SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Fleet,* 2017 NSSC 186

Date: 20170630
Docket: Hfx No. 452018
Registry: Halifax

Between:

David Richard K. Fleet

Appellant

v.

Her Majesty the Queen

Respondent

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Judge: The Honourable Justice Mona M. Lynch

Heard: January 20, 2017 in Halifax, Nova Scotia

Written Decision: June 30, 2017

Subject: *Canadian Charter of Rights and Freedoms;* reasonable expectation of privacy, unreasonable search, exclusion of evidence

Summary: Police attended at the home owned by the appellant's girlfriend looking for the appellant. The girlfriend refused the police entry and initially said that the appellant was not present. When threatened with charges for obstruction or public mischief, she admitted the appellant was in the home. There were children in the house. Police directed other officers to obtain a **Feeney** warrant. The girlfriend stepped outside and was handcuffed and arrested for obstruction and public mischief. She then gave the police permission to enter

the residence. The appellant was in the bedroom when police entered, signs of impairment were observed and the demand was made for breath samples. The appellant refused. The appellant was arrested. No charges were laid against the girlfriend. The trial judge found no reasonable expectation of privacy on the part of the appellant, no exigent circumstances and would not have excluded under s. 24(2).

Issues:

(1) Did the appellant have a reasonable expectation of privacy at the residence?

(2) Was the search reasonable?

(3) Should the evidence of the refusal be excluded?

Result:

The appellant had a reasonable expectation of privacy as there was uncontradicted evidence that he lived in the residence, paid bills and did chores. The search was not carried out in a reasonable manner and the consent was not voluntary. The evidence of the refusal was excluded under s. 24(2).

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Counsel: David A. Grant, for the Appellant
Erica Koresawa, for the Respondent

Background:

[1] The appellant appeals from the decision of Gabriel, JPC (as he then was), of May 6, 2016, finding the appellant guilty of; without reasonable excuse, refusing to comply with a demand for a sample of his breath contrary to s. 254(5) of the *Criminal Code of Canada,* R.S.C. 1985, c. C-46.

[2] A *voir dire* was held on September 2, 2015, during which the appellant argued: that his rights under ss. 7, 8 and 9 of the *Canadian Charter of Rights and Freedoms* had been infringed; that the evidence of and surrounding the breath demand and the appellant's refusal should be excluded pursuant to s. 24(2) of the *Charter.*

[3] On September 12, 2014, at about 8:30 p.m., Constables Kuhn and MacLennan of the Halifax Regional Police were dispatched to investigate a possible failure to stop at the scene of an accident, commonly referred to as "hit and run", contrary to s. 252(1) of the *Criminal Code.* The police officers met with the complainant at the Army Navy Club in Dartmouth, Nova Scotia. Her vehicle had been damaged while she was in the club and the other vehicle had not remained at the scene. The police officers gathered information which pointed to the appellant. The police officers received two addresses for the appellant, one on Main Street and one on Mountain Avenue. Both addresses were checked and the appellant's truck was located at the address on Mountain Avenue.

[4] The truck was parked on the wrong side of the street and there was damage to the truck. There was shrubbery attached to the truck. The damage observed by the police was thought to be consistent with the damage to the complainant's vehicle.

[5] The appellant's girlfriend, Carol-Ann Crawford, owned the home on Mountain Avenue. She was hosting a birthday party for one of her children when the police arrived at her door. There were six or seven HRP officers around the residence.

[6] Ms. Crawford, according to the police, initially indicated that the appellant was not in the residence, that he had arrived at the residence, had been drinking but left on foot. The police officers testified that they warned Ms. Crawford that if she was not telling the truth she could be charged with obstructing the police. Ms. Crawford denied having told police that the appellant was not in the residence or that he had been drinking prior to his arrival at the residence. The police testified

that shortly after being warned about an obstruction charge, Ms. Crawford recanted and told the officers that the appellant was in the residence and was drinking.

[7] Ms. Crawford told the officers that they could not enter her residence without a warrant. Ms. Crawford said she would try to get the appellant to come to the door but later indicated to the officers that the appellant was refusing to come to the door. The police officers at the door made a request to other officers to obtain a **Feeney** warrant.

[8] Ms. Crawford came out of the house, on to the step where the officers were. When she stepped out of the house, the police officers arrested her for obstruction and public mischief, read her rights and placed her in handcuffs. At that point, Ms. Crawford gave the police officers permission to enter the home.

[9] Constable MacLennan entered the residence and found the appellant in a bedroom, lying on the bed, with an empty wine glass in his hand, and a can of beer on the stand next to the bed. Constable MacLennan told the appellant that he was being arrested for leaving the scene of an accident. Constable MacLennan testified that he noted signs that the appellant was impaired and arrested him for impaired driving. Constable MacLennan made a demand for a breath sample and the appellant responded by saying that the officer had just seen him drinking wine and he was not taking any test. The appellant was provided his rights and caution and he did not want to speak to a lawyer.

[10] The appellant was arrested at 9:29 p.m. and the officers estimated that they had arrived at the residence at approximately 9:05 p.m. Ms. Crawford was released from the handcuffs after the appellant was arrested.

[11] Ms. Crawford testified that the appellant lived with her at the residence on Mountain Avenue, that the children were "freaking out" with all of the police officers around the house, the persistent knocking on the door and the dogs in the residence kept barking.

Decision of the Provincial Court:

[12] In his decision on the *voir* dire, **R. v. Fleet,** 2015 NSPC 92 the trial judge found that the police officers were not in a "fresh pursuit" or "exigent circumstances" situation, which would have permitted a warrantless search of the residence on Mountain Avenue. The trial judge accepted that the police, in gaining entry to her

home, may have breached Ms. Crawford's *Charter* rights. However, he found that the appellant bore the onus of showing that his *Charter* rights were breached.

[13] The trial judge found that the evidence was insufficient to find that Mountain Avenue was the appellant's home residence or that he had a reasonable expectation of privacy in that residence. The trial judge described Ms. Crawford's responses to the Court's questions about the appellant living at her residence as being extracted in a "tooth pulling like" fashion and said he did not accept that evidence. He found that even if there was a breach of the appellant's *Charter* rights, the refusal was a subsequent criminal act and not affected, in any way, by the manner in which the police gained entry. The trial judge found no breach of ss. 7, 8 or 9 of the *Charter.* The trial judge also decided that if a *Charter* breach was made out, he would have granted no remedy under s. 24(2).

[14] In his unreported decision on the trial proper, the trial judge found that the police officers had reasonable and probable grounds to make the demand for a breath sample based on the information they had. The trial judge found that he did not believe the appellant's evidence, it did not raise a reasonable doubt, nor was the trial judge left with a reasonable doubt on all of the evidence.

[15] The trial judge found reasonable and probable grounds for the demand by the police officer, both subjectively and objectively. The trial judge also found there was no reasonable excuse to refuse the demand and the demand made was a proper demand under the *Criminal Code.* The trial judge entered a conviction on the charge of refusal under s. 254(5) of the *Criminal Code.*

Issues:

[16] In the submissions and argument on appeal, the appellant argued a breach of his s. 8 rights, no reasonable grounds to make a demand for a breath sample and that the excuse for refusing the demand was reasonable.

1. Did the learned trial judge err by finding that the appellant's rights under s. 8 of the *Charter* were not violated when the police entered the residence and demanded a sample of the appellant's breath? If so, should the evidence be excluded under s. 24(2) of the *Charter*?
2. Did the learned trial judge err in finding that the police officer had reasonable grounds to believe that the appellant had committed an offence under s. 253 of the *Criminal Code,* within the preceding three hours, to make a demand for a breath sample?

3. Did the learned trial judge err in finding that the appellant's excuse for refusing the demand was not reasonable pursuant to s. 254(5) of the *Criminal Code*?

Standard of Review:

[17] In **R. v. Pottie**, 2013 NSCA 68 the court said:

> [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.

In **R. v. Timmons,** 2011 NSCA 39, the court discussed the standard of review on an appeal and said:

> [17] For questions of law, the standard of review is correctness. For questions of fact, it is overriding and palpable error. For questions of mixed law and fact, it is also palpable and overriding error, unless a question of law is readily extricable. In that situation, the standard of correctness applies to that question of law. See *Housen v. Nikolaisen*, 2002 SCC 33.
>
> [18] Whether the correct legal standards were identified and applied is a question of law. If no such error was made, an appellate court then considers the evidentiary basis of the decision and the application of the legal principles to the facts of the case which, unless there are extractable legal questions, are questions of mixed fact and law.

Mixed law and fact was discussed in **Housen v. Nikolaisen**, 2002 SCC 33 at paras. 26 and 27:

> 26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are

sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the *Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

Issue 1:

[18] In relation to the alleged *Charter* violation, the appellant submits that the trial judge misapprehended the evidence and applied an incorrect definition of residence, leading him to find that the appellant did not have a reasonable expectation of privacy at the residence on Mountain Avenue. The Crown submits that this issue should be reviewed on a standard of correctness, as it is the application of the law to the facts that is in issue. As stated above in **Timmons**, the application of legal principles to the facts of the case are questions of mixed fact and law, and the standard is palpable and overriding error unless an incorrect legal test is applied. Then the standard would be correctness. Whether there is a breach of a *Charter* right is a question of law.

Issue 2:

[19] The appellant submits that the trial judge erred in finding on the facts that the police officers had reasonable grounds to make a demand. The Nova Scotia Court of Appeal has determined that the standard of review on an appeal from a determination of whether an officer had sufficient grounds, under s. 254(3), to be correctness (**R. v. Schofield,** 2015 NSCA 5, para. 23- 24).

Issue 3:

[20] The appellant submits that the trial judge erred in finding that the appellant's excuse was not reasonable pursuant to the *Criminal Code*. This is an alleged error of law and is to be reviewed on a standard of correctness.

Analysis:

1. Did the learned trial judge err by finding that the appellant's rights under s. 8 of the *Charter* were not violated when the police entered the residence and demanded a sample of the appellant's breath?

[21] At the trial, the appellant argued that his s. 7 and s. 9 rights of the *Charter* were infringed and the trial judge found that there was no violation of those rights. The trial judge was correct in his conclusions on breach of the appellant's rights under s. 7 and 9, and the appellant did not raise violations of those sections on appeal. Also, at the trial, there was some attempt by the Crown to argue that a warrant was not needed to enter the residence on Mountain Avenue on the basis of

fresh/hot pursuit or exigent circumstances. The trial judge correctly found that, on the facts of this case, there was no hot/fresh pursuit or exigent circumstances.

[22] As the trial judge correctly stated, the onus is on the appellant to establish a breach of his *Charter* rights on a balance of probabilities. In a s. 8 challenge two questions must be answered: (a) whether the accused had a reasonable expectation of privacy; and (b) whether the search was an unreasonable intrusion on that right to privacy (**R. v. Edwards,** [1996] 1 S.C.R. 128 at para. 33). Once the accused establishes his or her reasonable expectation of privacy and that the search was warrantless, the onus shifts to the Crown to show, on a balance of probabilities, that the search was reasonable. The search is reasonable if it was authorized by law, the law itself is reasonable, and the manner in which the search was carried out was reasonable (**R. v. Collins,** [1987] 1 S.C.R. 265 at paras. 22 and 23). It is of fundamental importance to remember that the privacy right allegedly infringed must, as a general rule, be that of the accused person who makes the challenge (**Edwards**, supra, para. 34). The intrusion on the privacy rights of a third party may be considered in the analysis of whether the search was conducted in a reasonable manner (**Edwards**, para. 36). If the search is found to be unreasonable, the onus is on the appellant to show that evidence should be excluded under s. 24(2).

[23] The appellant submits that his rights were infringed when Ms. Crawford was detained, handcuffed and placed under arrest. It was at that point, that Ms. Crawford provided consent for the police officers to enter the residence and she told them where to find the appellant. As the trial judge found, this was likely a breach of Ms. Crawford's Charter rights. She was arrested for obstruction and public mischief, although, according to the testimony of the police officers, she told them the truth after being warned that if she did not, she could be charged. She had children in the house and was concerned that child protection would be called. There were no charges against Ms. Crawford so a complete analysis of a breach of her rights was not undertaken by the trial judge or on appeal.

[24] While Ms. Crawford's rights may have been violated, as stated above, the burden is on the appellant to show that he had a reasonable expectation of privacy and that his s. 8 rights were violated.

Reasonable Expectation of Privacy:

[25] The evidence in relation to the appellant's connection to the residence on Mountain Avenue at the *voir dire* was:

Constable Kuhn testified:

- the HRP in-house records provided information that the appellant was last seen earlier that month (September 2014) at 45 Mountain Avenue which was his girlfriend, Carol Crawford's house (transcript of evidence September 2, 2015 page 10 line 22 and page 11 lines 1-2);

- The appellant's truck was parked close to the residence at 45 Mountain Avenue (transcript page 15 lines 4-5);

- No inquiries were made about the appellant's relation to the house at 45 Mountain Avenue, but it was believed he resided at 205 Main Street (page 19 lines 1-4);

- The appellant's vehicle was registered to 205 Main Street and he had been questioned recently at that address (page 19 lines 8-11);

- The in-house records of HRP showed he lived at 205 Main Street when there was an investigation earlier in September 2014 (page 20 line 21-22 and page 21 line 1);

- The Registry of Motor Vehicles had his address as 205 Main Street (page 21 lines 3-4);

- Ms. Crawford was not asked whether the appellant lived at 45 Mountain Avenue (page 23 lines 14-17).

Constable MacLennan testified:

- The HRP in-house records for the appellant showed an address of his home at 205 Main Street and an address of 45A Mountain Avenue where officers had spoken with him on another occasion (page 27 lines 10-20);

- He believed the appellant's home address was 205 Main Street (page 27 line 21 and page 28 line 1);

- There was a request for units to check both addresses and the appellant's truck was located at 45A Mountain Avenue (page 28 lines 4-5);

- Ms. Crawford indicated that the appellant had left on foot (page 29 line 2);

- Ms. Crawford said the appellant drove there and then walked home (page 30 lines 11-12);

- The appellant was in the bedroom on the second floor, lying on the bed with empty liquor containers around him (page 32 lines 19-22);

- The room where the appellant was located appeared to be the master bedroom (page 33 lines 14-17);

- The appellant was not questioned about whether he lived at 45A Mountain Avenue (page 34 lines 2-4);

- The appellant was upset and didn't want anything to do with the police or he didn't want the police in the house (page 34 line 22 and page 35 line 1).

Carol Crawford testified:

- The appellant lived at 45A Mountain Avenue in September 2014 (page 53 lines 20-22 and page 54 lines 1-4);

- When the police arrived, the appellant was with Ms. Crawford in the bedroom on the third floor of the house, which she described as her bedroom, the appellant's bedroom and her and the appellant's bedroom (page 54 lines 5-8);

- When asked whether she had told the police officers that the appellant had walked home she responded – "What do you mean walked home? He was home." (page 64 lines 2-5);

- She owned the house, he was not an owner (page 64 lines 12-16);

- When asked how much time he spent at her house she responded – "He lived at my house. I had the dogs, I was sick, he was ...he was at my house ... he lived there." (page 64 lines 17-19);

- The appellant had a residence on Main Street (page 64 lines 21-22);

- The appellant paid the bills at her house, he lived at her house, he slept in her bed, he bought groceries, looked after the lawn, looked after everything seven days a week (page 65 lines 2-4);

- The appellant continued to live with her in September 2015 (page 65 lines 9-10);

- The appellant had been living with her for over a year, he did men's jobs. She was in the hospital for up to six weeks at a time sometimes, and he looked after everything, he looked after her, he looked after the house and he lived with her (page 66 lines 6-11);

- The appellant had been living with her for a year prior to September 2014. They had celebrated her birthday, September 14, 2013, at the house and he was in the house then (page 66 lines 15-19);

- The appellant had started living with her on the weekend of Good Friday in the year 2013 (page 66 lines 19-22 and page 67 line 5).

In the decision on the *voir dire* the trial judge found:

- The records of the police and the Registry of Motor Vehicles had the appellant living at 205 Main Street (para. 3);

- The police also had a record of having encountered the appellant at 45 Mountain Avenue (para. 4);

- Carol Crawford owned the home at 45A Mountain Avenue (para. 6);

- The police checked their records and discovered two addresses at which the appellant might be found (para. 20);

- Ms. Crawford attempted to assert that the appellant lived there with her at 45A Mountain Avenue, in effect, that her residence was his as well (para. 31);

- The appellant had the onus of showing an infringement of his own reasonable expectation of privacy (para. 32);

- Ms. Crawford did not testify in direct or cross-examination as to any of the things that one would expect to hear in respect of such a claim -- where the

appellant got his mail, how long he has lived with her**, if he pays bills for the residence, what work he does around the house,** why he continues to maintain his own separate residence and why the records of the Registry of Motor Vehicles shows him as residing at the other residence (para. 33) (emphasis added);

- When questioned by the court, Ms. Crawford merely said that the appellant has lived with her for over a year, helps around the house, (because her health was fragile) and he pays some bills (para. 34)**;**

- The appellant did not testify (para. 34);

- The evidence was insufficient to satisfy the trial judge that the police entry into 45A Mountain Avenue constituted an entry into a residence which could be considered the appellant's home residence or, alternatively, that the appellant had a reasonable expectation of privacy while therein (para. 35);

- Ms. Crawford's limited evidence, extracted in a tooth pulling fashion during questioning by the court, was not accepted (para. 35);

- The evidence of Ms. Crawford was far too little in the face of evidence that the appellant maintained another residence of his own where the records of the Registry of Motor Vehicles and **other identification documentation also have him residing** (para. 35) (emphasis added).

[26] The trial judge considered the **Edwards** case, supra, where the court set out the principles to be considered were summarized at para. 43:

> 1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed. See *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619.
>
> 2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places. See *Hunter*, *supra*.
>
> 3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See *Pugliese*, *supra*.
>
> 4. As a general rule, two distinct inquiries must be made in relation to s. 8 . First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably. See *Rawlings*, *supra*.

> 5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso*, *supra*, at p. 54, and *Wong*, *supra*, at p. 62.
>
> 6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
>
> (i) presence at the time of the search;
>
> (ii) possession or control of the property or place searched;
>
> (iii) ownership of the property or place;
>
> (iv) historical use of the property or item;
>
> (v) the ability to regulate access, including the right to admit or exclude others from the place;
>
> (vi) the existence of a subjective expectation of privacy; and
>
> (vii) the objective reasonableness of the expectation.

[27] The court in **Edwards** found that the factors set out above are helpful, but not exhaustive (para. 46).

[28] The trial judge considered the evidence that he heard and determined that the evidence was insufficient to satisfy him that the appellant had a reasonable expectation of privacy at the residence on Mountain Avenue. The appellant asserts that the trial judge misapprehended the evidence and erred in applying a legal definition to residing.

[29] There was evidence that the appellant was in the residence at the time the police entered. There was evidence that the police records showed two addresses for the appellant, one of them being 45A Mountain Avenue. The police did not ask the appellant or Ms. Crawford whether the appellant lived at 45A Mountain Avenue. The evidence showed Ms. Crawford owned the residence and the appellant was not an owner. Ms. Crawford denied telling the police that the appellant had left on foot or had gone "home" and when questioned said "he was home" at 45A Mountain Avenue. Ms. Crawford testified on cross-examination that: the appellant lived at 45A Mountain Avenue, he paid bills there, he slept in her bed, he bought groceries, looked after the lawn and looked after everything seven days a week. Ms. Crawford added more when questioned by the court: he had been there since Good Friday 2013, he lived there for her birthday in September 2013, he did men's jobs, looked

after her and looked after the house. Ms. Crawford also testified that she would be in the hospital for up to six weeks at a time and the appellant looked after everything.

[30] The trial judge noted that the appellant did not testify at the *voir dire* and therefore there was no evidence of his subjective expectation of privacy. However, in **R. v. Tessling**, 2004 SCC 67 the court says:

> 42 I should add a *caveat*. The *subjective* expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society.

As such, it is not necessary for the appellant to testify regarding his subjective expectation of privacy to assert a s. 8 right.

[31] **Edwards** also involved a reasonable expectation in a romantic partner's residence and the court concluded that Mr. Edwards did not have a reasonable expectation of privacy in the residence, but was no more than an "especially privileged guest".

[32] Here there was uncontradicted evidence from Ms. Crawford that the appellant lived at 45A Mountain Avenue. He looked after everything when she was in hospital for up to six weeks. He paid bills, did chores (men's jobs), bought groceries.

[33] In the *voir dire* decision, the trial judge said that there was no evidence on direct or cross-examination from Ms. Crawford as to whether the appellant paid bills and what work he did around the house. However, Ms. Crawford clearly stated on cross-examination that the appellant paid bills, looked after the lawn and looked after everything seven days a week (page 65 of transcript, lines 2-4). The trial judge misapprehended the evidence of Ms. Crawford on this point. The trial judge also misapprehended the evidence when he said that other identification documentation had the appellant living on Main Street. The police records showed two addresses and the Registry of Motor Vehicles showed Main Street.

[34] The trial judge noted that there was no evidence as to where the appellant received his mail, why he maintained a separate residence and why the Registry of Motor Vehicles showed him living at the other residence. While this is correct, those things are not determinative. The evidence has to be taken as a whole, it is the totality of the circumstances.

[35] In **R. v. Cole,** 2012 SCC 53 said at para. 40:

> [40] The "totality of the circumstances" test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances (*Tessling*, at para. 32; *Patrick*, at para. 27).

Here the subject matter of the search was a dwelling home. The appellant had interest in the home and the bedroom where he was at the time of the search. The appellant's subjective expectation of privacy in the home can be inferred from the evidence from Ms. Crawford that he lived in the home with her, paid bills and did chores. His subjective expectation of privacy in the home where he lived would be objectively reasonable in all of the circumstances.

[36] The trial judge heard evidence that the appellant lived with Ms. Crawford for over a year, paid bills at the residence, did chores and helped her around the house. The trial judge said that he did not accept the evidence which was extracted by the trial judge's questions in a "tooth pulling like" fashion and the trial judge's assessment of the testimony is entitled to deference. However, that evidence was merely an expansion on the evidence that Ms. Crawford had previously given.

[37] The trial judge stated the correct onus and law in relation to a s.8 breach.

[38] When the evidence is considered as a whole, the only evidence that would support the appellant not living at 45A Mountain Avenue was that the registration for his car showed the Main Street address and that he still had that residence.

[39] The trial judge misapprehended some of the evidence in relation to the appellant's expectation of privacy. A person can have a reasonable expectation of privacy at more than one residence, but the trial judge seemed to imply that having a residence on Main Street ruled out an expectation of privacy on Mountain Avenue. The trial judge mentioned evidence that he did not have, such as where the appellant received his mail, but mail is less and less important in people's lives. The trial

judge considered the evidence that the appellant maintained his residence on Main Street.

[40] The trial judge did not analyze the evidence he had regarding the appellant's expectation of privacy at the residence on Mountain Avenue. The evidence of Ms. Crawford was uncontradicted and was supported in some aspects by the police information. The police had two addresses for the appellant in their system and they had spoken to him on Mountain Avenue previously. The law does not restrict an expectation of privacy to the residence where a vehicle is registered. Ownership or a proprietary interest in a property is not necessary.

[41] The trial judge's finding on the appellant's reasonable expectation of privacy cannot be supported by the evidence. The trial judge did not correctly apply the law to the uncontradicted facts. There was more than enough evidence to show that the appellant had a reasonable expectation of privacy on a balance of probabilities. The appellant was more than an especially privileged guest. There will need to be an analysis of whether the search was reasonable.

Was the search an unreasonable intrusion on the appellant's right to privacy?:

[42] Once the appellant has shown that he has a reasonable expectation of privacy, the onus shifts to the Crown to show that the search was authorized by law, the law was reasonable and the manner in which the search was carried out was reasonable. The trial judge did not undertake the analysis regarding the reasonableness of the search, as he found there was no reasonable expectation of privacy.

[43] No warrant was obtained although the evidence was clear that Constable MacLennan instructed other police officers to go and obtain a **Feeney** warrant to enter 45A Mountain Avenue. The search is presumptively unreasonable (**Hunter v. South Inc.,** [1984] 2 S.C.R. 145, at p. 161).

[44] There could be a suggestion that the search of 45A Mountain Avenue was by consent. Ms. Crawford consented to the police entering the residence to speak to the appellant. The inquiry into her consent is two-staged: (a) would the appellant reasonably expect that his or her co-resident would have the power to consent to police entry into a common space, and (b) if so, did the co-resident actually consent? (**R. v. Reeves,** 2017 ONCA 365 para. 50). Here, the appellant would reasonably expect that Ms. Crawford would have the power to consent to police entry into the

house. However, the question as to whether Ms. Crawford actually consented requires a review of the evidence.

[45] Was the consent by Ms. Crawford voluntary and informed? (**Reeves**, para. 70). In **R. v. Wills** (1992), 7 O.R. (3d) 337, Doherty J.A., sets out the test for consent:

> In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown 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 in the sense that that word is used in Goldman, supra, 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.

Also, in **Cole**, the court found that a valid consent requires both that it be voluntary and informed (para.77), and a third party cannot waive a constitutional protection on behalf of another (para. 79).

[46] It is clear that Ms. Crawford consented and she had the authority to consent to police entering the residence. It was not a voluntary consent. As the trial judge found in the *voir dire* decision, "a close examination of the circumstances might lend strength to the argument that Ms. Crawford's permission to enter the home was extracted by duress created by the ostensible arrest and handcuffing" (para. 30). The trial judge also noted that Ms. Crawford had testified that she was not going to let the police in the home prior to her arrest. Ms. Crawford testified that she was told she would be released from the handcuffs if she let the police in to get the appellant. Constable Kuhn testified that Ms. Crawford had initially said the appellant was not

in the residence (Ms. Crawford denied she said this), but she recanted and said he was upstairs shortly after the police told her if she was lying she could face obstruction or public mischief charges. Constable Kuhn testified that Ms. Crawford gave permission to enter the residence after she was arrested and she asked the police not to contact child protection because her children were in the house. After arresting the appellant, the police did not proceed with charges against Ms. Crawford. Ms. Crawford was in handcuffs when she let the police enter the home. Ms. Crawford was having a children's party and told the police her children were in the house.

[47] Clearly, under the circumstances, the consent given by Ms. Crawford could not be found to be voluntary. It was the product of police oppression or coercion. She did not have the freedom to choose once she was handcuffed and placed under arrest, particularly with children under her care.

[48] The Crown has not met the burden of establishing that Ms. Crawford's consent was voluntary. Therefore, the search was not a search by valid consent.

[49] The above circumstances surrounding Ms. Crawford's treatment by the police can also be used in the analysis of whether the search was conducted in a reasonable manner. The trial judge found that the police were not in hot pursuit and there were no exigent circumstances. The police officers had requested other officers leave the residence to obtain a **Feeney** warrant, which they knew was necessary to enter the house. They were waiting for that warrant.

[50] The police told Ms. Crawford that if she did not tell the truth about the whereabouts of the appellant that she could be arrested for obstruction or public mischief. Ms. Crawford told the police that the appellant was upstairs, but when she exited the residence to request that they leave because they were upsetting the children and dogs, they arrested her. Constable MacLennan testified that he continually knocked on the door. Ms. Crawford was placed in handcuffs and was released without charges once the appellant had been taken from the residence.

[51] The manner in which the search was carried out was not reasonable. Ms. Crawford was coerced into providing consent for the police to enter the residence. Continually knocking on the door to the residence while waiting for the warrant was not reasonable. The police had started the process to obtain the proper authorization, the **Feeney** warrant, to enter the residence. Rather than wait for that warrant, they extracted consent from Ms. Crawford by placing her under arrest and in handcuffs while she was caring for children in the residence. The Crown has not satisfied the

burden on a balance of probabilities that the search was reasonable. There was a violation of the appellant's s. 8 rights.

Was the evidence of the refusal obtained in a manner that violated the appellant's *Charter* rights?

[52] The trial judge found that the only thing that occurred after the entry into the residence by the police was the entry into the bedroom where the appellant was, and the demand for a breath sample. The appellant sought to exclude the appellant's refusal. The trial judge relying on **R. v. Ha,** 2010 ONCA 433, found that there was no evidence that the refusal was affected in any way by the manner in which the police gained entry into the residence and the refusal comprised the *actus reus* of the s. 254 charge.

[53] There are conflicting decisions from Ontario regarding whether the *actus reus* of a new offence can or cannot be excluded after a *Charter* breach where they do not flow causally from the *Charter* breach. In **R. *v.* Cobham**, [1994] 3 S.C.R. 360, the court excluded the evidence of the refusal after a breach of s. 10(b). In this case the breach of s. 8 was connected to the evidence of the refusal. The police officers entry into the home was necessary to observe the appellant's state of sobriety. It was only after the illegal entry that the police could make the observations they did to make the demand for the breath sample. The breach and the refusal are causally connected.

[54] There will need to be consideration of whether the appellant's refusal to provide a breath demand should be excluded under s. 24 (2) of the *Charter*.

Should the evidence of the appellant's refusal to provide a breath sample be excluded pursuant to s. 24(2) of the *Charter?*

[55] The evidence of the appellant's refusal must be excluded if it is established that, having regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. The trial judge did not undertake an analysis of s. 24(2) of the *Charter*, he simply indicated that he would not have granted a remedy under that section. Having come to a different conclusion than the trial judge on the s. 8 violation, I will not defer to his conclusion regarding s. 24(2) **(R. v. Paterson,** 2017 SCC 15 para. 42).

[56] The analysis under s. 24(2) regarding exclusion of evidence after a breach of the *Charter* requires consideration of: (1) Seriousness of the Charter-infringing State Conduct; (2) Impact on the Charter-Protected Interests of the Accused; and (3)

Society's Interest in an Adjudication of the Case on its Merits (**R. v. Grant**, 2009 SCC 32).

1. Seriousness of the Charter Infringing State Conduct:

[57] The consideration under this inquiry is to situate the conduct on a scale of culpability (**Paterson,** para. 43). Inadvertent or minor violations are to be distinguished from wilful or reckless disregard of the *Charter* (**R. v. Grant,** para. 74). Here, as in **Paterson,** the police were not operating in unknown legal territory. There are well established legal principles to enter a residence without a warrant. They had asked for a warrant but then coerced consent from Ms. Crawford without waiting for the warrant. Warrantless searches are presumptively unreasonable. There is a high privacy interest in a residence. These have long been fundamental to our understanding of the proper relationship between citizen and state (**Paterson** para. 46). The trial judge rightly concluded that there were no exigent circumstances and there was not a hot pursuit. The law places high value on the security of a home from state intrusion (**Paterson** para. 46).

[58] Here the police used trickery and coercion to obtain consent from Ms. Crawford rather than wait for the **Feeney** warrant they had requested. This inquiry would favour exclusion of the evidence.

2. Impact on the Charter-Protected Interests of the Accused:

[59] Here the inquiry is focussed on whether the admission of the evidence would bring the administration of justice into disrepute from the standpoint of society's interest. This requires considering the degree to which a *Charter* infringement undermined the *Charter*-protected interest (**Paterson** para. 48).

[60] There is a high expectation of privacy in a person's home. A search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy is more serious than one that does not (**Grant** para. 78). This was a warrantless search of a dwelling house. The police knew a warrant was needed and had started the process to obtain one. Rather than wait to see the outcome of the warrant request, they arrested Ms. Crawford to obtain her consent to enter the home. The police had requested permission to enter the home prior to Ms. Crawford's arrest and were refused entrance. There were no exigent circumstances. The appellant was in the bedroom of the home, lying on the bed, when the police entered. The impact of the warrantless entry on the appellant's rights were significant (**Paterson** para. 50). This factor favours exclusion of the evidence.

3. Society's Interest in an Adjudication of the Case on its Merits:

[61] The evidence is the appellant's refusal to provide a breath sample. Society has a high interest in keeping persons impaired by drugs or alcohol from driving a motor vehicle. The evidence is important to the Crown's case. Without the evidence, the Crown cannot prove the charge. This factor favours inclusion of the evidence.

Conclusion on s. 24(2) analysis:

[62] The balancing required is qualitative and not capable of mathematical precision (**Grant** para. 140). Two factors in the **Grant** analysis favour exclusion and one favour inclusion of the evidence. They must be considered separately and together.

[63] Where the conduct of the police was serious and the impact on the appellant's rights was significant, as here, society's interest in adjudicating a case on the merits should not trump all other considerations (**Paterson** para. 56). As in **Paterson,** (para. 56), I find that the importance of ensuring that the police conduct is not condoned by the court favours exclusion and this unpalatable result is the direct product of the manner in which the police chose to conduct themselves.

[64] The evidence of the appellant's refusal to provide a breath sample should be excluded as its admission would bring the administration of justice into disrepute.

Conclusion:

[65] Having found that the evidence of the appellant's refusal is excluded, there is no need to consider whether the police officers had reasonable and probable grounds to believe that the appellant had committed an offence under s. 253 within the preceding three hours, or whether the appellant had a reasonable excuse to refuse the demand. However, I have reviewed the trial judges reasons for both the reasonable and probable grounds and the reasonable excuse, and I find that he was correct in his findings on both.

Disposition:

[66] The only charge the Crown proceeded on was the refusal to comply with a demand for a sample of breath, contrary to s. 254(5) of the *Criminal Code*. With the evidence of the refusal excluded, there is no evidence upon which a properly instructed trier of fact could convict on a proper trial (**R. v. MacNeil**, 2009 NSCA 46, para. 10). Therefore, I direct a verdict of acquittal be entered, pursuant to ss. 822 and 686(2) of the *Criminal Code*.

Justice Mona M. Lynch