

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Chehil*, 2009 NSCA 111

Date: 20091106

Docket: CAC 307354

Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Mandeep Singh Chehil

Respondent

- and -

The Canadian Civil Liberties Association

Intervenor

Judge: The Honourable Justice Nancy Bateman

Appeal Heard: September 21, 2009

Subject: Search and seizure - **Charter**, s. 8

Summary: The drug enforcement team at the Halifax Airport were allowed by Westjet administrative personnel to view the electronic passenger list of an overnight Westjet flight originating in Vancouver. They were looking for *indicia* of the presence of a drug courier on that flight. Vancouver is a known drug distribution point. Drug couriers often travel alone on overnight flights, purchasing a last minute, walk-up ticket in cash, checking a single bag. These criteria are derived from profiles developed by the U.S. Drug Enforcement Agency. The appellant was the last passenger on the flight, passengers being listed in chronological order of ticket purchase. Identifying him as a

possible courier, the officers had his luggage, along with the bags of several other passengers, removed on the secure side of the airport and dog-sniffed. The dog indicated the presence of a substance in Mr. Chehil's bag. His luggage was returned to the conveyor belt. When Mr. Chehil collected the bag he was arrested. The bag was found to contain three kilograms of cocaine. At trial the judge held that the viewing of the electronic records violated Mr. Chehil's s. 8 **Charter** right to be free from an unreasonable search and seizure (The use of the sniffer dog and the subsequent search of the luggage were not at issue on the appeal.) Information collected by Westjet is subject to the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**"), S.C. 2000, c.5. The judge further determined that the drugs should not be admitted into evidence (**Charter**, s. 24(2)). Mr. Chehil was acquitted. The Crown appealed.

Issues: Did the judge err at law in finding a s. 8 breach and in excluding the drugs from evidence?

Result: A balance must be struck between respecting an individual's right to privacy yet recognizing the necessity of interfering with that right in the legitimate interests of law enforcement (**R. v. Tessling**, 2004 SCC 67, at para. 17). Not every form of government inspection is a "search" for constitutional purposes. A search occurs only where the state action intrudes upon an individual's reasonable privacy interest (**R. v. Tessling**, *supra* at para. 18 and **R. v. Evans**, [1996] 1 S.C.R. 8, at para. 11). Whether a particular state action constitutes a search is assessed in the context of the "totality of the circumstances" (**R. v. Tessling**, *supra*, at para. 19). Here the judge failed to apply the totality of the circumstances test in determining Mr. Chehil's reasonable expectation of privacy in his ticketing information. Applying the totality of the circumstances test here, Mr. Chehil did not establish that he had a reasonable expectation of privacy in the ticketing information. Consequently, his s. 8 rights were not breached. **PIPEDA** recognizes existing privacy rights and does not extend constitutional protection to the broad category of personal information which are covered by that **Act**. Section 8 of the **Charter** extends only to information which tends to reveal intimate details about a person's lifestyle and personal choices or specific and meaningful information, intended to be private and concealed. Mr. Chehil had no reasonable expectation of privacy in the ticketing information. In any event, the drugs should not have been excluded

from evidence. Appeal allowed and a new trial ordered

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 23 pages.

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The Canadian Civil Liberties Association

Intervenor

Judges: Bateman, Saunders and Oland, JJ.A.

Appeal Heard: September 21, 2009, in Halifax, Nova Scotia

Held: Appeal allowed and a new trial ordered per reasons for judgment of Bateman, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: Mark J. Covan, for the appellant
Stanley MacDonald, Q.C., for the respondent
J. Walter Thompson, Q.C., for the intervenor

Reasons for judgment:

[1] The respondent, Mandeep Singh Chehil, flew from Vancouver to Halifax on an overnight Westjet flight arriving in Halifax on November 16, 2005. Upon his arrival the R.C.M.P. found three kilograms of cocaine in his checked bag. He was charged with possession for the purposes of trafficking (**Controlled Drugs and Substances Act**, S.C. 1996, c. 19, s. 5(2)). At trial Justice Simon J. MacDonald of the Nova Scotia Supreme Court found that his right to be secure against an unreasonable search had been violated (**Canadian Charter of Rights and Freedom**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, s. 8 (**Charter**)) and excluded the drug evidence pursuant to s. 24(2). The Crown appeals. The reasons for judgment are reported as **R. v. Chehil**, 2008 NSSC 357.

BACKGROUND

[2] “Operation Jetway” is an R.C.M.P. program designed to curtail drug trafficking. It monitors the travelling public in transportation hubs such as airports and bus depots. Using drug "courier" profiles developed since 1974 by the United States Drug Enforcement Administration it identifies and investigates suspected drug couriers.

[3] On November 16, 2005, members of the R.C.M.P. Jetway team were on duty at the Halifax International Airport. Drug couriers are known to travel from Vancouver on discount carriers such as Westjet and to use overnight flights. Those factors, which are established Jetway indicators, led Corporal Fraser and Constable Ruby to attend the Westjet office and request permission to view the passenger manifest of the incoming overnight Westjet flight from Vancouver. Corporal Fraser and Constable Ruby were known to the Westjet personnel as members of the R.C.M.P. drug enforcement team. The Westjet administrative staff on duty agreed that they could view the computer manifest. The officers were looking for passengers travelling alone who had purchased a one way ticket with cash shortly before departure and checking a single bag. That profile is consistent with the travel pattern of drug couriers. Because the passengers are listed on the computer manifest in chronological order of ticket purchase, the officers were interested only in viewing the ticketing information of the last few names.

[4] They identified Mr. Chehil, the last passenger listed, as fitting the Jetway indicators. Westjet provided his baggage ticket number. When the flight arrived, the baggage was removed from the aircraft in the normal fashion by airport personnel. Once inside the terminal, Mr. Chehil's bag, along with nine others, was selected by members of the Jetway team in a secure area. A sniffer-dog was deployed and indicated the presence of controlled substances in Mr. Chehil's bag. The bag was placed on the luggage carousel with the other flight luggage and moved out into the public baggage retrieval area. Upon collecting his bag Mr. Chehil was arrested for possession of a controlled substance, advised of his **Charter** rights, cautioned and taken into custody. His locked bag was opened and found to contain three kilograms of cocaine.

[5] Mr. Chehil asked the trial judge to find that the R.C.M.P.'s viewing of Westjet's electronic passenger records which revealed his ticketing information was an unreasonable search contrary to s. 8 of the **Charter**. The judge agreed and excluded the evidence. Mr. Chehil was acquitted of the charge. The Crown appeals. The Canadian Civil Liberties Association sought and was granted Intervenor status on the appeal. (reported at 2009 NSCA 85)

ISSUES ON APPEAL

[6] The Crown says the judge erred in finding that Mr. Chehil's rights pursuant to s. 8 of the **Charter** were violated. This appeal raises the following issues:

- (a) Did the Respondent have an expectation of privacy in the Westjet ticketing information?
- (b) What relevance, if any, does the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**"), S.C. 2000, c.5. have to the analysis of whether there was an expectation of privacy?
- (c) Did the Learned Trial Judge err in excluding the evidence seized under s.24(2) of the **Charter**?

STANDARD OF REVIEW

[7] A Crown appeal from a verdict of acquittal is limited to a question of law alone (s. 676(1)(a) of the **Criminal Code**, R.S.C. 1985, c. C-46). Here the Crown asks that we set aside the verdict and order a new trial (s.686(4)(b)(i)). The Crown says the judge did not apply the appropriate legal analysis to the facts.

[8] The standard of review on an allegation of legal error is correctness. Failure to correctly apply a correct legal standard to a set of facts is an error of law (**Housen v. Nikolaisen**, 2002 SCC 33; **R. v. Araujo**, 2000 SCC 65; **R. v. Morin**, [1992] 3 S.C.R. 286).

ANALYSIS

[9] Neither the lawfulness of the dog-sniff of the luggage nor the resulting search which revealed the cocaine are at issue on this appeal. It is the judge's finding that the R.C.M.P.'s viewing of Mr. Chehil's ticketing particulars contained on Westjet's electronic passenger records violated his s. 8 **Charter** right to be secure against unreasonable search and seizure that is appealed. We must determine whether the judge erred in so concluding and in determining that the drug evidence ultimately disclosed should not be admitted into evidence.

[10] At the outset it is helpful to review the established common law principles that inform this inquiry. Society demands privacy but also protection from crime. A balance must be struck between respecting an individual's right to privacy yet recognizing the necessity of interfering with that right in the legitimate interests of law enforcement (**R. v. Tessling**, 2004 SCC 67, at para. 17). Not every form of government inspection is a "search" for constitutional purposes. A search occurs only where the state action intrudes upon an individual's reasonable privacy interest (**R. v. Tessling**, *supra* at para. 18 and **R. v. Evans**, [1996] 1 S.C.R. 8 at para. 11). Recognizing that it is not feasible to create a catalogue of permissible or impermissible state investigations, the Supreme Court of Canada has directed that an allegation of a s. 8 breach be assessed in the context of the "totality of the circumstances" (**R. v. Tessling**, *supra*, at para. 19).

[11] The law recognizes three primary privacy interests - personal; territorial; and informational. The origins of these privacy interests are detailed in **R. v. Tessling**,

supra. There, Binnie, J., writing for a unanimous Court, discussed informational privacy, which is the interest at issue here:

23 Beyond our bodies and the places where we live and work, however, lies the thorny question of how much *information* about ourselves and activities we are entitled to shield from the curious eyes of the state (*R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60). This includes commercial information locked in a safe kept in a restaurant owned by the accused (*R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10, at para. 16). Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others" . . .

. . .

25 Privacy is a protean concept, and the difficult issue is where the "reasonableness" line should be drawn. Sopinka J. offered a response to this question in the context of informational privacy in *Plant, supra*, at p. 293, as follows:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would *include* information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis added in original]

26 I emphasize the word "include" because Sopinka J. was clear that his illustration ("intimate details of the lifestyle and personal choices") was not meant to be exhaustive, and should not be treated as such. Nevertheless, *Plant* clearly establishes that not all information an individual may wish to keep confidential necessarily enjoys s. 8 protection.

(Emphasis added)

[12] It is not only "biographical core" information that is constitutionally protected. In *R. v. A.M.*, 2008 SCC 19, Binnie, J., writing about a police search of a high school student's backpack, said:

67 The Crown argues that in this case, as in *Tessling* and *Plant*, the information obtained is not part of a "biographical core of personal information", i.e. does not reveal intimate details about the lifestyle of the accused that he is entitled to

protect. However, *Tessling* and *Plant* were premised on the finding that the information had already escaped the possession and control of the suspect. In *Plant*, the electricity records were generated by a third party (the electrical company); in *Tessling*, information regarding the heat escaping from a house simply could not be controlled, as any home insulation salesman can tell from walking down a Canadian street after a snowfall. Here, the guilty secret of the contents of the accused's backpack was not known to third parties. It was specific and meaningful information, intended to be private, and concealed in an enclosed space in which the accused had a continuing expectation of privacy. By use of the dog, the policeman could "see" through the concealing fabric of the backpack.

68 In *Dyment*, *Plant* and *Tessling*, the various categories of "information" (including "biographical core of personal information") were used as a useful analytical tool, not a classification intended to be conclusive of the analysis of information privacy. Not all information that fails to meet the "biographical core of personal information" test is thereby open to the police. Wiretaps target electrical signals that emanate from a home; yet it has been held that such communications are private whether or not they disclose core "biographical" information: *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wiggins*, [1990] 1 S.C.R. 62, and *R. v. Thompson*, [1990] 2 S.C.R. 1111. The privacy of such communications is accepted because they are reasonably intended by their maker to be private: R. M. Pomerance, "Shedding Light on the Nature of Heat: Defining Privacy in the Wake of *R. v. Tessling*" (2005), 23 C.R. (6th) 229, at pp. 234-35. (Emphasis added)

[13] Turning back to the "totality of the circumstances" test, in **R. v. Patrick**, 2009 SCC 17, the police used evidence of criminal activity obtained from Mr. Patrick's household garbage to secure a warrant to search his house. Mr. Patrick argued that, in taking his garbage bags, the police had breached his s. 8 **Charter** right. In assessing whether Mr. Patrick had a reasonable expectation of privacy in the information contained in the garbage Binnie, J., writing for the majority, applied the following framework:

27 ...

1. What was the nature or subject matter of the evidence gathered by the police?
2. Did the appellant have a direct interest in the contents?

3. Did the appellant have a *subjective* expectation of privacy in the informational content of the garbage?
4. If so, was the expectation *objectively* reasonable? In this respect, regard must be had to:
 - a. the place where the alleged "search" occurred; in particular, did the police trespass on the appellant's property and, if so, what is the impact of such a finding on the privacy analysis?
 - b. whether the informational content of the subject matter was in public view;
 - c. whether the informational content of the subject matter had been abandoned;
 - d. whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
 - e. whether the police technique was intrusive in relation to the privacy interest;
 - f. whether the use of this evidence gathering technique was itself objectively unreasonable;
 - g. whether the informational content exposed any intimate details of the appellant's lifestyle, or information of a biographic nature.

[14] This analysis seeks to balance an individual's expectation to be free from government intrusion against the community's demand to be protected from crime. Binnie, J. wrote in **R. v. Patrick**, *supra*:

14 . . . Privacy analysis is laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy. This is inherent in the "assessment" called for by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60:

This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

...

The Personal Information Protection and Electronic Documents Act

[15] I digress at this point to discuss **PIPEDA**. This **Act** addresses the protection of personal information in the private sector. It applies to every organization except those government institutions to which the **Privacy Act**, R.S.C. 1985, c. P-21 applies. Information in the hands of Westjet is subject to **PIPEDA**.

[16] The purpose of **PIPEDA** is outlined in section 3:

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

Thus **PIPEDA** recognizes any pre-existing right to privacy but does not create any new privacy rights.

[17] "Personal information" is broadly defined in **PIPEDA** to include any and all information about an identifiable individual. **PIPEDA** sets out an organization's obligations respecting the use and disclosure of such information:

5(1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

...

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

(Emphasis added)

[18] Schedule 1, referred to in s. 5(1) above, provides:

4.3 Principle 3 — Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

4.3.1 Consent is required for the collection of personal information and the subsequent use or disclosure of this information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, consent with respect to use or disclosure may be sought after the information has been collected but before use (for example, when an organization wants to use information for a purpose not previously identified).

4.3.2 The principle requires “knowledge and consent”. Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.

...

4.5 Principle 5 — Limiting Use, Disclosure, and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

(Emphasis added)

[19] According to s. 5(1), above, an organization’s obligations in Schedule 1 are subject to the provisions of ss. 6 to 9 of **PIPEDA**. Of those enumerated sections, s. 7 is relevant here. It provides, in part:

...

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

...

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

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

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

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

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

...

(5) Despite clause 4.5 of Schedule 1, an organization may disclose personal information for purposes other than those for which it was collected in any of the circumstances set out in paragraphs (3)(a) to (h.2).

(Emphasis added)

[20] The Crown says that **PIPEDA** is not relevant for purposes of the **Charter** analysis. The **Charter** applies to actions by the state. If Westjet violated the terms

of **PIPEDA** by allowing Corporal Fraser and Constable Ruby to view the ticketing information, this does not create a **Charter** violation by the R.C.M.P.

[21] Although taking the position that Westjet's actions are irrelevant to this inquiry, the Crown further submits that in releasing the information, Westjet acted within the authority of s. 7(3)(c.1)(ii) and did not contravene the provisions of **PIPEDA**. For convenience, I repeat that section here:

7(3) . . . an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is . . .

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

. . .

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

[22] On the other hand, Mr. Chehil says that **PIPEDA** is central to the inquiry providing "clear and unequivocal support" for a reasonable expectation of privacy in travel information.

[23] While "personal information" is broadly defined in **PIPEDA**, constitutional protection under s. 8 of the **Charter** extends only to information which tends to reveal intimate details about a person's lifestyle and personal choices or specific and meaningful information intended to be private and concealed and in relation to which there is a reasonable expectation of privacy. Section 3 of **PIPEDA** recognizes only existing privacy rights. I am not persuaded that the fact that **PIPEDA** imposes limits on the use and disclosure of personal information by private enterprises results in an extension of constitutional protection to all such information in the absence of clear language to that effect. The reasonable expectation of privacy required for constitutional protection remains to be determined on the totality of the circumstances.

[24] Thus I do not accept the respondent's submission that **PIPEDA** creates a reasonable expectation of privacy interest in "personal information" as it is defined in that **Act**.

[25] Mr. Chehil further says Westjet contravened s. 7(3)(c.1)(ii) of **PIPEDA** in permitting the R.C.M.P. access to his ticketing information. The police obtained the information with the permission of Westjet. There was evidence from Westjet's head of corporate security that in doing so, the employees of Westjet did not act in accordance with the company's internal release policy. If Westjet contravened the provisions of **PIPEDA** that **Act** provides the remedy. Mr. Chehil may file a written complaint with the Privacy Commissioner (s. 11) who determines whether a complaint is initiated. Division 2 of **PIPEDA** provides a comprehensive process for the determination of complaints. I would agree with the Crown that Westjet's alleged contravention of the **Act** would not, in itself, constitute a s. 8 violation by the R.C.M.P.

[26] I will make further reference to **PIPEDA** in the context of the "totality of the circumstances" test.

The Trial Judge's Reasons on the Motion

[27] The Crown says the judge erred in law by failing to conduct the totality of the circumstances analysis mandated by the Supreme Court of Canada. This, says the Crown, led to a wrong result.

[28] Additionally, the Crown points to a number of specific errors in the reasons for judgment. The judge did not require Mr. Chehil to establish that he had a reasonable expectation of privacy in the information held by Westjet. He assumed that the application of **PIPEDA** to that information, in itself, created the necessary reasonable expectation. He was further of the view that the R.C.M.P. had not complied with the provisions of s.7(3)(c.1)(ii) in gaining access to the information. Specifically, that they did not have "lawful authority" to review the Westjet information. It is unclear whether the judge determined that the R.C.M.P. required a warrant to access the ticketing information. In any event, he found this to be a warrantless search. The judge seems to have concluded that officers Fraser and Ruby viewed the information without the permission of Westjet. This finding is

contrary to the uncontradicted evidence that they were granted access to the information by Westjet administrative staff. I would therefore infer that the judge equated the perceived non-compliance with s.7(3)(c.1)(ii) as negating the permission that was actually given. In concluding that the ticketing particulars were biographical in nature, the judge premised his finding not on the information actually available and accessed by the police, but upon that which might have been included in the record of Mr. Chehil's transaction.

[29] I would agree with the submission of the Crown that the judge erred in failing to apply the totality of the circumstances analysis to the facts before him. His decision appears to be based on his conclusion that the R.C.M.P. required, but did not have, "legal authority" to access the ticketing particulars and an assumption that **PIPEDA** creates a reasonable expectation of privacy of such information. With respect, the judge erred by failing to apply the "totality of the circumstances" test in determining whether Mr. Chehil had a reasonable expectation of privacy in the ticketing information.

The Totality of the Circumstances

[30] I will now address the various elements of the totality of the circumstances analysis as they apply here. Mr. Chehil bears an evidential and persuasive burden to establish a breach of his **Charter** right.

(i) The Subject Matter of the Search

[31] Accurately identifying the subject matter of the search is critical to the analysis. Binnie, J. wrote in **R. v. Patrick**, *supra*:

29 It is essential at the outset to identify the subject matter of the alleged search: *Tessling* (at paras. 34 and 58). In *R. v. Kang-Brown*, 2006 ABCA 199, 210 C.C.C. (3d) 317, the Alberta Court of Appeal accepted the Crown's argument that the subject matter of the sniffer-dog search was the public airspace surrounding a traveller's bag. In this Court, the subject matter was found to be the contents within, and specifically the existence of narcotics (2008 SCC 18, [2008] 1 S.C.R. 456). The differing perspectives made a major contribution to a different result.

[32] The subject matter in this case is the ticketing information maintained by Westjet – the flight number, Mr. Chehil’s name, the walk-up cash purchase of a one-way ticket and the single checked bag.

(ii) Mr. Chehil’s Interest in the Subject Matter

[33] There is no dispute that Mr. Chehil had an interest in the subject matter of the information.

(iii) A Subjective Expectation of Privacy

[34] The question under this head is not the reasonableness of Mr. Chehil’s expectation, but whether he had or is presumed to have had an expectation of privacy in the travel information revealed to the police (**R. v. Patrick**, *supra*, at para. 37). Mr. Chehil did not testify on the **Charter** motion. Consequently, there is no direct evidence about his expectation.

[35] In certain circumstances a court will infer a subjective expectation of privacy in the absence of testimony from the accused (**R. v. Law**, 2002 SCC 10 (documents locked in a safe); **R. v. A.M.**, *supra* (drugs secreted in a backpack); **R. v. Major**, [2004] O.J. No. 2651 (Q.L.)(C.A.) (drugs in a locked ‘family visits’ trailer on penitentiary grounds); **R. v. Patrick**, *supra*, (bags of garbage located on the accused’s property); **R. v. Tessling**, *supra*, (the quantity of heat generated inside a private residence)). In the case of “informational privacy”, this inference arises most commonly when the information emanates from or is contained in a private home or otherwise held privately by an accused. Such was not the case here.

[36] Mr. Chehil undertook his transaction with Westjet in full public view - carrying a single piece of luggage, he purchased a cash ticket at the check-in counter just before the boarding of the flight.

[37] There is no evidence about the nature of any contractual relationship between Mr. Chehil and Westjet as it might affect his expectation of privacy.

[38] In these circumstances, it is not reasonable to infer that he would expect that information arising from his public activities would be held confidentially by Westjet. To do so here would render this criteria meaningless.

[39] The Crown says the absence of a subjective expectation of privacy is fatal to Mr. Chehil's claim. In **Patrick** and **Tessling** the existence of a subjective expectation of privacy appears to be a prerequisite to finding a s. 8 breach. However, in the earlier case of **R. v. Edwards**, [1996] 1 S.C.R. 128, the subjective expectation was just one of the contextual factors comprising the "totality of circumstances". As Binnie, J. discusses in **Tessling**, a particularly suspicious person (whether the suspicion is warranted or not) should not be denied **Charter** protection simply because he has a significantly reduced subjective expectation of privacy. He offers the example of a person who is concerned that his telephone calls are intercepted and therefore no longer has a subjective expectation in the privacy of the communication. That person should not forfeit s. 8 protection (at para. 42).

[40] In view of the ambiguity in the case law regarding the importance of the subjective expectation I will consider the other factors relevant to the totality of the circumstances.

(iv) Was There an Objectively Reasonable Expectation of Privacy?

(a) The place where the alleged "search" occurred

[41] The place where the alleged search occurs greatly influences the reasonableness of an individual's expectation of privacy (**R. v. Tessling**, *supra*, at para. 44). In **R. v. Patrick** the Court asked: "did the police trespass on the appellant's property and, if so, what is the impact of such a finding on the privacy analysis?" (para. 27) Here the alleged search occurred at the Halifax offices of Westjet. While these are private corporate offices, the R.C.M.P.'s presence and access to the information was with the permission of Westjet employees who knew them to be police officers. There was no intrusion, for example, into Mr. Chehil's home (**R. v. Evans**, *supra*) or onto his private real property (**R. v. Patrick**, *supra*), or into his private personal property (**R. v. A.M.**, *supra*).

(b) Was the informational content of the subject matter in public view?

[42] As I have discussed above, while the Westjet electronic records were not in public view, Mr. Chehil's activities which were recorded in the ticketing information were conducted in public. He approached the Westjet ticket agent at the airport in Vancouver shortly before the flight's departure; he purchased a ticket in cash; he checked a single bag; he boarded the overnight flight to Halifax.

[43] Binnie, J. wrote for the Court in **R. v. Tessling**, *supra*:

40 It is true that a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public, or to a section of the public, or abandons in a public place . . .

(c) **Was the information already in the hands of third parties; if so, was it subject to an obligation of confidentiality?**

[44] The information was in the hands of a third party - Westjet. As I have discussed above, according to **PIPEDA** there was a conditional obligation of confidentiality. Mr. Chehil argues that the disclosure limitations in **PIPEDA** create or enhance an expectation of privacy in the ticketing information.

[45] Posted on the Westjet website is an 8 page document titled "Legal Stuff: Privacy Policy". The policy outlines Westjet's position on the collection and use of personal information and its disclosure and retention. At pages 3 and 7 under the heading of "Requirements of Government Authorities" the document states:

Because of the nature of the airline industry, and concerns with respect to safety and security, there may be situations in which Westjet is required by legal authorities to collect, use or disclose personal information about you, particularly when you are travelling with us, without your knowledge or consent. Information that we are required to collect by government authorities in either the U.S. or Canada or both, depending on your boarding location and destination, may include, as required by such authorities, your full name, date of birth, citizenship, gender, passport number and country of issuance, U.S. Visa number, Resident Alien card number, the means by which you paid for your flight, details as to how it was booked, and any other personal information collected by us as set out in this policy or as required by such government authority.

...

As mentioned above, we are required to collect personal information by government authorities in either the U.S. or Canada or both, and that information will be disclosed to the authorities without your knowledge or consent as required by law. It is the policy of Westjet to only collect and disclose what is required by law, and nothing further.

(Emphasis added)

[46] As the Crown points out, the policy is a warning to passengers that any information maintained by Westjet is subject to disclosure to the authorities. Additionally, s. 7(3)(c.1)(ii) authorizes disclosure of information for law enforcement purposes. Mr. Chehil cannot rely upon the limitations in s. 5(1) of the **PIPEDA** yet ignore the disclosure permitted by s. 7(3)(c.1)(ii) or the caution in the Privacy Policy. I am not persuaded that **PIPEDA** advances his claim that he had a reasonable expectation of privacy in the ticketing information.

(d) Whether the police technique was intrusive in relation to the privacy interest

[47] The R.C.M.P. viewed the ticketing information with the permission of Westjet employees. They did not use surreptitious means or intrusive technologies. I refer to the comments of Sopinka, J. in **R. v. Plant**, [1993] 3 S.C.R. 281 at p. 295:

The place and manner in which the information in the case at bar was retrieved also point toward the conclusion that the appellant held no reasonable expectation of privacy with respect to the computerized electricity records. The police were able to obtain the information on-line by agreement of the Commission. Accessing the information did not involve intrusion into places ordinarily considered private, as was the case in *Duarte, supra*, and *Wong, supra*. Nor did it involve invasion by state agents in personal computer records confidentially maintained by a private citizen. . . .

(e) Whether the use of this evidence gathering technique was itself objectively unreasonable

[48] The police have a general duty to investigate and prevent crime. In **R. v. Patrick**, *supra*, at para. 70 the Court asked whether the police techniques were the sort that “. . .undermine privacy and have the potential to make social life in this country intolerable....” citing the example of electronic recordings of private

conversations as in **R. v. Duarte**, [1990] 1 S.C.R. 30. Here the police did not have unlimited access to Westjet's database. They could view ticketing information only on request and with the permission of Westjet. There was no continuous, real-time monitoring of passenger manifests. This was a point in time inquiry about a particular flight.

[49] As I have already discussed, Vancouver is a known departure point for drug distribution throughout Canada. According to the Jetway profile information, drug couriers use overnight flights, buying last minute tickets in cash and carrying minimal baggage. The purpose of the police viewing of the flight manifest was to identify any passengers who fit the drug courier profile. Not knowing whether a drug courier was on the flight the police were using an investigative technique to determine if such might be the case. The application of the drug courier profile to the manifest may or may not have produced a suspect. I am not persuaded that this evidence gathering technique is unreasonable.

(f) Whether the informational content exposed any intimate details of the appellant's lifestyle, or information of a biographic nature.

[50] Not all details about a person's lifestyle and personal choices are constitutionally protected. The use of the modifier "intimate" requires that the information be deeply personal or inherently private. As discussed at para. 12 above, the categories of protected information may extend beyond the "biographical core" classification to "specific and meaningful information intended to be private and concealed in an enclosed space" (**R. v. A.M.**, *supra*, at paras. 67 and 68). Examples of the broader category include the state's electronic taping of private communications (**R. v. Duarte**, *supra*; videotaping events in a private hotel room (**R. v. Wong**, [1990] 3 S.C.R. 6); and the seizure by state agents of a blood sample (**R. v. Dymont**, [1988] 2 S.C.R. 417).

[51] The information targeted and obtained by the R.C.M.P. amounted to nothing more than Westjet's record of Mr. Chehil's public activities in transacting business with the airline. On a broad interpretation one might say that it revealed something about his lifestyle, i.e., that he chose to travel from Vancouver to Halifax. However, I reject the submission that the transactional record revealed "intimate details" of his lifestyle or personal choices or was "specific and meaningful information intended to be private and concealed".

[52] It is appropriate to consider whether the information accessed, although not itself revealing intimate details about Mr. Chehil's lifestyle or personal choices, provides a direct route to biographical core information.

[53] In **R. v. Cuttell**, 2009 ONCJ 471, [2009] O.J. No. 4053 (Q.L.) the police located an IP address that they believed was sharing images of child pornography on the internet. Upon request, Bell Canada voluntarily provided the subscriber's name and address from Bell Canada without first seeking a search warrant. Pringle, J. noted that there is an element of anonymity in the passage of information over the internet because the identity of the source is not automatically revealed. He was satisfied that although the subscriber name itself was not biographical core information, it was private information. This was so because its disclosure created a direct link to the pornographic material contained on the internet in association with the IP address. This was information revealing intimate details of the subscriber's lifestyle and personal choices (at paras. 15, 20, 21 and 23). Here, the ticketing information did not provide such a link.

[54] There was much discussion at the trial about the information that might have been attached to Mr. Chehil's records. The manifest provides an area for "comments" by the ticket agent. This could include information provided by the passenger, such as his religious faith, meal preference, or reason for travel, or it could contain observations made by the ticketing agent, all relevant to the passenger's travel. Such information might be represented by a number code but there might also be narrative comments. This section on Mr. Chehil's record was blank. However, the potential for this record to contain additional comments featured prominently in the trial judge's conclusion that the ticketing information was private in nature:

[47] I find in this case, the facts are significantly different than those in **R. v. Plant**. I conclude the details one could find on the manifest which the RCMP reviewed in the Westjet offices at Halifax Airport on the date in question could contain and reveal intimate details about both the lifestyle and/or personal choices of a member of the travelling public.

[48] I find it could include a "biographical core of personal information" which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.

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

[55] The totality of the circumstances assessment is not a theoretical inquiry. It must focus on the information actually targeted and accessed (see **R. v. Tessling**, *supra* at para. 28).

[56] I would find that the ticketing information did not reveal intimate details about Mr. Chehil's lifestyle and personal choices nor did it provide a direct link to such information.

Conclusion on the Totality of the Circumstances

[57] With respect, I would find that the judge erred in concluding that the R.C.M.P.'s viewing of the Westjet information violated Mr. Chehil's s. 8 **Charter** right. The ticketing information did not reveal intimate details of his lifestyle or personal choices and was not specific and meaningful information intended to be private and concealed. I am not satisfied that he had a reasonable expectation of privacy in the information. This was not a search within the meaning of s. 8 of the **Charter**.

[58] I find the comments of Major, J. in his dissenting judgment in **R. v. Evans**, *supra*, Gonthier J. concurring, particularly relevant here:

48 The word "search" is defined by *The Oxford English Dictionary* (2nd ed. 1989), vol. XIV as: "**1. a.** The action or an act of searching; examination or scrutiny for the purpose of finding a person or thing....Also, investigation of a question; effort to ascertain something." In this sense, every investigatory method used by the police will in some measure constitute a "search". However, the scope of s. 8 is much narrower than that, and protects individuals only against police conduct which violates a reasonable expectation of privacy. To hold that every police inquiry or question constitutes a search under s. 8 would disregard entirely the public's interest in law enforcement in favour of an absolute but unrealistic

right of privacy of all individuals against any state incursion however moderate. This is not the intent or the effect of s. 8. . . .

EXCLUSION OF THE EVIDENCE

[59] If I am wrong and this was a search which violated Mr. Chehil's s. 8 **Charter** right, I am not persuaded that admission of the evidence would bring the administration of justice into disrepute.

[60] The burden lies on the party seeking to exclude evidence to establish, on a balance of probabilities, that the admission of evidence would bring the administration of justice into disrepute. The test for determining the admissibility of the evidence under s. 24(2) in the face of a **Charter** breach, at the time of the reasons for judgment on appeal, focussed on three general areas (**R. v. Collins**, [1987] 1 S.C.R. 265 at paras. 35 to 39):

- (a) effect of the admission of the evidence on the fairness of the trial;
- (b) seriousness of the manner in which the **Charter** right was violated; and
- (c) whether the system's repute will be better served by the admission or exclusion of the evidence.

[61] In a decision pronounced after the within reasons for judgment, **R. v. Grant** 2009 SCC 32 (with companion cases **R. v. Suberu**, 2009 SCC 33 and **R. v. Harrison**, 2009 SCC 34) a majority of the Supreme Court of Canada clarified the test for admission of evidence. McLachlin, C.J. and Charron, J. wrote:

71 A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether,

considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

(Emphasis added)

[62] As to the first of the **Grant** criteria, it is evident from my analysis above that if this were a violation of Mr. Chehil's s. 8 **Charter** right, the police conduct leading to it was not a serious deviation from permissible police activity. The Jetway team did not mislead Westjet or rely on false information to gain access to the passenger record. Nor did it use surreptitious techniques or force. The information was obtained with Westjet's permission.

[63] Regarding the second criteria, this was not a serious intrusion on Mr. Chehil's right to be free from an unreasonable search. If there was an expectation of privacy here it was minimal given the nature of the information accessed and the fact that Mr. Chehil's activities leading to the record were conducted in public. I would agree with the trial judge's finding that the admission of the drugs into evidence would not render the trial unfair. The drugs were non-conscriptive real evidence in that Mr. Chehil was not compelled to participate in their discovery (**R. v. Stillman**, [1997] 1. S.C.R. 607).

[64] Finally, under the third criteria the reliability of the evidence and its importance to the prosecution case are significant factors. Exclusion of highly relevant and reliable evidence may undermine public confidence in the administration of justice (**R. v. Grant**, *supra* at para. 81). The 3 kilograms of cocaine was reliable evidence, critical to the Crown's case.

[65] Weighing these three criteria, I would find that the exclusion, not the inclusion, of the evidence would undermine the reputation of the administration of justice.

DISPOSITION

[66] I would allow the appeal and order a new trial.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.