IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. G.C., 2010 NSPC 10

Date: February 5, 2010
Docket: 2044603, 2044606
Registry: Halifax

Her Majesty the Queen

v.

G.C., a young person

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge Anne S. Derrick
Heard:	November 20, December 21, 2009, and January 18, 2010
Decision:	February 5, 2010
Charges:	Possession for the Purpose of Trafficking (s. 5(2) *CDSA* x 2)
Counsel:	Leonard MacKay - Crown Attorney Jennifer Cox and Jacqueline Porter (law student) - Defence Counsel

By the Court:

Introduction:

[1] G.C. was charged on May 20, 2009 after a search by a Halifax Regional police officer produced a small quantity of cocaine from a pocket in his jean shorts. That search has been the subject of a *Charter* challenge with the Defence arguing that the cocaine should be excluded from evidence under section 24(2) of the *Charter*.

[2] At the start of G.C.'s trial on November 20, 2009, the Crown advised that it was not seeking convictions on the offences charged - two counts of possession for the purpose of trafficking, one for cocaine and the other for ecstasy - and instead intended to prove the included offence of simple possession of cocaine by G.C. on May 20, 2009, contrary to section 4(1) of the *Controlled Drugs and Substances Act.*.

[3] After a *Charter* voir dire with evidence being heard from Cst. Swallow, the Halifax Regional Police officer who detained and searched G.C., the Defence raised the issue of G.C.'s right to counsel as a further basis for seeking the exclusion of the cocaine evidence.

[4] The only evidence called on the *Charter* voir dire was that of Cst. Swallow. G.C. did not testify.

Facts

[5] On May 20, 2009, Halifax Regional Police executed a search warrant at * in Halifax. They had obtained the warrant on the basis of reasonable grounds to believe that there were, at that address, certain items related to a recent robbery where the victim was stabbed. The police believed that L.S. had been involved in the robbery. L.S. was a resident of *.

[6] Members of the Halifax Regional Police General Investigation Section were asked to assist with the execution of the search warrant. There was a briefing session in advance of the search and the assisting GIS officers were made aware of the robbery investigation and the items listed on the warrant. One of those officers was Cst. Christine Swallow, a police officer with the Halifax Regional Police for 11 years.

[7] Cst. Swallow arrived at * with her partner, Cst. Fairbairn. She was familiar with the area - Uniacke Square - and while not familiar with this particular address, she knew generally where the house would be located. When she arrived at the property, other police officers went through the door first. As Cst. Swallow entered the home, she saw a young male run up the stairs. She told him to stop and when he didn't, she pursued him and grabbed him by his jacket. Turning him around, she was face to face with him.

[8] When she saw the young man run up the stairs, Cst. Swallow could not see one of his hands and had been unsure if there was something in it or if he was just trying to keep his pants up. As Cst. Swallow had been unable to see the young man's hands as he went up the stairs she decided to search him. Officer safety was foremost in her mind. She was concerned about weapons. She described the area they were in as "very

high crime" and "high violence." It was going through her mind that she needed to stop the young man and "see what he has." She could not immediately determine if the young man was in possession of a weapon. She focused exclusively on the young man and did not notice anything else in the house at that time.

[9] The discovery by Cst. Swallow of money and drugs on the young man led to her arresting him for possession for the purpose of trafficking. Her evidence was that, upon arrest, she gave him his rights, searched him better and turned him over to another officer who was driving the police wagon. The young man was cooperative the entire time, once Cst. Swallow had stopped him.

[10] The young man was identified as G.C.. The Defence is not putting identity in issue and concedes that G.C. was the young man detained and searched by Cst. Swallow inside the * residence. Cst. Swallow arrested him at 16:28 hours, about 3 minutes after she had arrived on the scene.

[11] When Cst. Swallow caught G.C. he was "mid-stairs." He was wearing three-quarter length jean shorts, a red nylon jacket and a red do-rag on his head. When Cst. Swallow turned G.C. around she could see his hands. She was however concerned that he had put whatever was in his hand in his pocket.

[12] In order to search him, Cst. Swallow took G.C. to the main level of the home. She had seen a bulge in his front left jacket pocket. A pat search told her it was something hard although she could not identify what it was. Reaching into his pocket, Cst. Swallow discovered a tight roll of bills in a hair elastic. After finding the money,

Cst. Swallow continued her pat search of G.C. and retrieved whatever she felt in his pockets. What she felt were several small hard objects. These turned out to be a single larger piece of crack cocaine wrapped in plastic known as an "eight-ball" and two smaller pieces of crack cocaine in tin foil. She also found a cell phone. These were found in the pockets of G.C.'s jean shorts. She found no weapons on G.C..

[13] Cst. Swallow testified that weapons can be hard to detect, and gave the example of an Exacto blade cut in half being a very small and easily concealed weapon. Cst. Swallow said that a pat-down search will not always locate a weapon because "not all the time can you feel a weapon." She said that sometimes it is easier to tell it is a weapon rather than drugs but sometimes not, as people can be creative about where they conceal things. She testified that, for officer safety purposes, she typically retrieves what she feels in pockets during a pat down search.

[14] Cst. Swallow knew of drug activity in the area of *. She was not familiar with L.S., the target of the search warrant, but she knew his name from working downtown. She associated the name with criminal activity - drugs and violence. Cst. Swallow testified that L.S. is "known for drugs." When Cst. Swallow stopped G.C. on the stairs inside * she did not know it was not L.S. She did not know who it was she had stopped and was about to search.

[15] Cst. Swallow acknowledged that instead of detaining and searching G.C., she could have arrested him for officer safety but that was not the decision she made. She testified that it was all "split-second" based on the fact that as she saw it, the young man was running from police.

Legal Principles and Analysis: The Search

[16] The search of G.C. was a warrantless search. G.C. was not asked if he consented to be searched. A warrantless search without valid consent is not considered reasonable under section 8 of the *Charter* unless (1) it is authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search was carried out was also reasonable. *(R. v. Collins, [1987] S.C.J. No. 15)*

[17] The search of G.C. was not a search incidental to arrest as G.C. was not arrested until after the search. It was a search that arose out of an investigative detention by Cst. Swallow and accordingly is governed by the principles in *R. v. Mann, [2004] S.C.J. No. 49.* As I will discuss in due course, the fundamental issue concerning the search of G.C. is whether the manner in which the search was conducted was reasonable.

[18] *Mann* recognized there is a fundamental right to be free of state interference that must be balanced with the "necessary role of the police in criminal investigation." *Mann* establishes that there is, at common law, a police power to detain individuals for investigative purposes and a "concomitant common law power of search incident to such investigative detentions." As in *Mann*, the question in this case becomes whether the search, for officer safety purposes, "fell outside the ambit of what is permissible." If I found that to have been the case, the remaining issue would be whether the crack cocaine should be excluded from evidence pursuant to section 24(2). (*Mann, paragraphs 1 - 3*)

[19] It was acknowledged by the Supreme Court of Canada in *Mann* that the mandate of the police to investigate crime and keep the peace requires the police to be empowered "to respond quickly, effectively and flexibly to the diversity of encounters experienced daily on the front lines of policing." (*Mann, paragraph 16*) According to *Mann*, in the context of an investigative detention, the police must have reasonable grounds to detain the individual and conduct a protective search of him.

[20] In *Mann*, the Supreme Court of Canada recognized the importance of ensuring officer safety, observing: "Police officers face any number of risks every day in the carrying out of their policing function, and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible...Where an officer has reasonable grounds to believe his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual. The search must be grounded in objectively discernible facts to prevent 'fishing expeditions' on the basis of irrelevant or discriminatory factors." *(Mann, paragraph 43*) The officers in *Mann* were found to have had the necessary reasonable grounds for the pat-down search of Mr. Mann. (*Mann, paragraph 48*)

[21] On the right facts, a search conducted pursuant to an investigative detention that goes beyond a pat-down search can still be found to comply with section 8 of the *Charter*. *(R. v. Batzer, [2005] O.J. No. 3929 (Ont. C.A.))*

[22] I am satisfied on the *Mann* principles, and given the following factors - the dynamic circumstances at * , the fact that a search warrant was being executed for a knife associated with a robbery, Cst. Swallow's mandate to investigate crime and keep

the peace, and G.C.'s actions - that Cst. Swallow subjected G.C. to a lawful detention and had reasonable grounds to be concerned about officer safety, thereby entitling her to engage in a protective pat-down search of him. G.C.'s actions on the stairs, especially in the context of the execution of the search warrant for a weapon and other evidence relating to a violent crime, gave Cst. Swallow the reasonable grounds to exercise physical control over him on the stairs, stopping him as he ran up them. It was then reasonable in the circumstances for her to conduct, for officer safety purposes, a protective search for a weapon. She had been unable to see G.C.'s hand as he ran up the stairs and although once she stopped him, she could see there was nothing in them, it was reasonable for her to consider that he might have concealed on his person what he had been carrying. For all Cst. Swallow knew, the young man could have been L.S. himself who was a suspect in a violent robbery: she did not know who it was she had stopped on the stairs.

[23] Cst. Swallow's pat-down search revealed something hard on G.C.'s person which she had seen as a bulge in the front pocket of his jacket. She reached into a pocket and found a wad of money held together by a hair elastic. I see nothing problematic about this. It was Cst. Swallow's evidence that she could not tell what the hard object was and, as she was searching for a weapon, she was justified in visually confirming whether the object was a weapon.

[24] The real crux of this case is what happened next. Cst. Swallow continued her pat-down search. She felt several small hard objects. She retrieved them from G.C.'s pockets. They were crack cocaine and a cell phone. This raises the question: did Cst. Swallow go too far in her pat-search of G.C. when she reached into his pocket and

found the cocaine?

[25] In *Mann*, the decision of the police officer to reach into Mr. Mann's pocket after feeling a soft object, constituted a serious violation of Mr. Mann's reasonable expectation of privacy in the contents of his pockets. *(Mann, paragraphs 49 and 56)* The soft object, which turned out to be a bag of marijuana, could not have been a weapon. Reaching in to retrieve it was not a reasonable intrusion into the privacy of Mr. Mann's pockets. The police in *Mann* were looking for someone who might have had break-and-enter tools in his possession, which could be employed as weapons. The soft object in Mr. Mann's pocket did not bear any reasonable resemblance to what was being searched for. The search was found to have violated Mr. Mann's section 8 *Charter* rights.

[26] The circumstances in this case differ from those in *Mann*. The officer in *Mann* did not indicate that he reached into Mr. Mann's pocket out of a concern for officer safety. The objects on G.C. were hard, not soft. Cst. Swallow could not tell what they were. She removed them from G.C.'s pockets to ensure he was not concealing a weapon of some kind that could pose a danger to police.

[27] At no time in her evidence did Cst. Swallow deviate from her assertion that she searched G.C. for the purposes of ensuring officer safety. I accept her evidence that the search she conducted was a protective search. There was nothing to indicate she was engaged in a fishing expedition or a search for evidence. Nor did I find anything in the evidence to suggest that Cst. Swallow initiated a protective search for officer safety but then engaged in a search to locate evidence, which would have

caused the search to lose its lawful character incidental to detention. (*R. v. Cooper, [2005] N.S.J. No. 102 at paragraph 57 (N.S.C.A.))*

[28] Cst. Swallow was also not idly wondering what G.C. had in his pockets. She had a concern for officer safety in the context of the execution of a search warrant granted to further the investigation of a violent crime. She explained that weapons can be hard to detect in a pat-down search and may be very small. This reality was recognized by the British Columbia Court of Appeal in *R. v. Crocker, [2009] B.C.J. No. 1816*: "In today's world, weapons may extend to more than conventional guns or knives, and include other forms of weaponry of microscopic size." *(Crocker, paragraph 72)* Cst. Swallow described an Exacto knife blade or razor blade cut in half as an example of the smallest weapon she has ever found. And although not mentioned by Cst. Swallow, presumably police detect small, hard objects in a pat-down searches that turn out to be bullets.

[29] Police officers have a duty to investigate crime. In this case, the police officers at *, including Cst. Swallow, were tasked with the responsibility of executing a search warrant. They were entitled to minimize the risks associated with this endeavor. Cst. Swallow acted to minimize the risk to herself and her fellow officers by detaining and searching G.C. She believed he could have hidden a weapon on his person between the time when she could not see his hands and when she could. She knew that a bladed weapon can be very small. It would have been foolhardy for her to have stopped searching G.C. once she found the money. The pat-search of G.C. was not complete at this point. The subsequent removal from G.C.'s pockets of several small hard objects was part of Cst. Swallow's efforts to ensure that G.C. would not pose a danger

to the police officers in the house, including herself.

[30] *Mann* established that the right to search a person under investigative detention does not extend to searching pockets just because they feel something in them. In this case I have had to ask myself if the evidence indicates that Cst. Swallow's search of G.C. amounted to a search of this nature. Cst. Swallow testified that if something is detected in a detainee's pocket during a pat-down search, "obviously we [meaning the police] go in." Referring to the paramount concern for officer safety, she said: "So, if there is anything in anybody's pockets, we go in after what it is." As this statement was not explored, I do not know if Cst. Swallow was talking about a general search practice or referring to what she does when she is searching a person detained during the execution of a search warrant. The statement by itself suggests an approach that was found in *Mann* to be constitutionally invalid. In light of it, I have had to consider whether it explains why Cst. Swallow searched G.C.'s pockets. Did Cst. Swallow reach into G.C.'s pockets simply because there was something in them, without a reasonable basis for thinking that the objects might pose a danger to police officers?

[31] The law is clear that searching a person's pockets is more intrusive than merely patting down the exterior of their clothing. There is a reasonable expectation of privacy entitlement associated with pockets. Reaching into one in the course of a search for no other reason than something has been felt in the course of patting down the individual is unlikely to withstand constitutional scrutiny. A search of pockets in the course of an investigative detention is not justified in all circumstances. *(R. v. Mann; R. v. S.M., [2006] O.J. No. 3775, paragraph 73)* A police officer must be able to specify the particular facts on which her belief is based that a search is necessary

for officer safety. The scope of the search must also be justifiable on an objective basis. If an officer conducting a pat-down search reached into a pocket with no subjective belief that the object being felt was a weapon, nor any objective foundation for such a belief, then, as in *Mann*, a section 8 violation would be made out. An analogy can be made with the Alberta Court of Queen's Bench decision of *R. v. Phan, [2003] A.J. No. 607* which considered police search powers in the context of a section 11 *Controlled Drugs and Substances Act* warrant: "A standard operating police practice of automatically searching all those found within searched permises, without more, will inevitably result in the systemic violation of *Charter* rights." *(Phan, paragraph 27)*

[32] The search of G.C. did not involve the automatic turning out of his pockets. G.C.'s pockets were searched when Cst. Swallow felt hard unidentifiable objects that she believed could be weapons. She reached in to safeguard officer safety. At some point the detention would come to an end, and Cst. Swallow was entitled to ensure that when this occurred she and her fellow officers were not put at risk by G.C. retaining on his person a concealed weapon. *(R. v. Ferris, [1998] B.C.J. No. 1415, paragraph 58 (B.C.C.A.))*

[33] I have been invited by G.C. to consider what Cst. Swallow might have done to alleviate her concerns for officer safety short of searching him to the point of reaching into his pockets. It has been suggested to me that Cst. Swallow could have asked G.C. what he had had in his hands, what he had in his pockets, that she could have asked him who he was and then directed him to leave the house, even hand-cuffing him for the purpose of escorting him out, if she thought it prudent to take such a precaution.

G.C. says Cst. Swallow did not try any other approaches other than one that led to a personally intrusive search of his pockets.

[34] The circumstances in which G.C. was searched are critical to an analysis of Cst. Swallow's actions. She went into * to assist in the execution of a search warrant. As she entered she saw G.C. almost coming out of the house, she thought, and then instead, running up the stairs. The execution of a search warrant was in progress. Police were investigating a robbery where the victim was stabbed. According to Cst. Swallow, "it was all split-second." The time from when she entered the house to G.C.'s arrest was three minutes. In my opinion, it is not reasonable to find, in the context of the events unfolding at * on May 20, 2009, that Cst. Swallow should have approached her responsibilities differently. That would amount to second-guessing what she did in the less than three minutes during which she detained and searched G.C. What she might have done, or should have done, had the investigative detention occurred under different circumstances is not the issue before me. The investigative detention and consequent search of G.C. can only be assessed in the context in which it occurred.

[35] I accept that Cst. Swallow had a belief, based on G.C.'s conduct and the circumstances for the police being at the house, that G.C. might be carrying weapons. In those circumstances, I find it to have been reasonable for her to believe that G.C. needed to be detained and searched for officer safety. I am further satisfied that Cst. Swallow's search of G.C.'s pockets was objectively reasonable in the circumstances. As I noted earlier, weapons like razors or small blades or bullets could reveal themselves as small, hard objects in the course of a pat-down search. I am satisfied

that Cst. Swallow's search of G.C. did not violate his section 8 *Charter* rights.

Legal Principles and Analysis: Right to Counsel on Detention

[36] As I noted earlier, G.C. has also raised the issue of his right to counsel in relation to his detention by Cst. Swallow. He submits that he was not informed of the reasons for his detention, and not provided with an opportunity to retain and instruct counsel without delay, and was thereby denied his *Charter* rights pursuant to sections 10(a) and (b).

[37] The issue of G.C.'s section 10 *Charter* rights was raised only after Cst. Swallow had testified. G.C. raised the issue in a supplementary written submission addressing section 8 of the *Charter*. Oral argument for the section 8 issue had been scheduled for December 21. After reading G.C.'s supplementary brief, I emailed Crown and Defence counsel indicating that I wanted them to address issues of notice, the Supreme Court of Canada's recent decision in *R. v. Suberu, [2009] S.C.J. No. 33* on investigative detention and section 10(b) rights, and the fact that when Cst. Swallow detained G.C. on May 20, 2009, *Suberu* had not been decided.

[38] On December 21, 2009, Crown counsel and counsel for G.C. made some brief submissions on the issue of *Charter* notice and provided me with some cases. Crown counsel submitted that notice was an issue as the section 10 argument was being raised after Cst. Swallow had given her evidence, thereby depriving the Crown of the ability to explore this aspect of the facts. However, Cst. Swallow had been asked by Crown counsel directly whether she had said "anything at the time of the detention or

during the search" to G.C. She responded by stating: "Nothing I can recall; it would basically have been 'We're here to execute a search warrant.'

[39] To ensure fair treatment of the Crown in light of the lack of notice, argument on the section 10 rights issue was adjourned. While it is my view that Defence could have given the Crown more timely notice, and could have advised the Crown even before Cst. Swallow's *voir dire* that G.C.'s right to counsel might become an issue - this possibility could have been reasonably anticipated by Defence - I am satisfied that granting an adjournment to the Crown to prepare submissions was an appropriate compromise. G.C. is entitled to make full answer and defence and I am not persuaded that I am missing any relevant evidence on this issue. Cst. Swallow has testified that she said very little to G.C., explaining no more than the fact that the police were at the house to execute a search warrant. The Crown did not make any request to have Cst. Swallow recalled for evidence on the section 10 issue, which, in my view, it could have done quite legitimately. The Crown did however file cases on January 18, 2010 and a short brief on February 5 to support its submissions on the section 10 issue.

[40] The issue of G.C.'s section 10 rights arose in the context of his investigative detention. The issue of right to counsel in this context has only very recently been clarified by the Supreme Court of Canada in *R. v. Suberu, [2009] S.C.J. No. 33*. In *Mann*, the Court had only briefly commented on sections 10(a) and (b) of the *Charter*, noting that: "At a minimum, individuals who are detained for investigative purposes must...be advised in clear and simple language of the reasons for the detention." Section 10(b) was seen as raising "more difficult issues" which the Court preferred to leave "to another day." *(Mann, paragraphs 21 and 22)*

[41] The day came on July 17, 2009 when the Court, confronting the issue directly, held that the words “without delay” in section 10(b) of the *Charter* mean ‘immediately’ and that “subject to officer safety or public safety concerns”, the police have a duty to inform the detained person of their right to retain and instruct counsel, and a duty to immediately facilitate that right. *(Suberu, paragraph 42)*

[42] There is no suggestion in this case that Cst. Swallow informed G.C. upon detention of his constitutionally-protected right to counsel. Cst. Swallow testified in her direct testimony that she informed G.C. that the police were present in the home to execute a search warrant. She testified that she did not recall saying anything else. Although she was not asked by Defence if she had told G.C. why she was detaining him, I find as a fact that on her evidence she told G.C. nothing other than the police were there to execute a search warrant.

[43] I have already determined that the detention of G.C. and his search and arrest took all of three minutes. Even in such a tight time-frame, it would have been possible for Cst. Swallow to tell G.C. why he was being detained, that it was because Cst. Swallow had concerns about officer safety and wanted to ensure he had not concealed a weapon on his person. She did not tell him that. Telling him that the police were at the house to execute a search warrant did not tell G.C. why he was being detained. G.C. was entitled to know and it would have been possible for Cst. Swallow to have told him, even while adverting to officer safety.

[44] Before I address the section 10(a) issue further I am going to deal with the section 10(b) (right to counsel) in the context of this case. First of all, there was the

state of the law on May 20, 2009. The law concerning the obligation of police in an investigative detention to immediately advise concerning right to counsel was in flux. The Ontario Court of Appeal decision in *Suberu*, which had been decided on January 31, 2007, was under appeal before the Supreme Court of Canada. The appeal had been heard on April 15, 2008 and the Court's decision was still pending.

[45] The Ontario Court of Appeal's position on the "without delay" requirement of the right to counsel provision in the *Charter* was less stringent than the standard ultimately set by Supreme Court of Canada. Doherty, J.A.'s acceptance of a brief interlude between the commencement of an investigative detention and the advising of right to counsel as compatible with section 10(b) rights was not endorsed by the Supreme Court of Canada. As I have noted, the Supreme Court of Canada has established that the detainee must be advised of his or her right to counsel immediately upon being detained. That is now the law. However it was not the law in May 2009. Cst. Swallow cannot be held to a standard that did not exist at the time she detained G.C. When Cst. Swallow detained G.C. she had not made up her mind that the detention would be more than a brief interval: she was intending to conduct a protective search, a decision she made in a split-second when she saw G.C. running up the stairs. It was not intended to be, nor did it become a *de facto* arrest. *(Mann, paragraph 54)*

[46] In any event, the delay in giving G.C. his right to counsel was minimal. Cst. Swallow gave G.C. his rights as soon as she arrested him. The evidence establishes that everything happened very quickly: G.C. was arrested and read his rights three minutes after Cst. Swallow saw him running up the stairs. This is not a case where any

appreciable length of time elapsed between when G.C. was detained and when he was given his right to counsel.

[47] Furthermore, there is the context of G.C.'s detention. It occurred in the course of a search warrant being executed, which Cst. Swallow was assisting. As noted in *R. v. Connor*, the routine police procedure of rounding up the occupants of a house and keeping them under police control while a search is being conducted, "is necessary to protect the efficacy of the search and to ensure the safety of the officers engaged in that search." Malloy, J. deciding *Connor* with regard to the principles set out by the Supreme Court of Canada in *Suberu*, went on to say: "It would be wholly unworkable to require police executing a search warrant to provide every person on the premises with their rights to counsel immediately upon entering those premises." (*R. v. Connor, [2009] O.J. No. 3827 at paragraph 82 (Ont. S.C.J.)*)

[48] This case is very different from *R. v. N.N. and T.O, [2009] O.J. No. 4574* where the court found the police officers had effected a detention that was a *de facto* arrest and were obligated "even under the somewhat reduced test enunciated by the Ontario Court of Appeal [in *Suberu*]" to immediately advise the young persons for the reasons for their detention and their right to counsel. *(N.N. and T.O., paragraph 42)*

[49] In May 2009, Cst. Swallow should have known that *Mann* established that her obligations under section 10(a) of the *Charter* were to provide G.C. with the reasons why she was detaining him. There was no reason not to do so. G.C. was cooperative and as he had nothing in his hands, posed no immediate threat. It would have taken seconds to tell him he was being detained for reasons of officer safety and that he

would be searched. I find that the failure to have informed G.C. why he was being subjected to an investigative detention was a breach of his section 10(a) *Charter* rights.

[50] However, I am not satisfied that Cst. Swallow breached G.C.'s right to counsel, given the state of the law at the time of his detention, the fact that he was detained in the context of a search warrant being executed, the proviso in *Suberu* that the duty to inform a detainee about his or her right to counsel is "subject to officer safety" concerns, and the fact that he was informed of his right to counsel in under three minutes from the time he was detained.

Legal Principles and Analysis: Section 24(2) and the Exclusion of Evidence

[51] Having found a breach of G.C.'s section 10(a) *Charter* rights, I must consider whether G.C. is entitled, under section 24(2) to have the evidence obtained during the search of his pockets excluded from evidence. There is no automatic exclusion of evidence in the wake of a *Charter* violation and the accused must demonstrate that admission of the evidence would bring the administration of justice into disrepute.

[52] The analysis to be conducted under section 24(2) requires an examination of three factors: (1) the seriousness of the state conduct; (2) the impact of the breach on protected interests of the accused; and (3) society's interest in adjudication of the case on its merits. *(R. v. Grant, [2009] S.C.J. No. 32 , paragraph 71)* I am required by *Grant* to "assess and balance the effect of admitting the evidence on society's confidence in the justice system" having regard to the three factors I just listed. My

role 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." *(Grant, paragraph 71)*

[53] The first of the three factors - the seriousness of the state conduct - requires an assessment to determine whether admitting the evidence would signal disregard by the court for the rule of law by reliance on evidence that was obtained through unlawful conduct. As stated in *Grant*, "The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to disassociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence and ensure state adherence to the rule of law."

[54] The failure by Cst. Swallows to advise G.C. of the reasons for his detention does not constitute in my opinion, a wilful or flagrant disregard of the *Charter*. I take into account the fact that Cst. Swallows was dealing with a "split-second" situation in the context of assisting with the execution of a search warrant. There is no suggestion that she acted other than in good faith: indeed she did give G.C. a reason for why the police were present although not why she was detaining him. Obviously, as I have found that a *Charter* breach occurred, she should have done so and presumably will in future, but in the circumstances of this case, I do not consider it necessary for the court to distance itself from Cst. Swallow's conduct by excluding the evidence she subsequently obtained.

[55] As for the seriousness of the impact on the *Charter*-protected interests of G.C., the Supreme Court of Canada in *Grant* notes that the "impact of a Charter breach may

range from fleeting and technical to profoundly intrusive." *(Grant, paragraph 76)* In the circumstances of this case, failing to tell G.C. why he was being detained does not in my opinion constitute a serious breach of G.C.'s rights. It was a relatively minimal breach. I do not consider there to be a risk that the admission of the evidence will "signal to the public that *Charter* rights...are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute." *(Grant, paragraph 76)* G.C. was detained very briefly and subjected to a quick pat-down search that involved the removal of items from his pockets. I have already found that the search did not breach his *Charter* rights. The evidence does not reveal that he was treated in a high-handed or officious manner: Cst. Swallow provided him with an explanation for the police presence. She simply did not go far enough and should have explained why the police were stopping him, not just why they were at the house. This deficiency in her explanation to G.C. does not, in my view, constitute a serious infringement of G.C.'s rights in the circumstances.

[56] The final consideration concerns society's interest in an adjudication of the case on its merits, something that cannot occur here if the evidence is excluded. There is no issue in this case of the reliability of the evidence being undermined by the *Charter* breach. I must consider whether excluding the highly relevant and reliable evidence in this case will "undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective...bringing the administration of justice into disrepute." *(Grant, paragraph 81)*

[57] In this case, the exclusion of the drugs seized from G.C. would be fatal to the Crown's case. Without the drugs the prosecution would fail. That is a factor for me

to take into account in assessing the impact of exclusion of highly reliable and pivotal evidence on the reputation of the administration of justice. *(Grant, paragraph 83)*

[58] Having undertaken the required assessment according to the legal principles articulated by the Supreme Court of Canada in *Grant*, in the specific circumstances of this case, and given the nature of the *Charter* breach in the context in which it occurred, I am satisfied on balance that the exclusion of the drugs would bring the administration of justice into disrepute. I am therefore denying G.C. relief under section 24(2) of the *Charter* and admitting the drugs seized from his pockets into evidence.