SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Druken*, 2015 NSSC 394

Date: 20151210
Docket: SPH No. 426809
Registry: Port Hawkesbury

Between:

Stephen Paul Druken

Appellant

v.

Her Majesty the Queen

Judge:	The Honourable Justice Patrick J. Murray
Heard:	August 18, 2015, in Port Hawkesbury, Nova Scotia
Counsel:	Adam Rodgers, for the Appellant Lisa Johnston, for Her Majesty the Queen

By the Court:

Introduction

[1] This is an appeal from a decision of the Honourable Judge Robert A. Stroud rendered May 31, 2013. The Appellant, Mr. Druken made an application at trial to exclude evidence under ss. 7, 8, and 10(b) of the *Charter of Rights and Freedoms*. In his decision the learned trial judge found there was no breach of the *Charter* under any of those provisions.

[2] There was a delay in the Appeal being brought forward for hearing. Procedural matters arose and were dealt with by the appropriate Orders. An extension of time to file the appeal was granted as part of that process.

[3] The appeal was heard in Port Hawkesbury on August 18th, 2015 at which time I reserved decision.

Background

[4] Stephen Paul Druken was charged that on or about 10 February, 2011, at or near Mulgrave, Nova Scotia, that he did:

> 1. Without lawful excuse, store a restricted weapon to wit: CRVENA ZASTAVA, 9mm Pistol, in a careless manner, contrary to and in violation of section 86(1) of the Criminal Code of Canada and amendments thereto;
>
> 2. Have in his possession a weapon to wit: CRVENA ZASTAVA, 9mm Pistol, for a purpose dangerous to the public peace, contrary to and in violation of section 88(2)(a) of the Criminal Code of Canada and amendments thereto;
>
> 3. Did possess a firearm, to wit: CRVENA ZASTAVA, 9mm Pistol, without being the holder of the registration certificate for the firearm, contrary to and in violation of section 91(1) of the Criminal Code of Canada and amendments thereto;
>
> 4. Did without lawful excuse, store a firearm, to wit: IZHEVSKY MEKANICHESKY ZAVOD (IZHMECH), 12 gauge shotgun in a careless manner, contrary to and in violation of section 86(1) of the Criminal Code of Canada and amendments thereto; and
>
> 5. Did without lawful excuse, store a firearm, to wit: a SIMONOV SKS 1945, 7.62 X 39 rifle in a careless manner, contrary to and in violation of section 68(1) of the Criminal Code of Canada and amendments thereto.

[5] Following trial, Mr. Druken was found not guilty of Counts 1, 2, 4 and 5. He was convicted of Count 3, having possession of the Crvena Zastava (CZ) without being the holder of the registration certificate for that firearm. He was sentenced to one year of probation, and was prohibited from possessing a firearm for that period of time.

[6] The Honourable Judge Robert A. Stroud, issued a written decision dated May 21, 2013 on the Charter Application and his trial decision on June 4, 2013.

Grounds of Appeal

[7] The Appellant has filed a Notice of Appeal of Conviction containing the following three (3) grounds:

> i) That the trial judge failed to recognize that the Appellant being detained in his home by the RCMP over the course of 24 hours without access to legal counsel was a violation of his rights under section 10 of the Charter;
>
> ii) That the trial judge failed to appreciate that the incomplete and misleading information presented in the Information to Obtain for the search warrant (particularly as it related to mental health issues) lead to a search which violated the Appellant's rights under section 8 of the Charter.
>
> iii) That the trial judge erred by not finding that the violent takedown and arrest of the Appellant was a violation of his rights under section 7 of the Charter.

Standard of Review

[8] The Appellant submits respectfully, that the decision of the learned trial judge was in error when he found there were no breaches of the *Charter of Rights and Freedoms*. A determination of whether there has been a breach under the *Charter* and whether to exclude evidence is a question of law.

[9] The Appellant therefore submits that the decision should be set aside, on the ground that it is wrong on a question of law, pursuant to section s. 686(1)(a) of the *Criminal Code*.

[10] The Crown, as Respondent, submits that the trial judge's decision should be upheld. The Crown argues the trial judge made no legal error and that his decision on the charter issues at trial was correct in law.

[11] Both parties agree that the standard of review on a question of law is one of correctness. They agree that with respect to findings of fact, the standard of review is "palpable and overriding error".

[12] The Crown states on this appeal that the Appellant relies only on legal argument in its submission. The Appellant has stated he does not contest the findings of fact made by the trial judge.

[13] For the purpose of this Appeal I adopt a standard of review for a summary judgment appeal courts and for charter decisions as set out in ***R. v. Boliver***, [2014] NSJ No. 578, at paragraphs 9 and 10 (See appendix "A")

The Facts As Found by the Trial Judge and Recorded in his Decision.

> [4] Stephen Paul Druken is a former member of the Canadian Armed Forced where he served as a Military Police Officer. During the course of his service he served in various remote areas where he was involved in many serious violent encounters. As a result he apparently suffers from Post-Traumatic Stress Disorder (PTSD). (Mr. Druken denied this in his testimony.)
>
> [5] According to Mrs. Druken she and her husband got into an argument about finances on February 9, 2011 following which he went to the veranda and she went to bed.
>
> [6] Mr. Druken went upstairs a couple of hours later and found his wife. He was drinking Kahlua at the time.
>
> [7] At approximately 4 am on February 10th Mrs. Druken went to her parents' home in Antigonish to get away for a couple of days.
>
> [8] At approximately 10 pm she called 911 to get someone to check on her husband. She later received a call from the Antigonish RCMP who asked her to come to their detachment to give a statement and she subsequently did so.
>
> [9] During the course of her statement Mrs. Druken provided Constable Michael Scott Wilson with the information set out in the Grounds for Belief section of VD2 which included, among other things, that the accused had been talking about suicide for some time, that he threatened her with a gun the night before and wanted to freeze to death outside of their home, that he suffered from PTSD, that she was concerned if anyone went to the house her husband would harm them, and that he was on medication and drinking the night before.
>
> [10] The search warrant (VD1) was issued on February 11th.
>
> [11] Prior to the execution of the search warrant Constable William Boutlier called Mrs. Druken for an explanation concerning her husband's threats of suicide and she told him that Mr. Druken told her that he would shoot the first officer or paramedic, etc. who came into his house.

[12] As a result, Constable Boutilier called for assistance in order to set up a perimeter around the Druken house.

[13] Attempts were then made to contact Mr. Druken by telephone but, when they were unsuccessful, arrangements were made, because of public safety concerns, for an emergency response team to enter the house.

[14] The RCMP also arranged for 3 different negotiators to speak with Mr. Druken for several hours to try to get him to leave his residence voluntarily. Constable Krista (sic Kuchta), spoke to him for a period of 4 hours first from the Port Hawkesbury detachment and later from the Mulgrave Fire Hall. During that period the constable reviewed the information in the police file and discussed numerous matters with the accused. At that time the officer came to the conclusion that Mr. Druken was under considerable stress and was having hallucinations.

[15] Sargent Shelby Miller, who knew Mr. Druken for approximately 2 years, also spoke to him. He determined that the accused was drinking and had taken fifty to sixty anti-depressants and his speech was slurred and getting worse. He said he was not angry with his wife and didn't want to go to a mental hospital. He also admitted to having firearms and other weapons in the house but said they were all locked up and he had no intention of harming himself.

[16] Sargent Miller said he was concerned about the safety of both Mr. Druken and the general public and was eventually taken into custody under the *Involuntary Psychiatric Treatment Act*.

[17] Corporal Paul Pitman arrived on the scene at 5 pm on February 11th and took over as the main negotiator. Although Mr. Druken was apprehensive, a plan was eventually put in place for him to leave his residence voluntarily.

[18] Corporal Pitman said that Mr. Druken knew what the plan was and that the primary concern was the safety of the public. He also stated that the emergency response team could override the plan if Mr. Druken didn't comply with it.

[19] At approximately 9 pm on February 11, 2011 Mr. Druken voluntarily left his residence. However, when he saw members of the RCMP emergency response team with their rifles pointed at him he apparently panicked and turned back in the direction of his home. As a result he was taken down by two members of that team and apparently suffered injuries.

[20] Constables Tim Reid and Jamie Bingle were designated to take control of Mr. Druken following the take down and they arrested him under the *Involuntary Psychiatric Treatment Act* and transported him to hospital in Sydney, NS.

[21] Following Mr. Druken's arrest various members of the RCMP entered his residence and seized a substantial cache of weapons and ammunition which are described in VD 3 and VD 5.

[22] Defence counsel called three witnesses in support of the application, namely Dr. Henrietta MacKinnon, Mrs. Karen Druken and the accused.

[23] Dr. MacKinnon has been the Druken family doctor since the 1990's when she was also in the military. When she was contacted about the matter before the court she said she wanted to make sure he got out of the situation safely. She stated that he was obviously very tired and under stress at the time and believed it was important that he get out of the house for treatment. She was on the phone all the time the negotiations were going on and spoke to Mr. Druken after he was arrested.

[24] During cross examination Dr. MacKinnon said she was surprised by the take down and she thought it would be done easier. However, she also said she was not aware that Mr. Druken may have been armed with a loaded handgun.

[25] Mrs. Karen Druken said she was married to the accused for 26 years. She stated that her husband was distraught by his father's death in February, 2010 and was not a good person to be around. As a result she become less supportive of him which caused them to argue more. She confirmed that they discussed finances on February 9th and 10th, 2011 and got annoyed with each other, and also referred to her trip to Antigonish and what followed with the RCMP.

[26] Mrs. Druken said her husband only drank 2 ounces (or half a mickey) of Kahlua at the time and didn't want to go to the RCMP detachment to give a statement and thought they only wanted information in order to talk to her husband.

[27] Mrs. Druken also said she didn't understand what was meant by "carrying around a weapon of choice" and only knew that her husband worked on the handgun earlier in the day so it was in the house. She also stated that she didn't know why Mr. Druken would say he threatened to shoot the first person that came through his door, and that she didn't think he would do so.

[28] Mrs. Druken further stated that she would have gone home if the police asked her to when they were planning to go to the residence and was shocked when she learned what happened. As a result, she ended up in the hospital for seven to ten days.

[29] Mrs. Druken also said her husband is now in a lot of pain and no longer drives their car. She further stated that he has limited mobility when he is outside and he also went through a period when he could not taste his food.

[30] Mr. Druken gave evidence on his own behalf. He confirmed his former military service and stated that part of his duty was to confiscate weapons. He said he disagreed with the PTSD diagnosis but confirmed going to a physiatrist. He stated that he had to change his mediations from time to time because he became immune to them.

[31] Mr. Druken said he had the flu at the time of the incident and it was a joke when he said he was going to go outside and freeze to death. He said his plan was to go outside with a "spark plug", have a few drinks and look at the sky. Furthermore, he said he was dressed appropriately to do so and told him wife previously that he would never kill himself and have her find him.

[32] Mr. Druken said the drugs he was taking had no effect on him at all and the reason the weapons were in the house was that he found footsteps around his outside shed where he kept them and took them in to check them out. He also said he was cleaning pretty well all his firearms that day because he was unable to sleep and everything would have been locked up in his garage if he had not been doing so. He also said that nothing was loaded so he was not a threat to the police.

[33] Mr. Druken confirmed that the said things over the years to his wife about not calling the cops but not on that day and that he saw police officers outside his house but wasn't going to come out under the circumstances because he thought they were going to breach the house and if he made the wrong move he would be dead.

[34] Mr. Druken said his phone was cut off so he couldn't call anyone and he was not given an opportunity to call a lawyer. He also said no one told him he was under arrest.

[35] Mr. Druken said the whole incident was "much to do about nothing" and that he did a lot of bluffing during the incident.

[36] Mr. Druken said he expected to be met by the chief negotiator, Constable Pitman, when he went outside but when he saw one officer with a sub machine gun pointed at him with the safety off he started to back up. At that point he said he was hit really hard on his throat and knees dropped on his arms and legs. He ended up on his face and was then lifted up dropped again. As a result he had damage to his vertebrae; his neck and shoulder and four teeth were "smashed", his heel and a cartilage in his knee were damaged and he spent a year with a taste disorder.

[37] Mr. Druken said he asked to be placed in a car but didn't get any response and ended up in a suburban which was very uncomfortable and it was at this point that he was read his rights. He also said they told him earlier that he was under

arrest under the *Mental Health Act*. He also confirmed that he was taken to hospital in Sydney and released a number of days later.

[38] Finally, Mr. Druken said he would have complied with the warrant if the police had showed it to him.

Analysis – Grounds of Appeal Generally

[14] In giving his decision the trial judge stated correctly, that when determining whether there has been a breach of the *Charter* the facts of each particular case must be considered.

[15] The learned trial judge found that the RCMP were faced with a potentially dangerous situation when they arrived at Mr. Druken's residence on February 11, 2011.

[16] During the 911 call by Ms. Druken to the RCMP, she informed them that her husband suffered from PTSD, was alone in the house, and had a cache of weapons. She detailed what these weapons were, including the CZ 9 mm Cerveza handgun.

[17] When the officer, (Constable Boutilier) phoned her back for more details, she informed him that Mr. Druken would shoot the first paramedic or police officer, but only with intent to wound. She also mentioned that he had been talking about suicide more frequently since Christmas and felt she "couldn't take it anymore".

[18] She later gave a statement to Constable MacPherson in Antigonish and she told him Mr. Druken was intending to go outside to freeze to death, on purpose, and that he had been drinking.

[19] It was after this that Constable Boutilier set up a perimeter around Mr. Druken's home. The RCMP then started making phone calls to the house.

[20] The trial judge found that the RCMP had every reason to believe that: 1) there were weapons in the residence – whether or not they were registered; and 2) Mr. Druken was under considerable stress due to his mental condition; and 3) he was both drinking and heavily medicated.

[21] It should be noted that the trial judge also found that both Mr. and Mrs. Druken minimized and in some cases exaggerated their evidence when testifying during this application.

[22] I turn now to assess the three grounds of appeal under sections 7, 8 and 10(b) of the *Charter* beginning with section 7, the third ground of appeal.

Ground of Appeal # 3 – Did the trial judge err by not finding that the violent takedown and arrest of the Appellant was a violation of his rights under section 7 of the *Charter*?

[23] Section 7 of the *Charter of Rights and Freedoms*, 1975, c. 6, s. 7., states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[24] The Appellant submitted the case of ***R v. Maskell***, 2011 ABPC 176, in which excessive force was used by police. In ***Maskell***, the accused was dragged from his car and suffered a broken nose and other injuries. The Court issued a stay of proceedings because excessive force was used. In respect of the *Charter*, the court found an abuse of process, which if condoned "would undermine the community's sense of fair play and decency".

[25] The Appellant states that upon agreeing to exit his residence, Mr. Druken was violently arrested and taken to the Cape Breton Regional Hospital. After his removal from his residence, the RCMP executed the search warrant.

[26] The Appellant submits the evidence clearly establishes, after a lengthy period of negotiation, that Mr. Druken was to leave the home, and allowed to "peacefully surrender". What happened however, was in stark contrast to what had been carefully discussed between the negotiator and the Appellant, in the presence of the Appellant's physician Dr. MacKinnon. A "baffling development" says the Appellant, and one which caused significant injuries to him, including his neck and back.

[27] The Crown, as Respondent argues it was the Appellant who failed to comply with the "very specific instructions" of the plan for his exit when he "turned back" towards his residence. It was "his variation" submits the Crown, that led to the officers "overriding the plan" put in place by the negotiator.

[28] The trial judge acknowledged the Crown's submission in this regard as follows at paragraph 45 of his decision:

> 45. (7) All Mr. Druken had to do was walk out the door and a takedown became necessary when he failed to follow the agreed instructions.
>
> (8) There were no **Charter** breaches. The RCMP had to act to control a dangerous situation.

[29] The Court's ultimate finding on whether there was a charter breach under section 7 is contained at paragraph 52.

> 52. In my opinion there was also no breach of Section 7. Although the way the emergency response team took Mr. Druken down, was unfortunate, it was not, in my view unreasonable under the circumstances, due to their legitimate concern for his safety and the safety of the general public. Therefore, this was clearly not a case where the facts of **R. v. Maskell** apply.

[30] The trial judge agreed with the Crown's submission that whether the police actions were reasonable had to be considered in the context of safety for Mr. Druken and the general public. For this reason the trial judge considered that ***Maskell*** did not apply.

[31] The Appellant has submitted on appeal that:

> The ERT team pointed assault rifles at Mr. Druken's head, jumped on top of him, and tossed him in the ground.

[32] At paragraph 19 the trial judge concluded that when Mr. Druken saw the RCMP with their rifles pointed at his head he "apparently panicked and turned back in the direction of his house".

[33] What is troublesome is that, while it was a potentially dangerous situation, it was also one in which a carefully negotiated solution had been discussed and agreed upon.

[34] The trial judge addressed this in paragraphs 18 and 19:

> 18. Corporal Pitman said that Mr. Druken knew what the plan was and that the primary concern as the safety of the public. He also stated that the emergency response team could override the plan if Mr. Druken didn't comply with it.
>
> 19. At approximately 9 pm. On February 11, 2011 Mr. Druken voluntarily left his residence. However, when he saw members of the RCMP emergency response team with their rifles pointed at him he apparently panicked and turned back in the direction of his home. As a result he was taken down by two members of that team and apparently suffered injuries.

[35] The Crown's position is that the negotiated plan could be overridden if necessary, and that is what happened.

[36] The difficulty with the Crown's position is that the plan was not communicated to the members responsible for the "takedown". The evidence is clear on this.

[37] In cross examination, Cpl. Pittman was asked (pp. 334 – 336):

> Q: And that there were some people that were being assigned to arrest Mr. Druken, or take him in and put him in the vehicle when he came out of the house:
>
> A: Yes.
>
> Q: Were you in direct contact with them?

A: No.

…

Q: If those kind of instructions weren't properly passed along, then bad things could happen?

A: Yes.

…

Q: Would it surprise you if I were to tell you that officers arresting said that they didn't receive any of these instructions?

A: I have no idea.

[38] In ***Maskell***, the court found that "the force used did not meet any of the principles of proportionality, necessity, or reasonableness". (See ***R. v. Nasogaluak,*** *2010 SCC 6*)

[39] In the present appeal, the trial judge found at paragraph 36:

> 36. Mr. Druken said he expected to be met by the chief negotiator, Constable Pitman, when he went outside but when he saw one officer with a sub machine gun pointed at him with the safety off he started to back up. At that point he said he was hit really hard on this throat and knees dropped on his arms and legs. He ended up on his face and was then lifted up and dropped again. As a result he had damage to his vertebrae; his neck and shoulder and four teeth were "smashed", his heel and cartilage in his knee were damaged and he spent a year with a taste disorder.

[40] The Crown concedes that the exit plan was not communicated, but submits when all of the circumstances are considered this is but one factor. It is nonetheless an important factor.

[41] The difference between ***Maskell*** and the present appeal, is that on the facts here, the police conduct was not deliberate. Another difference is that the Appellant himself admitted to not complying with the plan.

[42] I concur with the learned trial judge that it is unfortunate that the plan was not better communicated. It was most unfortunate. In hindsight, it would be easy to say that the force used was excessive. Whether the police conduct was deliberate or not, it still had the same effect on the Appellant.

[43] On the basis of this evidence the trial judge was correct to conclude that a potentially dangerous situation existed. The RCMP's concern for Mr. Druken's safety and the safety of the

public appears to have been well supported by the evidence. The actions of the police had to be considered in light of the situation they were facing.

[44] In respect of this ground of appeal therefore, I find that deference is to be shown to the trial judge's ruling that there was no breach of section 7 of the *Charter*. Having considered the record, I find no error of law on Ground #3.

Ground of Appeal # 2 – Did the trial judge fail to appreciate that the incomplete and misleading information presented in the Information to Obtain for the search warrant (particularly as it related to mental health issues) lead to a search which violated the Appellant's rights under section 8 of the *Charter*?

[45] The second ground of appeal pertains to section 8 of the *Charter of Rights and Freedoms* which reads as follows:

> 8. Everyone has the right to be secure against unreasonable search and seizure.

[46] Counsel for the Appellant argues that the search undertaken of Mr. Druken's house violated his rights under s. 8. The Appellant argues in his brief that the Information to Obtain contained information obtained directly from the conversations over the phone with Mr. Druken. He submits that if those are excluded there remains very little upon which to base a proper search warrant.

[47] The Appellant states correctly that there exists a presumption of validity with respect to a search warrant and the information supporting the warrant. He argues however, that the trial judge had the authority to set aside a search warrant that appears valid on its face, where the section 8 charter rights of an accused have been infringed.

[48] In this instance the purpose of challenging the validity of the warrant at trial was to exclude the evidence pursuant to s. 24(2) of the *Charter*.

[49] The Appellant argues that the evidence obtained from this search should have been excluded by reason of violations under the *Charter*, specifically ss. 7, 8 and 10(b).

[50] The Appellant states on appeal that there were two primary sources of information for the search warrant, in Exhibit VD 2. Those sources were the Appellant and his wife, Karen Druken.

[51] Appellant's counsel Mr. Rodgers, argues that the majority of the information used to obtain the warrant was obtained from the improper questioning of the Appellant. Mr. Druken was questioned for ten (10) hours without being provided the right to speak to a lawyer.

[52] This is the crux of his ground of appeal alleging that the trial judge erred in finding there was no Section 8 violation.

[53] The Honourable Judge Stroud found in his decision that the police were entitled to rely on the information provided to them by Mrs. Druken. At para. 49 he stated:

> 49. I believe both Mr. & Mrs. Druken minimized, and in some cases, exaggerated their evidence, when testifying during this application. Therefore, the use of the information in Mrs. Druken's statement when the RCMP applied for the search warrant in VD 1 and VD 2 was appropriate and therefore the Order was valid.

[54] The point, says the Appellant, is that the information relied upon was obtained from a "combination" of both Mr. and Mrs. Druken, at a time when Mr. Druken's rights were being infringed.

[55] The Respondent submits that the trial judge addressed all of the arguments of the Appellant at trial. At paragraph 43 the trial judge discussed in his decision the Appellant's section 8 charter challenge as follows:

> 43. In support of his argument under section 8 defence counsel relies on **R. v. Collins** [1987] S.C.J. No. 15 where Lamer, J. (as he then was) stated at par. 23:
>
> > " A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable."
>
> Also in **R. v. Collins** (1989), 48 C.C.C. (3d) 343 the Ontario Court of Appeal held that there exists a presumption of validity with respect to a search warrant and the sworn information supporting the warrant.
>
> Defence counsel also refers to **Hunter et al v. Southam Inc.** (1984), 41 C.R. (3d) 97 (S.C.C.) where Dickson, J read a warrant requirement, in certain circumstances, into section 8 of the **Charter** as being constitutionally warranted "where it is feasible to obtain prior authorization".

[56] There are additional facts relevant to the issue of whether trial judge erred in his decision that the Appellant was not subject to unreasonable search and seizure.

[57] In the initial application for a search warrant under section 487, Justice of the Peace Judith Gass, ruled in VD 14 that there was no evidence of a crime being committed. Thus, the search was to be restricted to the CZ handgun only. The police conducted their own registry search and were able to determine this gun was unregistered without entering Mr. Druken's home. (Transcript at pg. 56)

[58] The second search warrant application to Her Honour Judge Laurel J. Halfpenny MacQuarrie was made pursuant to section 117.014 of the *Criminal Code*. This was based on the

information the police had obtained on the weapons and firearms contained in the residence of Mr. and Mrs. Druken.

[59] The question before me is whether the trial judge erred in concluding there was no charter breach under section 8. The Appellant acknowledges that his submission on this ground of appeal is somewhat complex because the information was obtained from both he and Mrs. Druken.

[60] It has been noted under the authority in ***R. v. Collins***, (1989) 48 CCC (3rd) 343, that a search will be reasonable if it is carried out in a reasonable manner. The Honourable Judge Stroud made reference to the fact that the evidence found, the CZ handgun, was real evidence.

[61] I have concluded that the trial judge was correct in his finding that no breach of Mr. Druken's section 8 rights occurred. According to the evidence, the information provided solely by Mrs. Druken was sufficient to justify the warrant.

[62] The information obtained was not simply that Mr. Druken had been drinking and went outside into the cold. Mrs. Druken informed the RCMP that he stated he would shoot the first responder to enter his home. She confirmed this to Constable Wilson when he phoned her back for more details.

[63] The Appellant also states in the ground of appeal itself, that the trial judge failed to appreciate that there was incomplete and misleading information presented to obtain the search warrant, particularly as it related to mental health issues.

[64] To place this argument in the right context the Appellant states at paragraphs 48 and 52 of his brief as follows:

> 48. The RCMP were concerned about Mr. Druken's mental health. Sgt. Miller [210], Cst. Kutcha [189-24] and Sgt. Green all indicated that mental health concerns were their primary concern. …
>
> 52. Failing to obtain proper authorization under the *Involuntary Psychiatric Treatment Act* was a symptom of a larger issue whereby the RCMP trampled over Mr. Druken's rights throughout this ordeal. …

[65] On this point I concur with the Respondent. The trial judge did address the Appellant's mental health issue in his decision. At para. 48 the trial judge found:

> 48. In my view the RCMP had every reason to believe that (i) There were weapons in the residence – whether or not they were registered, and (2**) Mr. Druken was under considerable stress due to his mental condition and he was drinking and heavily medicated.** (emphasis added)

And further, I repeat paragraph 49 where the trial judge said:

> 49. I believe both Mr. & Mrs. Druken minimized, and in some cases, exaggerated their evidence, when testifying during this application. **Therefore, the use of the information in Mrs. Druken's statement when the RCMP applied for the search warrant in VD1 & VD2 was appropriate and therefore the Order was valid.** (emphasis added)

[66] It follows, in my view, that the search warrants were presumptively valid and this presumption was not rebutted by the Appellant. The Appellant's argument under this ground focussed in large measure on the Appellant being denied the right to counsel. This is more appropriately addressed in the analysis in Ground #1 herein.

[67] I therefore find that the trial judge did not err in finding there was no breach of Mr. Druken's right to be protected from unreasonable search and seizure.

Ground of Appeal # 1 – Did the trial judge fail to recognize that the Appellant being detained in his home by the RCMP over the course of 24 hours without access to legal counsel was a violation of his rights under section 10 of the *Charter*?

[68] The core of the Appellant's submission on this ground, and on the Appeal itself, is that the trial judge erred in failing to recognize that the Appellant had been "detained" in his home over the course of 24 hours without the ability to access legal counsel. The Appellant submits this constituted a violation of the Appellant's rights, and thus an error of law.

[69] The right to counsel under section 10(b) is triggered by detention or arrest. Section 10(b) of the *Charter* reads as follows:

> Arrest or detention
>
> 10. Everyone has the right on arrest or detention:
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; and

[70] In this regard the learned trial judge made the following finding at paragraph 50 of his decision:

> 50. When determining whether there had been a breach under the **Charter** the context of the facts of each particular case must be considered. In my view, **R. v. Therens** and **R. v. Bartle** have no application to this matter. Mr. Druken was not "detained" during the negotiations. In fact, the opposite was true because the police were doing everything they could to get him to come out of his residence. In addition, when he was arrested following his take down by the emergency response team he was read his **Charter** rights before Constables Reid and Bingle transported him to Sydney. Therefore, he was not denied his right to counsel.

[71] Whether a charter violation occurred is a question of law to which the standard of correctness applies. Both parties to this appeal are in agreement on this. The learned judge clearly based his decision on his conclusion that Mr. Druken was not detained and that he was read his charter rights upon being arrested. In terms of whether he was detained, the judge found that the "opposite" occurred because the police were "doing everything they could" to have Mr. Druken leave his residence.

[72] The Appellant takes no issue with the facts. He did not challenge them but does challenge the findings based upon them. Some context is useful in the discussion on this ground of appeal. There is no dispute that Mr. Druken's phone was re-routed directly to the RCMP.

[73] The Appellant's counsel maintains that a lack of curiosity and an inflexible approach led to a breach of Mr. Druken's charter rights. On the facts there were no gestures or use of firearms made by Mr. Druken. It was the police they say, who created the situation. It was they who used terms such as "containment" in terms of their operation.

[74] The police stated in the warrant application that Mr. Druken had been "barricaded" in his home. The Crown acknowledged this was an unfortunate use of that term. There was also use made by the RCMP of the term "peaceful surrender", when describing their attempts to deal with Mr. Druken. Indeed these terms are relevant in assessing the issue of detention and in particular the mindset of the police.

[75] The Appellant argues the information was misleading. The Honourable Provincial Court Judge Laurel J. Halfpenny MacQuarrie found on the basis of the information submitted, that it was not desirable in the interests of safety for Mr. Druken to possess or have control of the 9 mm CZ automatic, among other firearms or weapons. (see Exhibit VD 1).

[76] In terms of the police doing what they could to get Mr. Druken to "come out", the Crown agreed the negotiated plan was not properly communicated to the arresting officers. The Appellant argues that if Mr. Druken was not detained, why having taken one step toward his home was he pounced upon. The Appellant submits charges were clearly being contemplated by the police. If you cannot leave, you are detained submits the Appellant.

[77] In the decision, the trial judge found the following as facts:

> 33. Mr. Druken confirmed that he said things over the years to his wife about not calling the cops but not on that day and that he saw police officers outside of this house but wasn't going to come out under the circumstances because he thought they were going to breach the house and if he made the wrong move he would be dead.
>
> 34. Mr. Druken said his phone was cut off so he couldn't call anyone and he was not given an opportunity to call a lawyer. He also said no one told him he was under arrest.

> 36. Mr. Druken said he expected to be met by the chief negotiator, Constable Pittman, when he went outside but when he saw one officer with a sub machine gun pointed at him with the safety off he started to back up. At that point he said he was hit really hard on this throat and knees dropped on his arms and legs. He ended up on his face and was then lifted up and dropped again. As a result he had damage to his vertebrae; his neck and shoulder and four teeth were "smashed", his heel and cartilage in his knee were damaged and he spent a year with a taste disorder.

[78] There is really no dispute that the Appellant's home was surrounded by an emergency response team or that he picked up the phone to call an army "padre" whom he knew.

[79] Mr. Druken testified that he asked if he could call a lawyer.

[80] The Respondent argues that Mr. Druken did not ask to actually speak to a lawyer. They argue further that "no one could argue that he is unfamiliar with Canadian law." The Respondent submits he was under no obligation to leave his home. Further they argue that Mr. Druken was not complying with the police demands (to leave) and as such he was not detained.

[81] The Crown refers to Dr. MacKinnon's testimony at pages 376-378. She expressed her goal as getting Mr. Druken to leave his residence, in order that he could receive treatment. This evidence would appear to support the trial judge's findings. Here is some of what Dr. MacKinnon said:

> Q: Did you have a plan? Did you have a goal in mind"
>
> A: Yes. To make sure that everything – that he was **safely** taken care of and could get treatment. (page 376)

[82] She was asked to tell a bit about the conversation she had; she stated:

> I just knew he wasn't doing well and I thought the only way he was going to get better was to leave. (page 378)

[83] She said further on:

> We were hoping there wouldn't be any charges, because I know the way he's – respect – he was so proud of himself, and this would be just a devastating thing for him. (page 379)

[84] The Respondent relies on ***R v. Grant***, 2009 SCC 32, and cautions that legal issues of detention and exclusion of evidence are "difficult to apply and may lead to unsatisfactory results". The Crown refers to paragraph 44 of ***Grant***:

> 44. In summary, we conclude as follows:

> 1. Detention under s. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:
>
> a. The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquires regarding a particular occurrence; or, singling out the individual for focused investigation.
>
> b. The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> c. The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[85] The Respondent submits that when Mr. Druken asked them to call a lawyer it was not denied. Instead, the police went on to the next question. (Transcript at page 449)

[86] The Respondent submits there was no physical restraint and no physical interaction between the police and Mr. Druken until he left his residence. Prior to that he refused to leave in his residence. There was only conversation with Mr. Druken by phone and there was no psychological detention.

[87] The Respondent submits Mr. Druken was detained only at the point where he was not permitted to return to his residence. That point was at the time of his arrest, when he was given his right to counsel. The Crown argues Mr. Druken was not detained during the negotiations, as found by the trial judge.

[88] In his brief the Appellant refers to a leading case on detention, that of ***R. v. Therens***, (1985) 1 SCR 613. This case states that detention can occur when police or the state assume control over a person, which may impede the person's access to legal counsel.

[89] Referring to ***R. v. Chromiak***, (1979) 46 C.C.C. (2d) 310, the Appellant argues there must be "some form of compulsion or coercion" which maybe of a "physiological or mental nature"; meaning a restraint on the will of a person.

[90] For his part, Mr. Druken stated he had been in the army long enough to know the presence of heavily armed officers surrounding his house was not a good thing. He was scared, he said. There were several snipers.

[91] On the one hand his phone was "cut off" to him, on the other he said he knew "his rights". He said also, "I felt I had no say". He admitted that the evacuation of the town caused him to come out and he admitted to violating the plan.

[92] In his brief, the Appellant refers in ***R. v. Therens***, [1985] 1 S.C.R. 613, at paragraph 51 to the statement of Tallis, JA. In discussing "detention" he states, when you are considering the circumstances of the case, can it be said that the accused was "free to depart as he pleased ".

[93] The weight of the evidence contained in the record suggests to me that Mr. Druken was not free to depart as he pleased. The evidence bears this out, when one looks at what happened when Mr. Druken decided to do as he pleased. He ended up having a gun pointed at this head.

[94] Restraint on liberty can prevent access to counsel or induce a person to assume he or she does not have access to counsel. I think this was very much the situation in the present case. (***Horyski v. H.(R)***, 152 A.C.W.S. (3d) 441)

[95] Considering the factors set out in ***Grant***, while there was no physical restraint or legal obligation, there is little doubt that Mr. Druken was being "singled out for focused attention". There was as well the "duration of the encounter". The police were outside his residence for nearly 24 hours.

[96] The evidence of the physician clearly shows the vulnerability of Mr. Druken in these circumstances. In my view, he did not have to assume he had no access, he did not in fact have access because his phone was re-routed. This was as a result of the deliberate conduct of the RCMP, even if well intentioned.

[97] In addition, the evidence is he was on the phone for about 10 hours in total. In ***Horyski***, a mother and her child were placed in a police vehicle for 2 ½ hours while the residence was searched. While it was clear there was a detainment in ***Horyski***, the court also stated:

> 51. Even as matters dragged on, no one thought to provide M. Horyski with information about her right to call a lawyer or to give her an opportunity to do so.

[98] In cross-examination Sargent Greene was asked whether Mr. Druken had been detained to which he replied, "He wasn't leaving the house or the property".

[99] In terms of whether Mr. Druken was subject to a legal obligation, there was a search warrant in place for his residence to be searched. It may be that the officers were understandably focussed on their work. Mr. Druken was very much in a crisis situation and could have benefitted from legal counsel, which he asked for. Other options could have been explored with

his counsel and his status could have been explained. Indeed, he said in his evidence, that had he been asked, he would have complied with the warrant.

[100] With great respect to the learned trial judge, in my view he was in error when he concluded that Mr. Druken had not been detained during the negotiations.

[101] The trial judge dismissed the cases of ***R. v. Therens*** and ***R. v. Bartle***, [1994] 3 S.C.R. 173, as having no application because there was no detention. The principles in these cases did have applicability to whether Mr. Druken was detained, even if the trial judge did not agree that he was detained.

[102] For all of the above reasons, I find that the trial judge erred in law in concluding there was no violation of Mr. Druken's right to counsel under section 10(b).

[103] The circumstances cried out for Mr. Druken to have been given the opportunity to consult counsel at some point during this longstanding, stressful and potentially dangerous situation.

Section 24(2) of Charter

[104] Section 24 of the *Charter of Rights and Freedoms* states:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (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.

[105] It must be remembered that the objective in balancing the three lines of inquiry (as set out in ***Grant***) is to determine whether in all of the circumstances admission of the evidence would bring the administration of justice into disrepute.

[106] I will now examine the three lines of inquiry for the purpose of determining whether the trial judge erred.

Inquiry No. 1 – Seriousness of the Charter breach

[107] When one considers the sheer length of these negotiations, the extreme intensity for all concerned, the psychological impact on Mr. Druken, and the resulting charges, it was a serious breach of a charter right not to allow Mr. Druken to speak to legal counsel. As stated in ***R. v.***

Crane, [2005] A.J. No. 292., extra care is to be taken when dealing with persons suffering from mental health issues.

[108] Being afforded the right to counsel may or may not have altered the outcome but that is not the only consideration. In my view, the considerations under this line of inquiry favours exclusion.

Inquiry No. 2 – Impact of the Charter Breach Upon the Accused's Charter Protected Interests

[109] Given the existence of the search warrants (presumed to be lawful), the impact of the breach of section 10(b) on the accused rights is minimal due to the tenuous connection of the breach to the evidence obtained.

[110] The RCMP acknowledged the concern around Mr. Druken's mental health. It is evident from the record that he was tired, under stress, and not thinking clearly. In a word, he was vulnerable. He should have been accorded more deference even with the potentially dangerous situation that existed.

[111] The impact on his rights must also be considered in light of the evidence given by Mrs. Druken. She was a separate source of information independent of her husband in the police obtaining the warrants.

[112] There is case law that would allow the section 10(b) right to be "suspended" due to the seriousness of the situation and the concern for the safety of the public and Mr. Druken himself. (***R. v. Strachan***, [1988] 2 S.C.R. 980)

[113] This was touched upon by the learned trial judge in his reasons, but "suspending" the right to counsel was not argued by the Respondent. The record under this line of inquiry favours admission of the evidence and to some extent exclusion, but mostly it favours the admission.

Inquiry No. 3 – Person having a trial on the merits it takes on importance

[114] Where weapons and firearms are concerned, society's interest in having a trial on the merits takes on considerable importance. The trial judge noted that the evidence seized was considered "real evidence". Without the evidence, a trial on its merits is placed in jeopardy.

[115] There is also the evidence of Mrs. Druken that gave rise to a public safety concern. The actions of the police must be considered in light of this concern and the safety of the Appellant.

[116] There is little question that this line of inquiry favour admission. In the long term however, the public might expect police actions that would serve to resolve and not escalate a volatile situation. Ensuring the Appellant's the right to consult counsel could well bolster the public's confidence in the administration of justice.

[117] On balance however, I find that this line of inquiry favours admission.

Balancing of the Lines Inquiry

[118] The requirement under s. 10(b) is to provide the opportunity without delay, meaning immediately. As mentioned, only legitimate safety concerns or other exigent circumstances can justify a delay in advising a detainee of his rights under s. 10(b) (***R. v. Strachan***). This was not something which was argued by counsel or raised in a ground of appeal.

[119] The case of ***R. v. Crockwell***, [2013] N.J. No. 59, bears similarity to the present appeal. It was held that a six day standoff was not an arbitrary detention. In ***Crockwell*** however, the accused refused to communicate with the police, had in fact barricaded himself, and had in fact used his gun to fire shots. In ***Crockwell*** there was a finding of exigent circumstances.

[120] In the present case, it appears that the connection between the breach of s. 10(b) and the obtaining of the evidence is tenuous. (***R. v. Roy***, [2012] S.C.J. No. 26) In addition, the trial judge found that the evidence obtained by the search was real evidence. While these factors favour admission the Appellant was arrested under the *Involuntary Psychological Treatment Act*, 2005, and not in relation to charges under the *Criminal Code of Canada*.

[121] In the transcript of the negotiations (VD 16), Mr. Druken spoke of the fear of being "double crossed". His last words prior to departing the residence were: "They bluff a lot, I am glad to be going to Halifax". Dr. MacKinnon, "Yeah". Mr. Druken ,"Just walk (sic) to my lawyer".

[122] On the other hand, there was a comment from Mr. Druken in the transcript that he could "blow the town to bits, when I'm in the mood". That said, Mr. Druken had not demonstrated use of violence. He held no prior criminal record.

[123] What I find is relevant to this appeal is the cumulative impact of the police actions upon the Appellant. The manner of the takedown, the alleged use of excessive force, the cutting off of the accused's phone, the overlooking of his request to contact a lawyer, were all were found to be justified in the name of public safety.

[124] Needless to say the judgment call on the part of the police was they were taking no chances. The trial judge's decision recognized this in its findings.

[125] The balancing of these factors is a delicate exercise. (***R. v. Timmons***, 2011 NSCA 39)

[126] Considerable deference is owed to the trial judge on whether to exclude evidence under s. 24(2) of the *Charter*, because the determination requires the judge to exercise some discretion, "when the appropriate factors have been considered". (***R. v. West***, 2012 NSCA 112)

[127] The trial judge's reasons in relation to s. 24(2) are brief. Because he found no violation of the *Charter*, he did not analyze the various factors under s. 24(2). He did state however that even had he determined there were one or more charter breaches, he would have decided that excluding the evidence would bring the administration of justice into dispute, "under the unusual circumstances of this case". (Para 53)

[128] In the leading case of ***Grant***, an important factor in the court's decision not to exclude was that the police were acting in good faith, much as is the case here. In addition, exclusion would have rendered conviction, impossible.

[129] In ***R. v. Black***, [1989] 2 S.C.R 138, there was a serious breach of the right to counsel (physical evidence obtained, a knife), but the Court held that the accused's s. 10(b) rights were not infringed, where the evidence obtained was real evidence.

[130] If the temporal link between the charter breach and the evidence obtained is tenuous, the court may conclude that the evidence was not obtained "in a manner" that infringes a right or freedom under the charter. (***R. v. Strachan***)

[131] On the other hand while a temporal link is often determinative, it is not always required. The whole of the relationship between the breach and the evidence must be examined. (***R. v. Goldhart***, [1996] 2 S.C.R. 463)

[132] Having considered the manner in which the evidence was obtained, in regard to all the circumstances, I am satisfied the evidence should have been excluded by the learned trial judge. The record in my view demonstrates the heightened concern came at the expense of Mr. Druken's rights, almost at every turn. The *Charter* was intended to control and restrict such violations, even in serious circumstances.

[133] This is not to suggest that every "standoff" situation, would have a similar result. Suffice to say, that in spite of the concern for safety, the accused's rights should still be respected, and not the reverse. The cumulative effect of the police actions upon the Appellant is a legitimate concern in these circumstances.

Section 686(2) of the *Criminal Code*

[134] Having concluded the learned trial judge erred, I turn now to the issue of whether there should be a new trial or an acquittal. The Appellant has sought an acquittal in his Notice of Appeal. The test in considering section 686(2) as stated in ***R. v. MacNeil***, 2009 NSCA 46, is as follows:

> A court of appeal (or summary conviction appeal court) should direct:
>
> i) a verdict of acquittal where there is no evidence upon which a properly instructed trier of fact could have reasonably convicted D;
>
> ii) a new trial, where a properly instructed trier of fact could reasonably have convicted D on the admissible evidence adduced at trial.

[135] I have concluded that if the evidence from the search is excluded, a properly instructed trier of fact could not reasonably have convicted Mr. Druken at trial. The evidence excluded would include the 9 mm CZ as well as the derivative evidence of the testing of the gun.

[136] Under section 2 of the *Criminal Code,* the definition of firearm is one that is capable of operation. In his decision of June 4, the trial judge found that the weapons included in VD 5 had been dismantled by Mr. Druken and were kept for historical purposes. The 9 mm he said was one of those weapons.

[137] The charge under section 91(1) requires "possession" of a firearm.

[138] There is still the evidence of Mrs. Druken who said that her husband did possess the 9 mm CZ gun. However, the trial judge concluded the evidence that that the firearms were dismantled and inoperable was not refuted by any Crown witness.

[139] For all of the above reasons I am allowing the appeal and direct that an acquittal be entered in place of the conviction at trial.

Murray, J.

Appendix “A”

Standard of Review:

9 As this Court stated in *Pottie*, appeals under s. 839 of the *Criminal Code* are restricted to questions of law to which a correctness standard of review applies. As *Pottie* explains, this Court's jurisdiction is grounded in error alleged to have been committed by the SCAC judge:

> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

10 The standard of review with respect to alleged *Charter* breaches was discussed in *R. v. West*, 2012 NSCA 112:

> [74] The standard of review for a *Charter* breach was set out in *R. v. B.(T.W.)*, 2012 MBCA 7, at para24:
>
> 24 In *R. v. Farrah (D.)*, 2011 MBCA 49, 268 Man.R. (2d) 112, Chartier J.A. wrote (at para. 7):
>
> By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
>
> a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
>
> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant*, [2009] 2 S.C.R. 353 at para. 129).
>
> c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd (C.)*, [2009] 2 S.C.R. 527, 391 N.R. 132, 331 Sask.R. 306, 460 W.A.C. 306; 2009 SCC 35, at para. 20).
>
> d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant*, at para. 86, and *R. v. Beaulieu (G.)*, [2010] 1 S.C.R. 248, 398 N.R. 345; 2010 SCC 7, at para. 5). [at para24; see also *R. v. V.(S.E.)*, 2009 ABCA 108, at para3-5]