice.

[75] The court also stated in *Collins* supra at p.284 that in general it would be much easier to exclude evidence if its admission will affect the fairness of the trial, as opposed to condoning a serious constitutional violation.

[76] In considering the above three factors, I am of the opinion the admission of this evidence would bring the administration of justice into disrepute. I reach this conclusion for the following reasons:

1      ***Fairness***

In this case it is obvious that the admission of the evidence would have an adverse affect on the accused's case. However, the cocaine found in this case was real evidence which is non-conscriptive evidence the admission of which would not affect trial fairness.

2      ***Seriousness of the Breach***

In this case Mr. Chehil, as a member of the travelling public, when he made his reservation, I am satisfied would have a reasonable expectation of privacy with Westjet. I find this was not a good faith investigation as the police knew the proper procedure to follow to obtain this information. Mr. Plimmer said he told the police. They didn't follow it. They ignored it. If this was not a flagrant violation of the rights of Mr. Chehil it was at least ignorance as to the scope of the police officer's authority. Cpl. Fraser emphasized in evidence the C.I.T. team is a pro-active operation. In doing as they did here in the method of searching the flight manifest they became too pro-active.

[77] The manifest of a member of the traveling public is capable of telling a lot about a citizen's personal life. As said in evidence the material that can be placed on a manifest is "unlimited".

[78] The Supreme Court of Canada has stated that "good faith cannot be claimed if a charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority". Buhay, (Supra) at para.59.

[79]           3       *Affect on the Administration of Justice*

The third factor to be considered is the affect on the administration of justice of the admission or exclusion of the evidence. Crown counsel pointed out the cocaine in this case was real evidence and that it is vital to the prosecution of its case. There is also no doubt that the charge before the court is a very serious crime; however, I am of the view that the breach of the accused's s.8 charter rights, by the manner in which the police obtained the information from the manifest, is so serious a breach, that to allow this evidence in, would in fact bring the administration of justice into disrepute.

[80] In Buhay, Supra at para.71 the Supreme Court of Canada stated that evidence which is non-conscriptive and essential to the crown's case need not necessarily be admitted.

[81] Furthermore, as Iacobucci, J. said in *R. v Mann*, at para.57:

“Just as there is no automatic exclusionary rule, there can be no automatic inclusion of the evidence either. The focus of the inquiry under this head of analysis is to balance the interests of truth with the integrity of the justice system. The nature of the fundamental rights at issue, and the lack of a reasonable foundation for the search suggest that the inclusion of the evidence would adversely affect the administration of justice.”

[82] In my view the Charter breach is a serious one. The casual and random manner the police went about looking at Westjet's flight manifest ought not to be endorsed. A member of the traveling public would likely be more concerned if the personal information one might find on an airline manifest about him or her could be obtained by police without lawful authority.

[83] It is not the rights of a drug trafficker here that I am protecting. It is the rights of a member of society who chooses to give personal information to an airline ticket agent which is recorded on a flight manifest. This personal

information ought not to be available to state authorities without proper lawful authorization.

[84] The amount of cocaine found in this case is significant but to admit the evidence over the rights of the citizen would be going down a slippery slope, and I choose not to do so.

[85] In Buhay, the court held the decision to exclude evidence always reflects a balancing between the interests of truth on one side and the integrity of the justice system on the other. As framed by Doherty J.A. in **Kitaitchik**, the “inquiry asks whether the vindication of the specific Charter violation through the exclusion of evidence exacts too great a toll on the truth seeking goal of the criminal trial. While the inquiry is, of necessity, case-specific, judges have been reminded not to lose sight of the fact that consideration must also be given to the long-term consequences of regular admission or exclusion of the evidence on the repute of the administration of justice.

[86] Lamer J. (as he then was) said in **R. v. Greffe** [1990] SCR 755 at para. 35:

35. “The long-term effect of admitting evidence obtained in a manner that infringed the Charter on the basis that the offence is a very serious one, would lead to the result that s.24(2) will only be used to exclude evidence when less serious crimes are involved.”

[87] For the above reasons all evidence obtained following the illegal viewing of the Westjet manifest is excluded pursuant to s. 24(2) of the Charter. I thus find it unnecessary to consider the remaining issues raised herein.

J.