SUPREME COURT OF NOVA SCOTIA
Citation: *R v. Honcoop*, 2017 NSSC 317

Date: 20171112
Docket: SYD No. 458800
Registry: Sydney

Between:

Her Majesty the Queen

v.

David John Honcoop

Applicant

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Heard:	September 8, 2017, in Sydney, Nova Scotia
Written Decision:	September 12, 2017
Subject:	Criminal Law; S. 24 of the Charter of Rights and Freedoms
Summary:	On May 28, 2016 the Accused, David Honcoop, entered the marine ferry terminal in North Sydney, Nova Scotia to board the ferry to Newfoundland. Mr. Honcoop was selected at random for screening by terminal security personnel. The officers escorted him to a private room where his luggage was checked by security. During the inspection of Mr. Honcoop's suitcase a package was found, which the Crown alleges to have contained 2 kilograms of cocaine. Mr. Honcoop was detained and turned over to CBRM police who subsequently laid a charge under the *Controlled Drugs and Substances Act*, specifically 5(2) of that *Act*.

Issues:

1 Does the Charter apply?

2 If so, was Mr. Honcoop's section 8 right to reasonable search and seizure engaged?

3 If so, was there is violation of Mr. Honcoop's section 8 charter right? The main issue is whether Mr. Honcoop consented to the search of the contents of his suitcase and if he did consent, was it valid consent such that it constitutes a waiver of his rights under section 8 of the *Charter*?

4 If there was a violation of Mr. Honcoop's charter rights should the evidence obtained be excluded under section 24(2)?

Result: Court found that there was a violation to Mr. Honcoop's section 8 charter right. Court allowed the application. Court held the evidence seized during the search of the suitcase to be excluded from the evidence at trial.

Caselaw: ***R. v. Chehil***, 2010 NSSC 255; ***R v. Brian Richard Crisby***, 2008 NLTD 185; ***R v. Nagle***, 2012 BCCA 373; ***R v. Neyazi***, 2014 ONSC 6838; ***R v. Edwards***, [1996] 1 S.C.R. 128 (S.C.C.); ***R v. Wills***, [1992] O.J. No. 294; ***R v. Paterson***, 2017 S.C.C. 15; ***R v. Sandeson***, 2017 NSSC 197; ***R v. Grant***, 2009 S.C.C. 32; ***R v. Timmons***, 2011 NSCA 39; ***R v. Tsekouras***, 2017 ONCA 290; ***R v. Morgan***, 2017 NSSC 206.

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Counsel:	David Iannetti for Her Majesty the Queen Nash T. Brogan and TJ McKeough, for the Applicant, David Honcoop

By the Court:

Introduction

[1] On May 28, 2016 the Accused, David Honcoop, entered the marine ferry terminal in North Sydney, Nova Scotia to board the ferry to Newfoundland. He had with him a roller type suitcase and was carrying a computer bag.

[2] Mr. Honcoop was selected at random for screening by terminal security personnel. The officers escorted him to a private room where his luggage was checked by security. The Accused testified he did not agree to this inspection.

[3] During the inspection of Mr. Honcoop's suitcase a package was found, which the Crown alleges to have contained 2 kilograms of cocaine.

[4] Mr. Honcoop was detained and turned over to CBRM police who subsequently laid a charge under the *Controlled Drugs and Substances Act*, specifically 5(2) of that *Act*.

[5] The Crown submits that the Accused consented to his luggage being inspected.

[6] The Crown submits the security officers complied with the written policy of Marine Atlantic in terms of the procedure used for screening in obtaining Mr. Honcoop's consent.

[7] The Defence argues there are credibility issues with the evidence of the Crown witness (Mr. Shea) and point to inconsistencies in his evidence as compared to that given by him at the pre-liminary inquiry.

[8] The Defence submits that even if the Court accepts Mr. Shea's evidence, any consent given by the Defendant is invalid, as he was not fully informed and was the subjected to oppressive procedures at the marine terminal.

[9] The Defence therefore argues that Mr. Honcoop's guaranteed rights under the *Charter of Rights and Freedoms* were infringed and that this violation should result in the evidence obtained being excluded, pursuant to section 24(2) .

Background Facts

[10] Mr. Honcoop entered the Marine Atlantic terminal at approximately 9:45 p.m. (2145 hours). He purchased his ticket, he was selected for a random search.

[11] There is a sign posted at the entrance to the marine terminal that reads:

> For your safety and security this facility is monitored by Closed Circuit Television (CCTV)

> This facility is currently operating at
>
> MARSEC LEVEL 1
>
> Entering this facility is deemed valid consent to security **screening or inspection.** Failure to consent to security measures will result in a denial or revocation of authorization to travel. (emphasis)
>
> [French translation follows]

[12] There is a second sign posted inside the terminal that reads:

> Voluntary **Search:** All passengers entering Marine Atlantic property are subject to a voluntary **search** of their person, vehicle and effects under the Domestic Ferries Security Regulations. Refusal to submit to search will result in a denial of access to Marine Atlantic facilities. (emphasis)

[13] Mr. Honcoop was directed by Commissionaire Gear into a screening room at approximately 2147 hours where the search was to take place by Commissionaire Stephen Shea.

[14] Once inside, Mr. Honcoop was asked to present his ID and Boarding Pass to Mr. Shea.

[15] Commissionaire Shea instructed Mr. Honcoop to remove the items from the suitcase he was carrying when he entered the room.

[16] Once the items had been removed Mr. Shea noticed a bulge inside the zippered lining of the open suitcase. Mr. Honcoop was asked and denied knowing what the bulge was.

[17] Mr. Honcoop removed a package from the area of the bulge and stated he did not know what it contained.

[18] Mr. Honcoop was then directed to open the package. He removed numerous layers of tape before Mr. Shea ultimately finished opening the packages to discover a white substance.

[19] On discovering the substance Commissionaire Shea left the room and contacted the Cape Breton Regional Police while Commissionaire Billson stood watch over Mr. Honcoop.

[20] Cape Breton Regional Police attended the ferry terminal and arrested Mr. Honcoop.

Issues

1. Does the Charter apply?
2. If so, was Mr. Honcoop's section 8 right to reasonable search and seizure engaged?

3. If so, was there is violation of Mr. Honcoop's section 8 charter right? Here the main issue is whether Mr. Honcoop consented to the search of the contents of his suitcase. In addition, if Mr. Honcoop did consent, was it valid consent such that it constitutes a waiver of his rights under section 8 of the *Charter*?

4. If there was a violation of Mr. Honcoop's charter rights should the evidence obtained be excluded under section 24(2)?

[21] The Crown submits that this is highly reliable evidence and its exclusion would automatically result in an acquittal of the Accused.

[22] The Defence submits that a key issue is that discovery of the evidence is directly connected to the alleged breach. The Defence argues that but for the breach the package would not have been found.

Discussion

Issue 1: Does the Charter apply?

[23] The Crown concedes that this is a case where the *Charter* applies because the actions taken were under federal statutory authority. The onus is on Mr. Honcoop to establish a charter breach on a balance of probabilities.

[24] In paragraph 13 of its brief, the Crown states:

> The Crown concedes that the Charter applies to security guards employed by Marine Atlantic Inc. because it is a Crown corporation expressly operating as a Crown agent.

Issue 2: Was Mr. Honcoop's section 8 right engaged?

[25] An important issue in this case, is whether Mr. Honcoop's s. 8 charter right was engaged in the context of a random screening of his luggage under the Domestic Ferries Security Regulations.

[26] No reported cases have been provided with respect to screening procedures under these Regulations or its parent statute, the *Marine Transportation Security Act*.

[27] The Court required supplementary briefs from Crown and Defence on the issue of whether such a search was authorized by law and therefore reasonable.

[28] In its brief the Crown stated, if there is no reasonable expectation of privacy, then there was no search for the purpose of Section 8 of the *Charter*.

[29] The Crown referred to the relevant cases ***R. v. Chehil***, 2010 NSSC 255 and ***R v. Brian Richard Crisby***, 2008 NLTD 185, which involved police dog searches in the context of airport

security. Based on these cases the Crown submitted as the prevailing view that there is a reduced expectation of privacy in respect of security screening at an airport, and consent to screen for security purposes may be implied in some circumstances.

[30] In ***R v. Nagle***, 2012 BCCA 373, the Court found that a customs officer was within his legislated authority to search Ms. Nagle's purse, even though he may have had a concurrent criminal purpose.

[31] As to whether the Marine Atlantic security guards do in fact require consent to perform their screenings, the Defence refers to several provisions in the *Act* including s. 20 and s. 21. In short, the Defence submits that screening before boarding is authorized only if the person selected, permits the authorized screening. The *Act* is clear they are not obligated to do so.

[32] The Defence submits the requirements of the signage under the *Act* make it clear that Notice be posted in prominent places, and that a person must consent to a search under the *Act*.

[33] In ***R v. Neyazi***, 2014 ONSC 6838, the Court stated that for a court to assess whether a reasonable expectation of privacy exists, a court must engage in a fact specific assessment of the "totality of the circumstances" by considering all interrelated factors.

[34] I feel some limited assessment is required here due to the legislation not having been previously considered, notwithstanding the clear requirement for consent.

[35] In cases referred to earlier a distinction is made between a search for airport security and one for general police investigation.

[36] In ***Chehil***, upheld an appeal, the Court held that a traveller's expectation of privacy in the airport context is greatly reduced, because of security measures, but it is not completely eliminated.

[37] The Court ultimately found that a person maintains an expectation of privacy, even in relation to regulatory searches. Two of the factors referred to in ***Chehil*** were "1) the fact that a traveller can refuse to have his or her luggage searched; and 2) the fact that a passenger can witness the physical search of the checked luggage, and communicate directly with the searcher."

[38] The Court in ***Chehil*** held, among other factors, that these facts were relevant in determining whether the contents of the bag remain private and in determining whether a continuing privacy interest remains in the luggage.

[39] I note that these similar factors are present here in the case of Mr. Honcoop. It s apparent that the Marine Atlantic personnel believed he had some privacy interest in his luggage, as they left it to him alone, for the most part, to conduct the inspection.

[40] In ***Neyazi***, the court also referred to the leading case of ***R v. Edwards***, [1996] 1 S.C.R. 128 (S.C.C.), which outlined a test of non exhaustive factors for a court to consider in determining whether a reasonable expectation of privacy exists in a given circumstance.

[41] Included in these factors were the presence of the accused at the time of the search, and possession or control of the property or place searched.

[42] Other factors referenced include the existence of a subjective expectation of privacy and the objective reasonableness of the expectation.

[43] In ***Neyazi***, the court considered the nature of the privacy interest at stake, its factors in ***Edwards*** *and the statutory framework governing the conduct of the state authorities*.

[44] In terms of the subjective expectation, there is little evidence of that here, except that Mr. Honcoop stated he had no expectation of being screened or searched. He also testified that he had previously travelled via the ferry to Newfoundland. The caselaw suggests that personal belongings in a suitcase calls for a reasonable level of privacy.

[45] Objectively speaking, I think the expectation of privacy, while it exists, has to be lower in the context of a ferry, border crossing situation between provinces.

[46] In ***Neyazi***, the court held that the accused had a reasonable but reduced expectation of privacy in his suitcase, in the context of a search carried out for security purposes, when he attempted to board a domestic flight. The court held that the search was not authorized by law and violated the accused's rights under s. 8 of the Charter.

[47] I conclude that the statutory framework in the present case is a clear acknowledgement of Mr. Honcoop's privacy interest. Without grounds, a person's consent given voluntarily is required.

[48] The policy itself, in evidence as Exhibit 3, and the procedure outlined is strongly suggestive of a privacy interest in conducting a visual inspection.

[49] It may be relevant, that the direct result of the screen involved here was that Mr. Honcoop was immediately detained pending arrest by other authorities namely the police.

[50] The main issue therefore is whether Mr. Honcoop consented and if so, was it valid?

Issue 3: Was there a breach of Mr. Honcoop's right to reasonable search and seizure?

[51] The Crown, to its credit has narrowed the issue in terms of whether there was a breach of Mr. Honcoop's charter right by stating that the only basis upon which this search could be authorized is with a valid consent given by Mr. Honcoop. The Crown acknowledges that if it was not valid, then his section 8 rights were infringed.

[52] The Crown contends in this case there was no charter breach, as Mr. Honcoop provided his consent for the security officers to inspect the contents of his suitcase. In ***R v. Wills***, [1992] O.J. No. 294, the Court stated the burden is on the crown to establish on the balance of probabilities, that the waiver doctrine applies and that a person has consented to what would otherwise be an unauthorized search and seizure.

[53] In the alternative, the Crown submits if the requirements for a valid consent were not met, and Mr. Honcoop's rights were infringed, the evidence should *not* be excluded under section 24 of the *Charter*.

[54] The Defence argues that Mr. Honcoop did not consent but also was not adequately advised of the of his right to refuse the search or of the consequences of having his suitcase inspected. In support of their position the Defence relies on the case of ***Wills***.

[55] I have reviewed and considered ***Wills*** and the principles therein for the purposes of this decision.

[56] Marine Atlantic has written policy that sets out the purpose for screening, the rate of random screening, relevant indicators for selective screening and the procedures that govern. It provides as follows:

> The guard will **ask for permission** to visually inspect their vehicle and/or belongings as may be the case. If permission to screen is not given, the person(s) and/or their vehicle will be denied access to the facility.
>
> …
>
> If items are found which are deemed to be prohibited or dangerous, the ATM on duty and FFSO will be notified and steps will be taken to prevent the items being introduced to the facility up to and including summoning authorities.

[57] According to the direct evidence given by Commissioner Shea, he asked Mr. Honcoop for his consent and it was given. He further testified in direct that he told Mr. Honcoop he did not have to consent if he didn't want to.

[58] Mr. Shea therefore testified that he sought and received permission from the Accused and explained to Mr. Honcoop that he had the option to refuse the inspection. Mr. Shea stated at trial, "I honestly can't recall if I told him what the repercussions of that were but I told him he didn't have to consent if he didn't want to".

[59] In cross examination Commissioner Shea was asked about the evidence he gave on preliminary which was to the effect that he did **not** inform Mr. Honcoop that he had the option to refuse the search. At trial Mr. Shea accepted the evidence he gave at the preliminary, which was that he did not inform him that he could not search without his consent The Commissionaire did

confirm on cross-examination that he asked Mr. Honcoop for his consent and Mr. Honcoop agreed.

[60] It was the evidence of Mr. Shea on direct- examination that**:**

> A: Um, I don't know… I honestly can't recall if I told him what the ah, the repercussions of that were **but I told him he didn't have to consent if he didn't want to.**

[61] Mr. Shea was asked in cross-examination about the evidence he gave at the preliminary inquiry as follows:

> Q: Now you were here at preliminary inquiry, do you recall, recall giving evidence at a preliminary inquiry.
>
> A: I did.
>
> Q: Okay and ah, I'm going to read questions and answers
>
> A: Uh huh.
>
> Q: Okay. At 11:14:20 this is on a tape, "I explained the screening procedure to him and I asked if he would consent to it and he said yes. I made the appropriate mark on the form". Okay that's what you said at the preliminary. Okay. Did you tell him you cannot search without his consent the answer was no, is that correct?
>
> A: Say that…
>
> Q: Did you tell him you cannot search without his consent you replied no.
>
> A: I don't believe I did.
>
> Q: I'm sorry.
>
> A: I asked him if he consent to the search he said yes.
>
> **Q: I asked you did you tell him you cannot search without his consent, and you said no you did not tell him that. That's what you said in the preliminary, is that your evidence today?**
>
> **A: If that's what it says yes.**
>
> **Q: Okay. Did you tell him he had the option to leave premises to avoid the search.**
>
> **A: I told him the repercussions if he said yes or no, yes.**
>
> **Q: Well here you said, did you tell him to leave the premises to avoid the search and your answer was no.**
>
> **A: No.**

Q: That's what you said under oath at the preliminary, is that your answer today?

A: It is.

Q: No, okay so you didn't tell him?

A: No.

[62] It was Mr. Shea's further evidence on cross-examination that:

> Q: And ah, so it's fair to say basically that he was not aware of consequences or of any consequences of as it related to the issue of giving consent to that search. And the answer was yes. Correct?
>
> A: Say it again
>
> **Q: It's fair to say basically that he was not aware of consequences or of any consequences of as it related to the issue of giving consent for the search. And the answer was yes.**
>
> **A: Okay.**

[63] In his evidence Mr. Honcoop testified he was not asked to consent to the screening and that he did not consent. He stated he was not given an option and instead was directed to the screening room by security guard Mr. Gear. He testified it was not a voluntary search. He further denied having any knowledge of the substance found.

[64] Considering the whole of the evidence, including the screening sheet in Exhibit 1 completed at the time of the inspection, I am satisfied that Mr. Honcoop did consent to the random screening he was asked to perform with respect to his suitcase.

[65] While there were some difficulties with Mr. Shea's evidence as compared to that given at the preliminary, he did not waiver on this point and remained certain of it. The video of what happened upon Mr. Honcoop's arrival is of limited assistance as it contains no audio and does not show the actual meeting in the screening room.

[66] I am equally satisfied that in agreeing to the inspection that Mr. Honcoop was not fully aware of the repercussions or jeopardy he could face, as confirmed by Commissioner Shea himself, in his evidence. Such was the case for the accused in ***Wills***, in which Justice Doherty stated that the giver of the consent must be aware of the potential consequences of giving the consent, this being the sixth factor. (See paragraph 69 of ***Wills*** for criteria)

[67] Mr. Iannetti for the Crown has acknowledged that the sign inside the terminal refers to a "search" being conducted with the consent of the ticket holder. Mr. Honcoop gave evidence he did not see either sign.

[68] The manner in which Mr. Honcoop arrived at the terminal that night and the location of his ticket purchase inside the terminal is supportive of his evidence on this point. Although there

is no video of his entering from the outside of the terminal his evidence that he approached the entrance to the terminal from the left door is uncontradicted.

[69] The photo in Exhibit 2 shows the entrance to the terminal and the sign, which is to the right, very clearly. From the video the location of the second sign inside (on the left) was not obvious to Mr. Honcoop, who was again located at the ticket counter to the right.

[70] In ***Wills***, the court held that non-disclosure and misinformation provided to the accused caused him to not realize the potential jeopardy he was in when he agreed to take the breathalyzer test. The court held the accused failed to realize the potential consequences of taking the test.

[71] In ***Wills***, the court stated there is kind of general knowledge that in many cases is sufficient to establish adequate awareness of potential consequences. For example, a person should know that if they took the test and failed, they could face criminal charges.

[72] In terms of whether the consent is valid and the requirements in ***Wills*** were met, the Crown's own evidence suggests that Mr. Honcoop was not aware of the consequences he could face.

[73] In ***Wills*** the fifth (v) criteria for a valid consent is that the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested.

[74] I have difficulty with the evidence of Mr. Shea on this point which I have earlier noted. In cross-examination he accepted his earlier evidence at preliminary, that he did not inform Mr. Honcoop of his right to refuse.

[75] In regard to the sixth (vi) criteria in ***Wills,*** the Crown argues that it does not apply, stating there was no obligation to inform Mr. Honcoop of potential consequences as there was no prosecution contemplated at that time.

[76] In support of this argument, the Crown submits that Justice Doherty confined the application of this factor to "an accused, suspect, or target of the investigation".

[77] It is clear that ***Wills*** involved a police investigation and equally clear that the Crown acknowledges that the other five criteria apply in this case.

[78] In ***Wills***, the court made no clear distinction between investigation or searches involving the police, and those involving regulatory offences.

[79] The relevant paragraphs in ***Wills*** are those contained in 69 – 72. In the latter the court stated:

> 72. In addition, **at least** in cases where the person is an accused, suspect or target of the investigation, the person whose consent is sought must

> understand that if the consent is given the police may use any material retrieved by them in a subsequent prosecution. **(emphasis**)

[80] What is clear from ***Wills***, and what is key is that the application of the waiver doctrine to situations where it is said a person has consented to what would otherwise be unauthorized, requires the Crown to establish the sixth (vi) criteria on a balance of probabilities.

[81] In this regard paragraph 51 of ***Wills*** is instructive, in terms of choosing one course of action over another:

> 51. The exercise of a right to choose presupposes a voluntary informed decision to pick one course of conduct over another. Knowledge of the various options and an appreciation of the potential consequences of the choice made are essential to the making of a valid and effective choice.

[82] Mr. Honcoop, as confirmed by the policy, signage, and *Act* had a choice. At a minimum he was entitled to be aware of the consequences of that choice, in order for the search to be voluntary.

[83] I agree that there was no obligation to inform him of all repercussions as there was no prosecution contemplated at that time. Justice Doherty at paragraphs 70 and 71 stated the sixth (vi) criteria only requires a general understanding of the choice they may face.

[84] The Crown submits that Mr. Honcoop was informed of the potential consequences in relation to the regulatory screening that was undertaking.

[85] I have earlier referenced to Commissioner Shea's evidence, on cross-examination where for example, he said he did not tell Mr. Honcoop he could leave the premises to avoid the search. Mr. Honcoop confirmed this in his evidence. (See para. 61 herein)

[86] I am satisfied on a balance of probabilities that the sixth (vi) criteria applies here, but even if that were not the case I find that the fifth (v) criteria in ***Wills*** was not met.

[87] In arriving at this conclusion I have considered the case referred by the Crown, in which it acknowledges is much different on the facts. That said I do not think the gridlock feared if police requires waivers is necessarily applicable here. There is only the expectation that the screening procedures *be properly explained* to those selected for random screening. (See reference to ***R v. Paterson***, 2017 S.C.C. 15 at paragraph 232 of ***R v. Sandeson***, 2017 NSSC 197)

[88] In all of the circumstances, I am not satisfied that the consent given by Mr. Honcoop was valid. The Crown has therefore not discharged the burden it has on establishing a valid consent.

[89] The Crown argued in the alternative that the written notice at the entrance to the terminal and on the second sign was sufficient to meet the fifth factor in ***Wills.***

[90] I am satisfied on the evidence that Mr. Honcoop likely did not see either sign and that the mere existence of the signs themselves do not constitute sufficient notice to him of the option he had to refuse the search and/or the consequences associated with that consent or refusal.

[91] There is further evidence that the language used on the sign was not the same as set out in the legislation. Each sign is worded differently. The sign displayed at the entrance speaks of there being a "deemed consent". I will address this in more detail later in my decision.

[92] On the question of whether this constitutes a breach of the Accused's charter rights, I have considered whether consent was necessary, given that the actions of the security officers were authorized by the statute. I have earlier found the section 8 right was engaged.

[93] I conclude that without a valid consent this search was not otherwise authorized by law and therefore infringed the Accused's rights under s. 8 of the *Charter*.

[94] As stated the Crown acknowledges that if the requirements for a valid consent were not met, the Defendant's rights under s. 8 would be infringed, subject to a determination under s. 24(2) of the *Charter*. I turn now to address that issue.

Section 24(2) Analysis

[95] Under s. 24(2), where the Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed, the evidence shall be excluded if it is established, in all of the circumstances, that admission of the evidence would bring the administration of justice into disrepute.

[96] Under the *Charter* the burden rests on the party seeking to exclude the evidence, on a balance of probabilities. In this case, the burden is therefore on the Accused to demonstrate that admitting the evidence would bring the administration of justice into disrepute.

[97] The test for determining whether the evidence should be excluded as a result of the charter breach is set out in ***R** v. **Grant***, 2009 S.C.C. 32. The Courts primary role is to assess and balance the effect of admitting the evidence on society's confidence in the justice system. This confidence in the system goes hand in hand with whether the administration of justice would be brought into disrepute. The notion is to maintain the public's confidence.

[98] The Court in ***Grant*** outlined three (3) criteria or lines of inquiry which are to be considered in assessing and balancing this question. In ***R v. Timmons***, 2011 NSCA 39, the Nova Scotia Court of Appeal called the exercise of balancing these factors a "delicate one" (paragraph 55).

[99] Recently the Ontario Court of Appeal had reason to address s. 24 and the approach set out in ***Grant*** in the case of ***R v. Tsekouras***, 2017 ONCA 290. (See also the recent decision of Gogan, J. in ***R v. Morgan***, 2017 NSSC 206)

[100] In ***Tsekouras***, the court noted that the test is broad and imprecise, requiring a trial judge to assess and balance the effect of admitting the evidence, noting that the "focus is long term, prospective and societal". (***Grant*** at paragraph 67 – 71)

[101] As to the three lines of inquiry set out in ***Grant***, the court in ***Tsekouras*** stated at paragraphs 104 and 105:

> [104] The first two inquiries operate in tandem. Both pull toward exclusion of constitutionally-tainted evidence. When the state's *Charter*-infringing conduct becomes more serious and the impact of it on the *Charter*-protected interests of the accused becomes greater, the synergistic effect of their combination strengthens the pull for and towards exclusion: *McGuffie*, at para. 62.
>
> [105] The third line of inquiry – society's interest in the adjudication of the merits – is contraindicative – pulls towards the inclusion or admission of the evidence. This is a pull that reaches its zenith when the evidence tendered for admission is at once reliable and crucial to the case for the Crown: *McGuffie*, at para. 62. See also, *R. v. Harrison*, 2009 SCC 34 (CanLII), [2009] 2 S.C.R. 494, at paras. 33-34.

1. Seriousness of the Charter Infringing Conduct

[102] Under this inquiry the task is to evaluate the seriousness of the infringing conduct on a scale of culpability. Was there wilful or deliberate conduct or reckless disregard for charter rights. Good faith becomes a consideration, errors may be reasonable, clear violations of well establishes rules is more egregious. There are various factors, that are case specific and often at odds. There is no overreaching principle as to how the balance or assessment is to be achieved. (***Paterson***, ***R v. Tsekouras***)

[103] In the present case the security officers were carrying out their regular duties to provide a level of screening as authorized by statute, the *Marine Transportation Security Act*, SC 1994, c. 10. The suggestion was it was at a low level. The authorization required was 3% of the foot passengers to be screened, described as Marsec Level 1, on Exhibit #2.

[104] As can be seen from the video their actions were not oppressive, there was no intense questioning for a prolonged period. Their attitude and demeanour was very civil and courteous. The inspection of Mr. Honcoop's suitcase and procedures lasted approximately 10 minutes.

[105] Upon discovery of the package, the officer detained the Accused and phoned the police authorities, who laid the charge contrary to the *Controlled Drugs and Substances Act* against Mr. Honcoop.

[106] The officers did not touch the items, but directed the Accused to separate the contents of the luggage for their view. Near the end of the inspection Officer Shea intervened to remove the remaining tape securing the package.

[107] Overall, the officers acted in good faith. However, where the offence is serious, any breach of Accused's rights must be considered serious. For example, absent a valid consent there were no grounds to conduct the search.

[108] There is a question here as to whether the procedures authorized by the statute were followed in terms of proper notice being posted to individuals of their obligations, and in particular, notice that a person is not obligated to undergo the authorized screening.

[109] Subject to this statutory compliance/posting issue, I find the actions of the officers and their conduct were neither deliberate or egregious. They had obtained a basic consent that proved in law to be invalid.

[110] The Crown in its brief has stated that there is little guidance as to how the law of consent is applied in the context of a search for regulatory purposes and in the context of criminal charges.

2. The Impact of the breach on Charter Protected Interests.

[111] I have already made reference to the "discoverability" of the evidence in this particular case. The Defence submits strongly that but for the breach there would be no other way for the evidence to have been discovered. This is similar to the case of ***Morgan*** where the discovery resulted solely from the infringement. In ***Morgan*** the court found multiple serious infringements.

[112] In terms of the Crown's interest (which also has application under the first line of authority) the officers sought out and obtained permission. That attenuates to some extent the seriousness of the breach.

[113] The Crown submits, that under this second line of inquiry that the expectation of privacy is reduced, given the regulatory authorization and the need for the operator to ensure the safety of its passengers, in a confined ferry setting.

[114] In ***Neyazi***, the court held that the accused in an airport setting had a reasonable expectation of primary, albeit reduced in the context of a search carried out for security purposes.

[115] I find here it is reasonable for persons to expect a lower level of privacy in travelling via a domestic ferry between provinces, as it is something akin to boarder crossings**.**

[116] In the present circumstances, the search would be authorized only with permission, absent other any other grounds that were not apparent.

[117] This second line of inquiry appears to clearly favour exclusion of the evidence.

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

[118] On the facts before me, this third line of inquiry favours the admission of the evidence.

[119] Arguably this factor is the most compelling in these circumstances, given the nature of the evidence, the Crown's ability to prove that it is a controlled substance, and society's interest in having these types of offences prosecuted to the fullest extent.

[120] The Crown's position that the evidence is reliable and critically important is very relevant under this inquiry. At the same time this consideration should not unduly govern or "trump" all other considerations as recently expressed by Supreme Court of Canada in ***Paterson***.

[121] The Defence submits there are serious questions as to the reliability of the evidence. Mr. Honcoop denied knowing about the bulge and there was nothing to link the contents of the suitcase to Mr. Honcoop. The Defence says the only link is that he was carrying it.

[122] I am cognizant that it is a balancing of the three factors that is required and that it is a delicate exercise.

[123] I am further cognizant that society's interest in the administration of justice is in one that is beyond reproach, and one that does not result in compromise of an individual's rights because they were not properly informed or because authority given under statute has been not been properly exercised.

[124] In the present case, the exercise and the extent of the authority the officers' had is relevant to the s. 24(2) analysis.

[125] In the recent case of ***Nagle***, the court held in the context of a border crossing that the search of a purse was part of a routine screening procedure.

[126] In that case the court held the accused had a reasonable expectation of privacy, that was reduced because of the context of an airport, involving an international flight. The court further held the officer was statutorily authorized to search the accused's purse and that his questioning during the search was a reasonable part of his investigation.

[127] I concur with the Defence that the requirements for the posting of notice(s) under that *Act* makes it quite clear that a person must consent to a search being conducted under the screening procedures. I made this finding in relation to whether there was a breach. (See para. 47 herein.)

[128] I am in receipt of the supplemental brief of the Defendant outlining various provisions of the *Marine Transportation Security Act*.

[129] The *Act* in s. 21(2) requires that the notices be posted "in prominent places where authorized security is carried out". The Defendant submits this was not done as the screening was carried out in the private room off the main reception area. There is no evidence that a sign was posted in that room.

[130] Secondly, s. 21(1)(c) of the *Act* requires the facility shall to post notice(s) stating:

> **Operators to post notices**
>
> 21(1) When authorized screening is required or authorized on a vessel or at a marine facility, the operator of the vessel or facility shall post notices stating that…
>
> (c) **no person is obligated to permit authorized screening of their goods** if they choose not to have the goods placed on board the vessel or in the restricted area." (emphasis added)

This supplemental submission is important because it is reasonably clear that the "pull" of the second line of inquiry favours exclusion and the third favours admission.

[131] The legislature chose certain language in determining what constitutes proper notice. The facility is expected to follow the language closely, as such a procedure could impact heavily on individual guaranteed rights and reasonable search and seizure under the *Charter*.

[132] The language as contained in the *Act* is in my view, materially different than language on the notices that were actually posted, as shown in Exhibit 2 and on the video in Exhibit 4.

[133] There is a significant difference in being told that "you are not obligated to permit authorized screening of your goods if you choose not to.." and being told that "entering of the facility is deemed valid consent to security screening or inspection..".

[134] In terms of the public's confidence in the administration of justice, it is entirely important for statutory bodies to respect and implement the laws of the statute as intended, so as to ensure those affected will be fully informed of the authority to be exercised and what their rights are in relation to that authority.

[135] This is especially true in the long term where these statutes govern operations such as a marine ferry terminal, whose actions are day to day, months to month, year to year affecting thousands of people. This clearly adds to the seriousness of the infringement in this case.

[136] Recently the Supreme Court of Canada in ***Paterson*** reminds us that in performing the ***Grant*** analysis, the court should not give undue weight to the third line of inquiry. In my view it is prudent to "step back" and acknowledge this message to ensure that a proper balancing of all factors is being done. Here, the seriousness of the beach is attenuated to some extent by the reduced privacy interest. On balance however, the breach in my view, is serious enough to warrant exclusion when one bears in mind the clear message that reliability of the evidence must not necessarily trump other factors, if individual rights are to count for something.

[137] For all of the above reasons I am satisfied the Defendant, Mr. Honcoop, has met the burden of establishing that admission of the evidence would bring the administration of justice into disrepute.

[138] Mr. Honcoop's application is allowed. The evidence seized during the search of the Defendant's suitcase is excluded from the evidence at trial.

[139] Order accordingly.

Murray, J.