HMTQ v. France & Winter, 2002 NWTSC 32

Date: 2002 04 19
Docket: S-1-CR-2001000084

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Respondent

- and -

MATTHEW JAMES FRANCE
DANIEL ROBERT WINTER

Applicants

Application to exclude evidence based on breaches of ss. 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms.*

Heard at Yellowknife, NT on February 25, 2002

Reasons filed: April 19, 2002

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Crown: Sue Kendall and Johnathon Burke
Counsel for Matthew James France: Sid Tarrabain
Counsel for Daniel Robert Winter: Scott Duke

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REASONS FOR JUDGMENT

[1] The accused, Matthew James France and Daniel Robert Winter, are charged with having in their possession a controlled substance for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. They have brought this application for the exclusion of evidence, a large quantity of marijuana and money, found in a rental vehicle in which they were travelling to Yellowknife. They allege that in stopping and searching the vehicle, the police breached their rights under ss. 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms* and that the evidence should accordingly be excluded under s. 24(2). For the following reasons, I agree.

[2] Sometime prior to April 11, 2001, Corporal Nowlan, who was in charge of the R.C.M.P. drug unit in Yellowknife, received information that an unnamed female was thought to be bringing drugs from Alberta to the Northwest Territories in a red Jeep Cherokee with Alberta plates.

[3] On April 11, while conducting surveillance for the red Jeep Cherokee on the highway southbound from Fort Providence, Corporal Nowlan passed a green van travelling northbound toward Yellowknife. He noted that it did not have territorial plates and that the back windows were open. Corporal Nowlan turned his vehicle around and drove into a truck stop where the green van had pulled up to the gas pumps.

[4] There, Corporal Nowlan made the following observations: the van was a rental vehicle; it was very dirty; the driver did not get out of the van while it was being gassed up; the driver paid for the gas in cash; the front passenger seat was not visible and appeared to be reclined; through the tinted windows could be seen what Corporal Nowlan presumed was luggage. Corporal Nowlan ran a check on the licence plates, on the mistaken assumption that they were Alberta plates. On a closer view, he determined they were B.C. plates. He did not have any interaction with the occupants of the van.

[5] Based on his observations, Corporal Nowlan decided the van would make a "good Pipeline check". There were several references to a "Pipeline check" and "Operation Pipeline" in the evidence. Corporal Nowlan testified that a Pipeline check is an investigatory technique or program which considers certain observed factors or "indicators" to be indicative of travelling criminals. None of the police officers who testified on this application had any specific training in this technique or program. Exhibit V-6, which Corporal Nowlan testified is part of the R.C.M.P. Operational Manual, refers to "Operation Pipeline/Convoy/Jetway" as a periodical published by a branch of the R.C.M.P. and says that its main objective is to collect intelligence regarding search and seizure incidents and disseminate it for the interest or information of all members. It refers to a form to be completed after any searches or seizures of interest. From this and the rest of the evidence, I infer that Operation Pipeline is simply a program designed to collect information on the circumstances of searches and seizures (presumably only successful ones), not necessarily restricted to drugs. What is not clear is how it is used as an investigative technique, although I infer that, for example, if the information collected indicates that in many or most of the instances of seizure of drugs from vehicles, the vehicle is a rental, the fact of a rental vehicle is deemed to indicate the presence of drugs. It is not clear to me how this is any different from the way an experienced police officer might draw conclusions based on his or her own past experience.

[6] Apart from what he observed at the truck stop, Corporal Nowlan had no other information about the van or its occupants. He testified that the observations he made fit the profile of a drug run. In his view, the fact that the van was a rental was very important because his past experience was that drug organizations use rental vehicles.

He found it bizarre that the driver did not get out of the van at the truck stop, because it was the only gas station for some distance and the driver must have been driving for a while. He testified that the appearance of bags or luggage in the van was an indicator of drug activity, although not as strong as the others. He also relied on the fact that the van appeared to have been travelling and had out of territory licence plates. From all of these “indicators” he formed a suspicion, which he testified was less if any one indicator was removed. He concluded from his experience that what he observed indicated travelling criminals.

[7] Corporal Nowlan agreed that in itself, there was nothing unusual about the use of a rental vehicle, that most vehicles on the road were dirty, that there is nothing unusual about paying for gas in cash, that he could not tell what was in the van and that luggage is not unusual in a vehicle coming from out of the territory.

[8] Corporal Nowlan acknowledged in his testimony that he did not have at any time reasonable and probable grounds to search the van and that he would not therefore have attempted to obtain a search warrant or make an arrest. His testimony was, I found, somewhat contradictory. In cross-examination by France’s counsel, he said that he felt that he could have pulled the van over and questioned the driver based on the indicators he had, but that as a drug investigator he would not have pulled it over that day. Later in cross-examination he said that he himself did not conduct a “check” on the van because he had no grounds on which to question the occupants. He said that the term “Pipeline check” does not mean a search, it could be stopping the vehicle and speaking to the driver.

[9] Another contradiction was that at trial, Corporal Nowlan denied that he wanted the van stopped and searched. He could not explain why, at the preliminary hearing, he had testified that he did want it searched.

[10] When it was suggested to him on cross-examination that he merely had a hunch about the van, Corporal Nowlan disagreed and said that indicators are something he can see, whereas a hunch is only a feeling. However, when asked about his contact with Corporal Guspodarchuk, which I will refer to below, he said that when he contacted him for a second time, (after the seizure had been made), it was because the more he thought about it, the more he “had a feeling”.

[11] I conclude from this evidence that Corporal Nowlan had merely a hunch about the van and that he knew that he had no grounds on which to stop and question the occupants.

[12] After the green van left the truck stop, Corporal Nowlan used his satellite phone to contact Corporal Guspodarchuk, who was farther north on the highway toward Yellowknife. Corporal Nowlan told him what he had observed and that the van would make a good Pipeline check. His evidence was that he did not tell Corporal Guspodarchuk that he wanted the van checked, but left it to him to decide what to do based on whatever he might observe.

[13] Corporal Guspodarchuk was aware that his colleagues were looking for a red Jeep Cherokee from a conversation he had had with Corporal Nowlan earlier in the day. His testimony was that Corporal Nowlan told him on the satellite phone that he had observed a green van of a suspicious nature and that he wanted Guspodarchuk to stop the vehicle and check it, or that it would be a vehicle to pull over and check.

[14] Corporal Guspodarchuk then went through the Yellowknife telecommunications system to contact Constable Linaker, who was patrolling at a location on the highway closer to where the van was. He learned that the constable had already stopped the green van and let it go. Corporal Guspodarchuk testified that he told Linaker about the indicators Corporal Nowlan had described, that Nowlan would like him to stop the vehicle and to get in touch with Nowlan to discuss the matter. After that conversation ended, he was contacted by Nowlan, whom he advised to get in touch with Linaker. Corporal Guspodarchuk never saw the green van.

[15] There were some significant differences between the testimony of Corporal Nowlan and that of Corporal Guspodarchuk. Corporal Guspodarchuk testified that Corporal Nowlan had told him earlier in the day to check all out of territory vehicles to see if the female connected with the red Jeep was inside; Corporal Nowlan denied that. Corporal Guspodarchuk said that Corporal Nowlan told him that he wanted the green van stopped and checked; Nowlan denied that. It may be that at least some of this contradiction is attributable to a possible misunderstanding or different understanding of the phrase, " this would be a good Pipeline check".

[16] Constable Linaker, who had much less experience as a police officer than the other two, testified that he was aware from a fax he had seen at the beginning of his shift that the drug section was looking for a red or green Jeep Cherokee with a male or female passenger and Alberta plates. He was the only one of the police witnesses who referred to it as red or green. Prior to the conversation with Corporal Guspodarchuk referred to above, Constable Linaker saw the green van driving northbound and noted that it was very dirty and the plate was not visible. He pulled the van over and asked for the

driver's licence and other documents. The driver was identified as the accused Daniel Robert Winter. Among the documents produced was a vehicle rental agreement in the name of the accused Matthew James France, who was the passenger. Constable Linaker confirmed that there were no outstanding warrants for the two accused and that the licence plate was valid and he let the vehicle go on its way. He made a number of observations at this time which I will refer to below. He did not tell the accused to do anything about the dirty licence plate.

[17] I find that this first stop by Constable Linaker was a valid one under the provisions of the *Motor Vehicles Act*, R.S.N.W.T. 1988, c. M-16, requiring that licence plates be free of obstruction.

[18] On return to his police vehicle after letting the van proceed, Constable Linaker was contacted by Corporal Guspodarchuk. Constable Linaker gave a different version of the conversation that took place between them. He testified that Corporal Guspodarchuk told him that Nowlan had seen a green van and that if Linaker saw it, it "might be in his interests" to stop it. Constable Linaker testified that he did not know what that meant but he concluded that the drug section was interested in the van. The radio connection was poor and although Linaker asked for further information about why Nowlan was interested, he did not get it. This conflicts with Corporal Guspodarchuk's testimony that he passed along Nowlan's observations. He did not recall Corporal Guspodarchuk telling him to talk to Corporal Nowlan first.

[19] Constable Linaker then followed the van. He tried unsuccessfully to contact Corporal Nowlan. He did contact a Corporal Bauhlkam, with whom he had taken some training relating to traffic stops and drug trafficking. He relayed his observations to Corporal Bauhlkam in order to get some advice. Corporal Bauhlkam told him his observations were very valid, in line with the training, and reason to continue. Constable Linaker then lost the satellite phone connection. He testified that Corporal Bauhlkam did not tell him to search the van.

[20] The observations that Constable Linaker testified he had made at the time of the initial stop were as follows:

a) the rear windows of the van were open although it was a cold day, which could be a way of getting rid of the smell of certain drugs;

b) Winter, the driver, was nervous, overly friendly and co-operative and his hands shook excessively;

c) after Constable Linaker signalled the van to pull over, Winter opened his window and was attempting to speak to Linaker as he left his police vehicle, leading Linaker to conclude he did not want him to approach the van;

d) Winter had said that he and France had left British Columbia the day before, which Constable Linaker assumed meant they had driven straight through to the Northwest Territories;

e) Winter expressed concern about the ice road at Fort Providence closing before they returned after their planned weekend trip to Yellowknife to visit France's parents, and asked how to find out its status, which is something Constable Linaker felt they would have researched if they were on a leisure trip.

[21] As a result of these observations, Corporal Bauhlkam's confirmation that they were valid, and the knowledge that Corporal Nowlan was interested in the van, Constable Linaker decided to stop the van again, on the belief that there was something in the van that should or could be investigated. His evidence was not clear as to whether he merely thought there was something to investigate or actually thought there were drugs in the van or thought there was a drug investigation going on.

[22] Constable Linaker acknowledged in his testimony that prior to his stopping the van, no one had suggested to him that there were drugs in the van. He did not smell anything indicative of drugs when he stopped the van the first time.

[23] On pulling the van over the second time, Constable Linaker noted that the rear windows were still open and that the driver, Winter, again tried to speak to him from the window as he was getting out of the police vehicle. There was no reference in his testimony to observing nervousness or shaking on the part of Winter on this second stop.

[24] Constable Linaker testified that when he asked Winter to step out of the vehicle, he intended to question him to help with his investigation; he later said in his evidence that he intended to obtain a consensual search of the vehicle.

[25] Constable Linaker's version of what happened next is that he asked Winter to get out of the van and said that he had questions to ask him. Winter got out. Linaker then told him that he had reason to believe that there was a controlled substance in the van and asked whether Winter wanted to tell him anything. Winter responded by saying that there was nothing in the van and asking whether Linaker wanted to look. Linaker asked

"would you mind" and Winter told him to go ahead. Linaker then told him that if anything was located in the vehicle they would be arrested and that he could withdraw his consent at any time without penalty. On cross-examination, he testified he believes he told Winter he could stop the search at any time without legal consequences. Winter indicated that he understood. France, who was watching, said nothing. Constable Linaker then looked into the van and had both accused come to the back of the van. The rear door of the van was locked. Linaker testified that Winter offered to get the keys from the ignition, did so, and helped him open the back. Constable Linaker did not ask who the various bags and other items inside the van belonged to.

[26] After the back was opened, Constable Linaker moved aside a couple of empty duffle bags and then opened one of two hockey bags. He noted that there were some green garbage bags inside the hockey bag and asked why that was. France said they had put their hockey gear in the plastic because it smelled. Constable Linaker then opened one of the green garbage bags and found it contained marijuana.

[27] Constable Linaker then took both accused into custody and arrested them for possession of a controlled substance. He then, for the first time since encountering the two accused, separately read them their right to counsel. Both said they wished to contact a lawyer. Constable Linaker told them they could do so once they had arrived in Yellowknife, which is a two and a half to three hours' drive away.

[28] Constable Linaker requested backup and continued to speak with the accused. The Crown does not seek admission of what was said by them. Approximately an hour later Corporal Nowlan and other officers arrived. The accused were turned over to Corporal Nowlan. He also read them their right to counsel, and gave them the police warning. He told them they could contact a lawyer by using the satellite phone, but that he could not guarantee privacy. Neither of the accused used the phone. Corporal Nowlan acknowledged that the accused could have been taken to Fort Providence or Rae to contact counsel and that there was no urgency to the search.

[29] The accused were taken to Yellowknife, where a full search of the van was conducted. No search warrant was obtained. The total amount of the marijuana found in the van was eighty-four pounds. Over $10,000.00 was also found.

[30] I turn now to Mr. Winter's evidence, which was the only evidence called by the defence. His testimony was that on the second stop he acceded to Constable Linaker's request that he get out of the van because he was a police officer. Constable Linaker said he had reason to believe there were drugs or contraband in the van and asked if he

knew anything about that. Winter replied "no". Constable Linaker then asked for permission to inspect inside the van and said something about a search. Winter replied "that's not for me to say". He denied consenting to the search. Constable Linaker then looked through some of the things in the van. He asked him to get the keys to the back and Winter did. He did not offer to get the keys. After the marijuana was found and Winter and France were arrested and Winter said he wanted to call a lawyer, Constable Linaker did not say when they could call a lawyer. Later, when Corporal Nowlan talked to him about the satellite phone, he said he would not use it because the Corporal could not guarantee privacy. On cross-examination by Crown counsel, Winter agreed that Constable Linaker may have said he had reason to believe there was a controlled substance in the van. He also agreed that Constable Linaker said that if he found anything they could be arrested and that although he did not hear Linaker say it, it was possible that he said Winter could withdraw his consent. Under cross-examination by the Crown he changed his version of his conversation with Linaker, saying that Linaker was looking inside the van, Winter pointed out which bag was his and Linaker asked what about the rest of the van, to which Winter replied "that's not for me to say". He had no explanation for why he pointed out his bag to the constable and said that he assumed the other bags in the van were France's.

[31] He also testified that the van windows were open because he was smoking cigarettes. Although he did not admit that his hands were shaking excessively as described by Constable Linaker, he said that his hands shake anyway, it was windy and he had been driving for a while. In cross-examination, he attributed any shaking to his having steel pins in one arm. He also said that he did not get out of the van at the truck stop because there were puddles on the driver's side.

[32] Winter testified that he has a hearing loss, which I accept, although I am not satisfied that it affected his ability to hear Constable Linaker during the events at issue. I note that no questions were put to Constable Linaker in cross-examination about whether he observed Mr. Winter to be having trouble hearing or about Mr. Winter's version of their conversation. Mr. Winter did not appear to have any significant difficulty hearing the questions put to him in court, and although he claimed not to be able to hear Constable Linaker testify, it was not raised with the Court during the testimony. Nor did counsel try to make anything of the hearing problem in his submissions.

[33] I find it curious that Mr. Winter would admit that it is possible that Constable Linaker said he could withdraw his consent, when his position is that he never gave any consent. I also found that Mr. Winter seemed to have an explanation for everything, and in the case of the shaking hands, too many explanations. On the whole, I did not find

Mr. Winter a credible witness. On the crucial issue as to the conversation about permission to search the vehicle, I do not accept his evidence. Nor do I accept it on the question of offering to get the keys to open the back of the van.

[34] I also have some reservations about the evidence of Constable Linaker because of the contradictions I have noted earlier. I find that Mr. Winter did indicate to Constable Linaker that he was consenting to a search of the van, although I am not satisfied as to exactly what words were used. I am also satisfied that he offered to get the keys to the van. None of this is determinative of the issues.

[35] In determining whether in all these circumstances the accused's ss. 8, 9 and 10(b) rights were infringed, the first issue is how to characterize the second stop made by Constable Linaker. The Crown submits that it was an investigative stop and that Constable Linaker had articulable cause to make it. The defence submits that there was no articulable cause and it was therefore an illegal detention in breach of the accused's right not to be arbitrarily detained under s. 9 of the *Charter*. As with all of the alleged *Charter* breaches, the onus is on the accused to prove their rights were infringed.

[36] The Crown concedes that the accused were detained on the second stop by Constable Linaker. I find that they were detained as soon as he pulled them over.

[37] It is clear that the second stop was not made for any road safety reasons or under the statutory authority of the *Motor Vehicles Act*. That leaves the common-law authority of a police officer to interfere with an individual's liberty by, for example, stopping his vehicle.

[38] Doherty J.A. considered the issue of common-law authority and arbitrary detention in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont.C.A.). The test he set out in that case requires that I decide first whether Constable Linaker was acting in the course of his duty when he stopped the van and then whether the detention involved an unjustifiable use of the powers of that duty.

[39] I conclude that Constable Linaker was acting in the course of his duty when he stopped the van, that duty being broadly defined as patrolling the highway and investigating matters which might come to his attention.

[40] Under the test in *Simpson*, whether the stop involved an unjustifiable use of the powers associated with that duty requires that I look at the totality of the circumstances

and that I determine whether Constable Linaker had some "articulable cause" for stopping and detaining the accused.

[41] In *Simpson*, Doherty J.A. said that articulable cause requires a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is implicated in the criminal activity under investigation. A "hunch" based entirely on intuition gained by experience is not enough, no matter how accurate that hunch may prove to be (at p. 502).

[42] A Court called upon to decide this issue has to determine whether the evidence supports an independent judgment that there was articulable cause to make the stop: *R. v. Lal* (1998), 130 C.C.C. (3d) 413 (B.C.C.A.) (at p. 420).

[43] As I have noted above, there is a conflict between the evidence of Constable Linaker, who says Corporal Guspodarchuk told him that Corporal Nowlan was interested in the van and that it might be in Linaker's interests to stop it; and the evidence of Corporal Guspodarchuk, who says he told Linaker that Nowlan wanted him to stop the van but that he was to talk to Nowlan first. This conflict may be the result of the poor radio connection or confusion about the meaning of a Pipeline check, but in any event, I accept that what Constable Linaker understood was that no one was directing him to stop the van at that point. He made the decision to stop it. Since no other officer instructed Constable Linaker to stop the van, it is Constable Linaker who must have reasonable cause to suspect that the accused were implicated in the criminal activity, based on objectively discernable facts.

[44] It seems to me that none of the observations made by Constable Linaker, considered objectively, can be the basis for a reasonable cause to suspect implication in drug or other criminal activity. Driving straight through to Yellowknife and not making inquiries beforehand about the ice road are not unusual and could apply to any number of people. There was no evidence that Winter's nervousness Constable Linaker noted on the first stop was present also on the second stop and as the constable conceded, many people are nervous when pulled over by the police. The only circumstances which Constable Linaker specifically attempted to link to a suspicion of drug activity were the open windows, but he smelled nothing in the van in the five minutes that he was dealing with the accused on the first stop. So if the open windows raised a suspicion for him, his contact with the van should have alerted him to the fact that there was no confirmation of that suspicion, on either the first or the second stop.

[45] Constable Linaker testified that his observations led him to believe on the first stop that there was a possible drug investigation but that he let the van proceed because this was the first time he had encountered this situation and was not confident as to how to proceed. He acknowledged that at that point he had no grounds for arrest, nor for a search warrant. In other words, he did not have information that would permit a Justice to be satisfied there were reasonable grounds to believe that a controlled substance was in the van as required in order to issue a warrant under s.11(1) of the *Controlled Drugs and Substances Act.*

[46] It is important to note that he also had no information to link either the van or its occupants with drugs. He had ascertained that there were no outstanding warrants for the accused. He did not check to see if they had criminal records. Nether the vehicle nor its occupants bore any similarity to the red Jeep and the female that the drug section were looking for .

[47] On his own evidence, after speaking to Corporal Guspodarchuk, Constable Linaker had no new facts or observations. The only new information he gained was that Corporal Nowlan was interested in a green van that he had seen in Fort Providence.

[48] Absent knowledge on Linaker's part of the basis for Nowlan's interest, I do not see how the fact that the latter was interested can add anything by way of an objectively discernable fact. To know that a drug investigator is interested in a vehicle but not know why seems to me to be not much different from knowing that another police officer has information that a certain place is a crack house without knowing anything about the source of his information. That, combined with observing an individual leaving that house in a vehicle, was considered not to amount to articulable cause in *Simpson*.

[49] In this case Constable Linaker did have more than that. He had his own observations. However, I find they do not amount to articulable cause and the additional knowledge of Corporal Nowlan's interest does not make them any stronger. Nor does the fact that Corporal Bauhlkam apparently found Constable Linaker's observations valid because Bauhlkam had no more knowledge of any facts than did Linaker.

[50] Constable Linaker's own evidence raises some concerns. While admitting that Corporal Guspodarchuk had not said to him that there were drugs in the vehicle or that the offence of possession for the purpose of trafficking was being committed, or even investigated, he acknowledged that he had put in his notebook that information was obtained regarding the vehicle "ppt". He stated that this note was for his own use and that it meant he had concluded based on his own observations and the drug section's

interest that there was potential of the charge of possession for the purpose of trafficking. In response to further cross-examination, he said that he had concluded that there was a *Controlled Drugs and Substances Act* offence, not specifically possession for the purpose of trafficking. Then he said that he concluded not that there was an actual offence, but just reason for investigation. Further on, he stated that he had reason to believe there was a controlled substance in the vehicle. In response to the question whether he had a suspicion, he said "if that's what you want to call it", then added that he felt it was beyond a suspicion, based on indicators he observed, not a hunch.

[51] I conclude from all this that what Constable Linaker had was nothing more than a hunch, which was perhaps given more strength in his eyes by the fact that Corporal Nowlan was interested and Corporal Bauhlkam felt his observations were valid. But it remained a hunch or something very close to it and much less than reasonable cause for suspicion. What have been described in this case as indicators seem to me to amount to nothing more than hunches based on intuition perhaps gained by experience. Obviously, Constable Linaker's hunch turned out to be correct, but that does not alter the fact that it was a hunch, not articulable cause.

[52] As a result, I find that the detention of the accused on the second stop was not justified, it was arbitrary, and the s. 9 rights of the accused were breached. I will add that even had I found that Constable Linaker was acting at Corporal Nowlan's direction, through his conversation with Corporal Guspodarchuk, I would not have found articulable cause because Corporal Nowlan did not have that.

[53] The next issue is whether the accused's section 8 rights to be secure against unreasonable search or seizure were breached. The protection under s. 8 is a protection that extends to an individual's reasonable expectation of privacy: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

[54] Where, as here, a search has taken place without a warrant, there is a presumption that it was unreasonable. The Crown has the onus of rebutting that presumption: *Hunter v. Southam Inc.* In this case, the Crown relies on Winter's consent to rebut the presumption of unreasonableness, saying, in effect, that the accused waived their s. 8 rights.

[55] In order for consent to operate as a waiver of the right to be secure against unreasonable search or seizure, the Crown must establish on the balance of probabilities that:

> (i) there was a consent, express or implied;
>
> (ii) the giver of the consent had the authority to give the consent in question;
>
> (iii) the consent was voluntary and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
>
> (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and
>
> (vi) the giver of the consent was aware of the potential consequences of giving the consent.
>
> *R. v. Wills* (1992) 70 C.C.C. (3d) 529 (Ont. C.A.) at p. 546.

It was also said in *R. v. Wills* that the standard to show waiver of a person's s. 8 right is a high one at the investigative stage.

[56] In this case, I find that the Crown has not established the factors listed as (ii), (v) and (vi) above.

[57] The first problem is whether Winter even had the authority to consent to a search of the van and its contents. By the time of the search, Constable Linaker knew, from having reviewed the rental agreement when he first stopped the van, that the accused France was the one who had rented the van. Despite that, he made no attempt to ascertain whether France consented to a search of the van. I note that the R.C.M.P. "Consent to Search" form in Exhibit V-7 requires information from the person giving the consent as to the owner of the item to be searched and it requires that the person state whether he or she has control over it by virtue of owning, renting or borrowing it and since what date. Had Constable Linaker used the R.C.M.P. form (and by that I mean the "official" form, not the one that actually has his name on it as it omits other information that the standard form includes), not only he, but also the accused Winter, would have been alerted to the issue of who had the authority to consent to the search of the vehicle.

[58] Since Mr. France had rented the vehicle, he had a higher expectation of privacy in it than did Mr. Winter according to the test in *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 (S.C.C.). The right under s. 8 is a personal right; it protects people and not places: *R. v. Belnavis*, at p. 418, referring to *R. v. Edwards*, [1996] 1 S.C.R. 128. I agree with Crown counsel's submission that Mr. Winter also had a privacy expectation as the driver, apparently with the agreement of Mr. France. But I do not see how that can enable Mr. Winter to waive Mr. France's s. 8 right.

[59] While there is a reduced right of privacy in a vehicle as compared to one's home, I am not persuaded that that reduced right applies for all purposes. It generally will where the police concern arises out of road safety issues or traffic control. But those were not issues with the van when Constable Linaker stopped it for the second time.

[60] In my view Mr. France had a reasonable expectation of privacy in the van. Constable Linaker knew, or should have known that the standard R.C.M.P. forms considered information as to authority to consent significant and it was Mr. France's consent that should have been sought. The Crown cannot rely on what might appear to be acquiescence to the search on the part of Mr. France. Acquiescence is not consent, as was pointed out by Doherty J.A. in *R. v. Wills* (at p. 540):

> True co-operation connotes a decision to allow the police to do something which they could not otherwise do. Acquiescence and compliance signal only a failure to object; they do not constitute consent.

[61] At most, Mr. France acquiesced; he did not consent or waive his s. 8 right. In my view, Mr. France's s. 8 right was breached unless it can be said that he authorized Winter to waive his right. There is no evidence of that.

[62] I also find that the evidence is less than clear as to what exactly Mr. Winter said in giving his consent to Constable Linaker. Constable Linaker was not certain as to the words used by Mr. Winter. If, as he testified at one point, the words were "have a look", I am not convinced that those words, referring to a vehicle, can necessarily be understood as the equivalent of a consent to search bags and personal belongings inside that vehicle. At one point he testified that the exact words were, "There's nothing there, go ahead and look". At another he said he could not remember the exact words, but that they were to the effect, "You will not find anything, go ahead and search". The problem is that he made no notes at the time of exactly what Mr. Winter said.

[63] Constable Linaker's evidence is that he told Winter he could withdraw his consent or stop the search at any time without penalty or without legal consequences. I am not sure what a layperson would understand from that. The main concern I have, however, is that it is not the same as telling a person they do not have to consent to the search at all. This leads me to factor (v) in *Wills*.

[64] While the police do not have a duty to advise a person of the right to refuse to consent to a search in the sense that failure to do so will amount to a s. 8 violation, a failure to do so may lead to a violation of s. 8 where the police conduct can be justified only on the basis of an informed consent: *R. v. Lewis* (1998), 122 C.C.C. (3d) 481 (Ont. C.A.).

[65] Constable Linaker had standard R.C.M.P. consent forms in his police vehicle which he did not use, because, he said, he felt he did not have to use them where the search was offered to him. It seems to me, however, that a police officer would want to obtain a written consent as the best evidence that a consent was in fact given and an acknowledgement that the individual understood the terms of the consent. I see no reason why a consent that is offered should be any different from a consent that is asked for.

[66] The blank "Voluntary Search - Release" form that is part of Exhibit V-7 and authorizes specifically Constable Linaker to search refers only to the signor understanding that he can withdraw his consent, not to an understanding that he does not have to consent. The R.C.M.P. "Consent to Search" form and the Operational Manual "Consent to Search Form", which are also part of Exhibit V-7 and are identical to each other in content, but different in format, include the following acknowledgments:

> I give my consent to this search knowing that:
>
> 1. I am under no obligation to consent to this search;
>
> 2. If I consent to this search, I maintain my ability to withdraw that consent.

[67] It is also significant that Exhibit V-8, which is a portion of the R.C.M.P. policy manual dealing with "Search with Consent", and which Constable Linaker acknowledged is something he has to follow, contains the following requirement for informed consent:

> 1. The person consenting must be informed of his/her rights to refuse consent and to withdraw consent at any time.

[68] In my view, the R.C.M.P. policy recognizes what the law says: that the information to be given includes two components: the right to refuse to consent and the right, if consent is given, to withdraw consent. Constable Linaker told Mr. Winter of only one of those components. For that reason alone, the consent given was not fully informed.

[69] When Constable Linaker arbitrarily detained the accused by pulling them over and asking Mr. Winter to get out of the van and commencing to question him, the circumstances were similar to those in *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481 (S.C.C.). In *Mellenthin*, the Supreme Court of Canada held that it was (at p. 487):

> ... incumbent upon the Crown to adduce evidence that the person detained had indeed made an informed consent to the search based upon an awareness of his rights to refuse to respond to questions or to consent to the search.

[70] The Crown has not adduced such evidence. The accused were not made aware of their right to refuse to respond to Constable Linaker's questions or to consent to the search.

[71] I find that Mr. France did not consent at all and that Mr. Winter did not give an informed consent. In making this finding I rely also on Constable Linaker's failure to advise the accused of their s. 10(b) rights, referred to below.

[72] I am also not satisfied that the accused were fully aware of the potential consequences of consent. They were told they could be arrested, but not that they could be charged or that the consent or anything found could be used as evidence. More important, they did not know that there was no other evidence and that their legal position at that point depended entirely on whether they consented.

[73] The evidence is also clear that the accused were not advised of their s. 10(b) right to counsel until after the marijuana was found and they were arrested. On detention they had the s. 10(b) right to retain and instruct counsel without delay and to be informed of that right. The breach of that right is also important when considering whether their s. 8 rights were breached. Advising a person of his or her right to counsel and the decision of that person to exercise or waive that right may be significant factors on the issue of whether a consent to search is truly an informed one, as was noted by Vertes J. in *R. v. Francis*, [2001] N.W.T.J. No. 8 (S.C.).

[74] When he stopped the van the second time, Constable Linaker made it clear that he wanted to ask questions and then that he was going to search the van. The accused were in jeopardy at that point and therefore needed, and were entitled to obtain, information as to their rights and options. It was particularly important for the accused to have legal advice because without their consent to the search, Constable Linaker had no lawful basis upon which to proceed with the search. In *R. v. Neilson* (1988), 43 C.C.C. (3d) 548, at pp. 561-564, the Saskatchewan Court of Appeal said the Crown had the onus of showing that the accused had clearly and unequivocally waived his right to be secure against a warrantless search knowing that the searcher did not have a reasonable belief that an offence had been committed and knowing the significance of what he had given up when he waived the right. It is difficult to see how an individual can be fully informed of that without legal advice. The Crown has not met that onus in this case.

[75] The denial of the right to counsel is a denial of the s. 10(b) right but it also triggers a violation of s. 8 where the lawfulness of the search is dependant on the consent of the person detained: per Lamer J. in *R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.). I find that the accused's s. 8 and s. 10(b) rights were infringed.

[76] The accused's section 10(b) rights were breached yet again when, after their arrest, they were advised of those rights and each asserted that he wished to contact a lawyer. They were told by Constable Linaker only that they could do so when they got to Yellowknife, which was some two and a half to three hours' drive away. He did not offer them the use of his satellite phone or suspend any further search until they could contact a lawyer, which they could have done from Fort Providence or Rae.

[77] When Corporal Nowlan came upon the scene, he was advised by Constable Linaker that the accused were under arrest. He spoke to Mr. Winter, who was in the back of one of the police vehicles. He advised him of his right to counsel and got no response, which is probably not surprising since Winter had already been told by Constable Linaker that he would have to wait until they got to Yellowknife to speak to counsel. Corporal Nowlan did tell Mr. Winter that he could use the satellite phone but that he could not guarantee privacy. Mr. Winter said that he would wait until Yellowknife to make the call. Corporal Nowlan then advised Mr. France of the same thing and Mr. France did not ask to use the satellite phone. Corporal Nowlan did not ascertain of either of them whether they were waiving their right to consult counsel.

[78] The law is clear that exercise of the right to counsel includes the right to do so in private: *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.). So the fact that the

accused did not take up Corporal Nowlan's offer of the satellite phone cannot constitute a waiver of their right to consult with counsel.

[79] Where a person detained or arrested, upon being advised of his s. 10(b) rights, asserts the desire to exercise those rights, the police have an obligation to hold off from eliciting evidence from him until he has had a reasonable opportunity to contact counsel: *R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.).

[80] The police had an obligation to cease any further questioning of the accused in this case until they had a reasonable opportunity to exercise their right to counsel. In this case, a reasonable opportunity would include consultation in private and would have to take into account that privacy was not immediately available but could be obtained some half hour or so away in Fort Providence, or in Rae.

[81] Also, since the search depended on consent, based on the reasons by Lamer J. in *R. v. Debot*, I would hold that the police were obliged to suspend the search pending the exercise of the right to contact counsel. As they did not, the initial unlawfulness of the search was exacerbated.

[82] The infringement of the accused's s. 8, 9 and 10(b) rights enabled the police to find the evidence in the van. Accordingly, under s. 24(2), "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".

[83] The test to be applied under s. 24(2) is whether admission of the evidence "could" bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully apprised of the circumstances of the case: *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1. This requires consideration of three factors: trial fairness, the seriousness of the breaches and the effect of exclusion of the evidence on the repute of the administration of justice.

[84] Cases at the appellate level, for example, *R. v. Lewis*, referred to above, and *R. v. Davies* (1998), 127 C.C.C. (3d) 97 (Y.T.C.A.), have accepted that on the issue of trial fairness, the procedure to be followed is as set out in *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.) rather than the "but for" discoverability test formerly adopted as in *R. v. Acciavatti* (1993), 80 C.C.C. (3d) 109 (Ont. C.A.). If the latter were still the test, I would have no hesitation in concluding that the evidence here would not have been discovered "but for" the illegal search and should be excluded. However, I am persuaded that it is no longer the test so I go on to consider the law as I understand it to be now.

[85] Under the procedure set out in *R. v. Stillman*, the evidence in question is to be classified as non-conscriptive or conscriptive. In *Stillman*, Cory J. provided the following definition of non-conscriptive evidence, at p. 352:

> If the accused was not compelled to participate in the creation or discovery of the evidence (i.e. the evidence existed independently of the *Charter* breach in a form usable by the state), the evidence will be classified as non-conscriptive.

[86] Cory J. also defined conscriptive evidence, at p. 353:

> Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.

[87] A third type of evidence, derivative evidence, was also described by Cory J. (at p. 363):

> Conscripted or self-incriminating evidence may lead to what has been termed derivative evidence. This phrase has been used to describe "real" evidence which has been "derived" from, that is to say found as a result of, the conscriptive evidence. The evidence discovered should be classified as conscriptive, since the accused's compelled statement was a necessary cause of its discovery.

[88] The most commonly cited example of derivative evidence is found in *R. v. Burlingham*, [1995] 2 S.C.R. 206. In that case, the accused was charged with murder. It was found that his right to counsel was violated in an intensive police interrogation, which ultimately led to his confession revealing where the murder weapon could be found. The gun was "real" evidence but its eventual retrieval and seizure was derived from the conscripted confession. The Supreme Court ruled that it should have been excluded.

[89] Cases such as *R. v. Lewis* and *R. v. Davies* have interpreted *R. v. Stillman* as limiting conscriptive evidence to statements, bodily samples or the use of the body as evidence. I understand use of the body to mean such things as compelled participation in a police lineup, where the evidence of a witness picking out the accused would not have existed prior to the accused being compelled to take part in the lineup.

[90] In this case, defence counsel argued that the marijuana and other evidence should be classified as conscriptive based on Mr. Winter's participation in the search. That participation consisted of giving consent, getting the keys to the back of the van and assisting in opening it.

[91] In *R. v. Lewis*, the accused, in very clear terms, invited the police to search him. He picked up his bag and opened it. He reached into it at the same time as the police officer did, at which point the bottle in which the cocaine was located was removed. The accused argued that when he opened the bag for the police, he was conscripted to assist in obtaining the evidence in the bag. Doherty J.A., who accepted that the accused's s. 8 and 10(b) rights were infringed, rejected the argument and found that the accused was not compelled to open the bag. He also found no difference for fair trial purposes between a situation where the police open the bag and one where the accused opens the bag for the police, concluding that, "In either case it is a police search and the evidentiary value of anything seized in the search has no connection to the accused's physical involvement in the search" (at p. 495). In the result, he found that the cocaine did not come within any of the three types of conscriptive evidence identified in *Stillman* and was not derivative evidence.

[92] I can see no real difference between the facts in *Lewis* and this case for purposes of characterizing the evidence found. Although I was initially inclined to the view that Mr. Winter's consent might be considered akin to a statement, leading to the discovery of the evidence, the consent, although not an informed one, was not compelled by the police. I conclude that the evidence is not conscriptive and would not impair the fairness of the trial.

[93] Having reached that conclusion, I must now consider, as one of the *Collins* factors, the seriousness of the *Charter* violations in this case.

[94] In that regard, I take into account that there were no exigent circumstances that would explain or justify either the stopping of the vehicle or a warrantless search or the denial of the right to counsel.

[95] In my view the seriousness of the breaches is compounded by the fact that Constable Linaker clearly acted on incomplete information as he did not know why Corporal Nowlan was interested in the van and did not know what Corporal Guspodarchuk meant by it being in his interests to stop the van. All of this cried out for further inquiry before taking any steps, especially where, as here, there was no urgency and Corporal Guspodarchuk was further up the road where the van was heading.

[96] The Crown argues that this was a relatively minor detention but I disagree. Constable Linaker had already detained the accused once, legally, and had let them go. He had no articulable cause to detain them a second time. Even though the detention did not last long and there was nothing aggressive or threatening about Constable Linaker's treatment of the accused or his search of the vehicle, the circumstances make it more than a minor detention. In my view the following words from the judgment of Sopinka J. In *R. v. Kokesch* (1990), C.C.C. (3d) 207 (S.C.C.) apply:

> Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the Charter violation is plainly more serious than it would be otherwise, not less.

While the issue in *Kokesch* was s. 8, I would also apply that principle to the other *Charter* breaches in this case.

[97] I also take into account the failure to follow police procedure with respect to the consent forms. Constable Linaker knew that he had no grounds on which to conduct the search without consent; he said in his testimony that he would not have proceeded had Mr. Winter said he would not permit it. He must or should have known how important the consent was and to not use the forms or take notes of what was said by Mr. Winter is very careless in those circumstances.

[98] The Crown also relies on the fact that Constable Linaker did have consent to search. But I do not think that is an answer when it is not an informed consent and when, as here, the accused were not even given the police caution about not having to say anything prior to the constable embarking on his questioning of Mr. Winter when he stepped out of the van. That distinguishes this case from *R. v. Lewis*. In my view, the fact that Constable Linaker believed he had consent does not lessen the seriousness of the breach.

[99] I bear in mind that Constable Linaker was relatively inexperienced but in my view that does not lessen the seriousness of the breaches in these circumstances.

[100] The Crown takes the position that the seriousness of the s. 8 breach is mitigated because the accused had a reduced expectation of privacy by reason of this being a vehicle and in particular a rented one. I accept that the nature or degree of the privacy expectation which is violated by a search in breach of s. 8 is an important factor on the

issue of seriousness of the breach of that right. However, while the need to ensure the safety of the public on the road may well reduce the expectation of privacy one has in a vehicle as compared to, say, a home, I am not convinced that the reduced expectation also applies to an individual's luggage or other personal items in the vehicle. In *R. v. Belnavis*, where the reduced expectation of privacy is discussed, the stolen goods were visible without opening the bag when the police looked inside the vehicle. They did not have to search inside any personal property to locate the goods. Further, the occupant of a vehicle does not have to subject his luggage to state scrutiny as does an air traveller, which was found to be a significant factor in *R. v. Lewis*.

[101] I have already referred to the way in which the breach of the s. 10(b) right to counsel was continued by the failure to take any prompt and appropriate steps to enable the accused to contact counsel even after Constable Linaker was no longer the only officer on the scene. For the Crown it was argued that the seriousness of this breach was reduced, in the case of Mr. Winter, by his admission that he probably would have refused the use of the satellite phone had Constable Linaker offered it to him and said he could not guarantee privacy. I find no merit in that argument. Since the obligation on the part of the police is to provide an opportunity for the exercise of the right to counsel in private, an individual's unwillingness to accept something less than that does not reduce the seriousness of a breach of that right. In my view the breach is made more serious by the fact that this was a purely investigatory detention; it was not something that occurred while the police were fulfilling some other police function.

[102] Finally, some mention must be made of Exhibit V-10, the "Report to a Justice Pursuant to Section 489.1 of the Criminal Code". It was completed by Corporal Nowlan and says that the van was seized under the authority of "s. 495 CC/ section 11 CDSA". Corporal Nowlan conceded that the van was not seized under either of those statutory provisions and that the form was therefore intentionally or unintentionally misleading. In my view that is a significant factor to take into account on the seriousness of the breaches.

[103] I find that the breaches in this case were serious, not trivial.

[104] The final factor to be considered in determining whether the evidence should be excluded is the effect on the administration of justice. Crown counsel advised during the hearing of this application that the Crown has no further evidence in this case so exclusion will mean that the case does not proceed to trial.

[105] While drug offences involving so-called “soft” drugs are generally considered less serious than those involving “hard” drugs such as cocaine, in this case the quantity of the marijuana makes the charge a very serious one. But that is not the sole consideration. There must be a balancing between the “public interest in being left alone, as manifested in the individual interest in being secure against unwarranted or unreasonable search or seizure” and “the broader interests of society to enhance its goals, namely, law enforcement”: per Vancise J.A. in *R. v. Baylis* (1988), 66 Sask. R. 268 (C.A.) at p. 287.

[106] In this case, the first factor in the balance has to include obviously not just the individual interest in being secure against unwarranted search or seizure but also against arbitrary detention.

[107] In *R. v. Lewis*, where the evidence sought to be excluded was cocaine and essential to the prosecution of the case, Doherty J.A., although he did not exclude the evidence, noted:

> There can be no doubt that the exclusion of this kind of evidence exacts a heavy toll on the repute of the administration of justice. That consequence must be accepted where necessary to preserve trial fairness or where the *Charter* violations are sufficiently serious to demand the exclusion of the evidence.

[108] Crown counsel submitted that I should consider that both Corporal Nowlan and Constable Linaker concluded separately that the van should be investigated and that Corporal Guspodarchuk said in his evidence that the things the others had observed meant something, that “it all made sense”. The Crown also referred to Constable Linaker’s evidence that Corporal Bauhlkam said that what he had observed was valid. In my view, however, the assessments made by the officers cannot be characterized as truly independent in that Corporals Guspodarchuk and Bauhlkam were only dealing with what they were told by officers Nowlan and Linaker, who had already formed opinions. In any event, to accept this as a significant factor on the issue of repute of the administration of justice would be to say, in effect, that so long as more than one police officer has the same hunch about an individual, no matter how tenuous the grounds on which that hunch rests, the police will be able to violate the fundamental rights guaranteed by the *Charter*. That would adversely affect the repute of the administration of justice.

[109] The accused’s rights were completely ignored in this case until after the evidence was found. If evidence is admitted despite serious violations of an individual’s fundamental rights, those rights may come to mean very little and may fail to protect not only those who may well be guilty but also those who are innocent.

[110] Having considered the case law submitted and the circumstances of the case, I find that the administration of justice would be brought into disrepute if the evidence is admitted. Accordingly, the evidence obtained from the search will be excluded.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
19th day of April, 2002

Counsel for the Crown: Sue Kendall and Johnathon Burke
Counsel for Matthew James France: Sid Tarrabain
Counsel for Daniel Robert Winter: Scott Duke

S-1-CR-2002000084

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

MATTHEW JAMES FRANCE
DANIEL ROBERT WINTER

Applicants

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER