Citation: *R. v. Sanddar,* 2024 YKTC 39

Date: 20240718
Docket: 22-00260A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REX

v.

DARIN MOHINDAR HARNAM SANDDAR

Appearances:
Arthur Ferguson — Counsel for the Crown
Amy Chandler — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] CHISHOLM T.C.J. (Oral): Mr. Sanddar is charged with various firearm offences, possession of proceeds of crime, and possession of cocaine for the purposes of trafficking. These indictable offences are alleged to have occurred on July 29, 2022.

[2] The defence has brought an application to exclude evidence based on alleged breaches of ss. 8, 9, 10(a) and 10(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The initial application was filed on October 23, 2023. Although not identified as such, an amended application was filed by the defence on January 19, 2024. The Crown filed a response to the application on February 16, 2024.

[3] The evidence regarding the *Charter* application was adduced in a *voir dire*. Counsel agreed to a blended hearing whereby any admissible evidence led in the *voir dire* would become part of the trial proper.

Summary of the Relevant Evidence on the *Voir Dire*

[4] Three RCMP witnesses testified on the *voir dire*. Mr. Sanddar did not call any evidence.

Cst. M. Cook

[5] Cst. Cook is a police officer with the Whitehorse RCMP. He testified that he has four and one-half years' experience in this capacity, and that he does general duty policing including conducting traffic stops under the *Motor Vehicles Act*, RSY 2002, c. 153 ("*MVA*").

[6] On July 29, 2022, at approximately 4:30 a.m., Cst. Cook was on duty and in uniform in an unmarked police vehicle. The vehicle was equipped with emergency lights and equipment, but without decals which would identify it as a police vehicle. Cst. Cook testified that he was patrolling on the Alaska highway between downtown Whitehorse and the Porter Creek subdivision when he observed a single cab white pickup truck ("the truck") commit two infractions under the *MVA*, when it crossed over a yellow line without signalling before passing another vehicle. Cst. Cook, who testified that he was between 100 and 150 metres behind the truck at the time of the incident, pulled the truck over soon thereafter. He described the weather as clear, dry, and relatively warm. The lighting was low necessitating him to have his headlights on.

[7] When Cst. Cook exited his vehicle, he approached the passenger side door of the truck, where he spoke to the driver and sole occupant. He testified that he approached the passenger's side for safety reasons, as he was on the shoulder of a highway where vehicles travel at high speeds. He identified the driver as Darin Sanddar whom he knew from a few previous dealings. Cst. Cook testified that he informed Mr. Sanddar of the reason for the traffic stop. Mr. Sanddar produced a valid insurance card; however, he was unable to produce a registration document or a licence.

[8] Cst. Cook subsequently returned to his vehicle and contacted the dispatch operator. He testified that he learned that the truck was registered, but that Mr. Sanddar's licence was suspended. Also, the dispatch operator mentioned a complaint from the previous night of Mr. Sanddar "carrying". Cst. Cook took that to mean that the complaint was that Mr. Sanddar had been carrying a firearm. He also testified that he was aware of previous files involving Mr. Sanddar and firearms, and had heard that there had been a seizure of a firearm from Mr. Sanddar's residence a few weeks prior. Cst. Cook testified that he suspected that Mr. Sanddar could have a firearm on him because of the "carrying" complaint from the previous evening, and the information he had heard "word of mouth" of a firearm having been seized from Mr. Sanddar's house a few weeks before the traffic stop.

[9] According to Cst. Cook, he asked the dispatch operator to create a *MVA* file, and to call a tow truck. He testified that he intended to give Mr. Sanddar a ticket and have his truck towed. He also requested that another officer attend. Cst. Cook also testified that he had significant officer safety concerns. He further explained in his testimony that although a driver would normally remain in their vehicle while awaiting receipt of a

ticket, his plan was to have Mr. Sanddar sit in the back of the police vehicle based on the location of the traffic stop and his officer safety concerns. In cross-examination, he stated that if Mr. Sanddar had refused to get into the back of the police vehicle, he would have allowed him to remain outside the vehicle, but in either case, he would have conducted a pat-down search.

[10] Cst. Marland arrived on scene approximately six minutes after Cst. Cook requested back up. Cst. Marland also brought a ticket book, as Cst. Cook did not have one in his police vehicle. Cst. Cook and Cst. Marland approached the truck on the driver's side and requested Mr. Sanddar to exit the vehicle. Mr. Sanddar complied with the request. Cst. Cook testified that once Mr. Sanddar was outside the truck, knowing that his truck would be towed, he requested to bring some items with him. Cst. Cook allowed Mr. Sanddar to take a Pelican case, a socket set, and a bag of tools from the open box of the truck. He testified that he permitted Mr. Sanddar to place these items in the rear hatch of his SUV-type police vehicle for safe keeping. He also explained in court that his intention was to return those items to Mr. Sanddar once he had received his *MVA* ticket.

[11] Cst. Cook testified that his next step was to perform a pat-down search of Mr. Sanddar for weapons, however Mr. Sanddar resisted, saying that it would be unconstitutional. Cst. Cook advised him that if he did not comply, he would be arrested for obstruction. He testified that as he was about to arrest Mr. Sanddar, the accused advised him that he had a loaded firearm in his jacket pocket.

[12] Cst. Cook testified that after locating the firearm, he arrested Mr. Sanddar. In his testimony, he stated that he believed he provided the accused with his rights by memory, and once Mr. Sanddar was secured in the police vehicle, Cst. Cook read him his rights from a *Charter* card. Mr. Sanddar told him that he wished to speak to duty counsel. Cst. Cook agreed in cross-examination that he advised Mr. Sanddar that if he wanted to call counsel immediately, it would not be in private, or he could wait to make the call until they arrived at the Arrest Processing Unit ("APU"). Mr. Sanddar indicated to Cst. Cook that he would make a call upon arrival at APU.

[13] Cst. Cook explained that he subsequently searched the Pelican case, incidental to arrest, and located another firearm – which he believed to be inoperable. Inside the Pelican case, he also located a naloxone kit, which he did not search. Prior to this, Mr. Sanddar asked if he could have a cigarette and a drink from his coffee mug, which Cst. Cook allowed him to do.

[14] Cst. Cook testified that he was aware that pursuant to s. 5 of the *MVA*, it is an offence to drive without a license. He also stated in his testimony that he believed that he had the power to arrest, ticket, or summons a driver to court for an offence of this nature. In Cst. Cook's view, Mr. Sanddar was detained under the *MVA* as the officer had not yet completed and served him with a *MVA* ticket.

[15] Soon after arrival at the APU, Mr. Sanddar spoke to duty counsel. Cst. Cook subsequently seized drugs that had been located in the red naloxone kit by a corrections officer, and in the jacket pocket of the accused. Cst. Cook did not re-arrest

the accused after seizing the drugs. He also seized a cell phone and cash belonging to the accused.

Cst. K. Marland

[16] Cst. Marland testified by videoconference. She explained in her testimony that on the morning in question, she attended the Rabbit Foot Canyon area of Whitehorse, close to the Porter Creek subdivision to act as safety back up for Cst. Cook who was dealing with a prohibited driver. Cst. Marland was familiar with the accused's name, as it had come up on other files related to weapons and drugs.

[17] Cst. Marland testified that she and Cst. Cook approached the accused's vehicle on the driver's side. She was present when Cst. Cook requested Mr. Sanddar to exit his truck. After the accused moved some items from the truck to Cst. Cook's vehicle, Cst. Cook told him that he was going to perform a quick pat-down search. Cst. Marland testified that Mr. Sanddar was refusing, by indicating that he did not want to be searched. After Cst. Cook told the accused that he would be arrested for obstruction if he did not comply, and then commenced the process of arresting him, Mr. Sanddar said that he had a firearm on him.

[18] Cst. Marland indicated that after the accused's arrest, she searched the truck he had been driving. She did not locate anything related to the investigation. She also assisted Cst. Cook with the firearm located in the Pelican case.

Cst. J. Savill

[19] Cst. Savill testified that he met with Cst. Cook at the Whitehorse RCMP detachment between approximately 7:30 a.m. and 8:00 a.m. on July 29, 2022. He assisted Cst. Cook with the processing of exhibits, and later recommended charges with respect to the firearms seized.

[20] Cst. Savill also testified that he attended the APU at 10:06 a.m. He spoke to Mr. Sanddar to advise him of the new charges that he was facing. Cst. Savill Chartered and cautioned the accused who declined to speak to duty counsel again.

Issues

[21] The issues argued on the *voir dire* are:

1. Section 9 of the *Charter* – Did the initial motor vehicle stop of Mr. Sanddar amount to an arbitrary detention?

2. Sections 8 and 9 of the *Charter* - Did the detention of Mr. Sanddar outside of his truck result in an arbitrary detention and a subsequent unlawful search?

3. Section 10(b) of the *Charter* - Was there an informational and/or implementational breach?

4. Sections 10(a) and 10(b) of the *Charter* – Was there a breach of Mr. Sanddar's s. 10 rights as a result of a failure to re-Charter him?

5. Section 24(2) of the *Charter*.

Positions of the Parties

Defence

Arbitrary detention (s. 9 of the *Charter*)

[22] First, the defence asserts that Cst. Cook engaged generally in an arbitrary practice of conducting a certain number of motor vehicle stops each shift, in a quota-like fashion. Additionally, in this matter, Cst. Cook initiated a traffic stop, on an arbitrary basis, as his stated reason for the stop does not accord with what is depicted in the video recording from his vehicle.

[23] Additionally, the defence says that Cst. Cook had no further grounds for detaining Mr. Sanddar. The police officer's continued detention of him, after the *MVA* investigation was complete, by requiring him to exit his vehicle, also constituted an arbitrary detention. The defence submits that the powers of a police officer in a situation such as this is limited to the roadside and must be brief unless police establish other grounds to permit a further detention. Cst. Cook had no grounds to remove Mr. Sanddar from his vehicle and place him in the police cruiser. The defence contends that the officer did this because of information that he had received about Mr. Sanddar's alleged association with guns. Based on this information, Cst. Cook decided to go on a fishing expedition.

[24] The defence contends that the nature of Mr. Sanddar's detention is comparable to the decision in ***R.*** v. ***Aucoin***, 2012 SCC 66, as opposed to other jurisprudence related to investigative detention. That being said, the defence reiterates that the entire basis for Mr. Sanddar's detention is absent, and, in any event, the detention must be

reasonably necessary, as opposed to the police acting upon a hunch. The defence argues that the nature of the detention of Mr. Sanddar was more intrusive on his liberty interest than was reasonably necessary to address Cst. Cook's perceived risk.

Section 8 of the *Charter* – Unlawful Search and Seizures

[25] The defence asserts that the arbitrary detention of Mr. Sanddar led to an unlawful search and seizure at roadside. This unlawful search and seizure led to other unlawful searches and seizures at the APU. The defence argues that since the s. 9 breach allegation is combined with a s. 8 breach allegation, the burden is on the Crown to prove the arrest was lawful, as the Crown must prove that the search was incident to a lawful arrest.

Sections 10(a) and 10(b) of the *Charter* – Breach of Rights to Counsel

[26] The defence submits that Cst. Cook's failure to inform Mr. Sanddar of the informational component of his right to counsel and to implement that right without delay upon his detention was a breach of his s. 10 rights. Also, at roadside, when Cst. Cook offered Mr. Sanddar a phone call to counsel, he specifically told him that it would not be private, despite testifying to having previously provided privacy to other accused at roadside. Additionally, the defence asks the Court to consider that in this matter there was a delay of 34 minutes before leaving the scene for APU.

[27] In terms of the delay in informing Mr. Sanddar of a change in his jeopardy, the defence argues that this should have occurred soon after the correctional officer advised Cst. Cook of suspected illicit drugs being found in the naloxone kit which had

been located in the orange Pelican case that Mr. Sanddar had requested he be allowed to take from the scene when he learned his truck would be towed. The defence points to the evidence of Cst. Cook who testified that he had formed reasonable grounds to believe that Mr. Sanddar was in possession of illicit drugs for the purpose of trafficking at that time, yet Mr. Sanddar was not advised of this until hours later. The defence argues that at the time Cst. Cook formed these grounds, Mr. Sanddar was speaking to duty counsel from the APU, and that if he had been advised of these new charges, he could have discussed his increased jeopardy with counsel.

Section 24(2) of the *Charter* – Exclusion of Evidence

[28] The defence submits that the Court must consider the cumulative nature of the breaches in this matter. They demonstrate a pattern of disregard for the constitutional rights of Mr. Sanddar. In addition to the ss. 8 and 9 breaches, the police failed to hold off asking a question of Mr. Sanddar about the operability of a firearm before he exercised his right to counsel. They also did not advise Mr. Sanddar of his change in jeopardy for approximately five hours. The defence argues that due to the number and nature of the breaches, the Court should disassociate itself from them by excluding the evidence obtained by the police.

Crown

[29] The Crown opposes the *Charter* application and maintains that Mr. Sanddar's ss. 8, 9 and 10 *Charter* rights were not violated, and further submits that even if a breach pursuant to ss. 10(a) or 10(b) occurred at the APU, no remedy is available as no

evidence was obtained as a result. Additionally, if a breach occurred, the evidence should not be excluded pursuant to s. 24(2).

Sections 8 and 9 of the *Charter* – Unlawful Search and Seizures; Arbitrary detention

[30] In terms of ss. 8 and 9, the Crown submits that there are three questions to be answered with respect to what occurred when police stopped Mr. Sanddar: was the roadside stop lawful; was the detention lawful and was the manner of detention (i.e. pat-down search) reasonable.

[31] Regarding the lawfulness of the traffic stop, the Crown says that Cst. Cook observed a traffic violation which prompted him to pull over the driver. According to the Crown, there is no dispute that the driver did not signal when passing the vehicle in front of him, an offence under the *MVA*. Additionally, it is argued that the driver did not comply with a traffic control device (i.e. a directional arrow), contrary to s. 159 of the *MVA*. The Crown points out that Cst. Cook only identified Mr. Sanddar as the driver after pulling him over.

[32] In terms of the lawfulness of the detention, the Crown submits that s. 106 of the *MVA* authorized Cst. Cook to have Mr. Sanddar bring his vehicle to a stop; to have him provide information required by the officer respecting the driver or the vehicle; and, to have Mr. Sanddar remain stopped until permitted by the officer to leave. Since Cst. Cook learned, while performing these duties, that Mr. Sanddar was suspended under the *MVA* from driving, and thus committing an offence under s. 5 of the *MVA*, the Crown contends that Cst. Cook was authorized to have him remain at the scene. The

detention of Mr. Sanddar was lawful as no ticket had been issued and the truck the accused was driving had not been towed.

[33] The Crown submits that Mr. Sanddar's change in detention after exiting his vehicle was reasonably necessary in all the circumstances. As his truck was to be towed, he could not remain in it. Additionally, there were officer and public safety concerns due to the location of the traffic stop and the time of night. Lastly, there were officer safety concerns based on information that Cst. Cook had regarding the accused.

[34] The Crown maintains that the manner of detention in this case was reasonably necessary in the circumstances. In other words, the Crown asserts that Cst. Cook's pat-down search of Mr. Sanddar was reasonably necessary in this case. The Crown submits that Supreme Court of Canada jurisprudence in this area supports the actions of Cst. Cook.

Sections 10(a) and 10(b) of the *Charter* – Rights to Counsel

[35] In term of the alleged s. 10 breach allegation roadside, the Crown argues that the right to counsel only arose at the time of Mr. Sanddar's arrest for the initial firearm offence, as opposed to at the time of the initial stop. Mr. Sanddar declined to exercise his right to counsel roadside, and instead asked the police if he could smoke a cigarette and drink a beverage from his vehicle. The Crown further argues that any further delay in departing the scene was to enable Cst. Cook to lawfully search, and subsequently secure, the contents of the Pelican case that Mr. Sanddar had asked to take with him when informed the truck that he was driving would be towed. The Crown states that the

APU was a short distance away, and Mr. Sanddar was given the opportunity to exercise his right to counsel upon his arrival there.

[36] In respect to the alleged s. 10(a) and 10(b) breaches at the APU, the Crown submits that any breach of Mr. Sanddar's rights does not grant a remedy in this case as no evidence flowed from the breach. Secondly, it is argued that any breach of his s. 10 rights was technical and of no impact.

Analysis

1. Section 9 – Did the initial motor vehicle stop of Mr. Sanddar amount to an arbitrary detention?

[37] Section 106 of the *MVA* permits roadside detention by a peace officer:

> Every driver shall, on being signalled or requested to stop by a peace officer in uniform, immediately
>
> (a) bring their vehicle to a stop;
>
> (b) furnish any information respecting the driver or the vehicle that the peace officer requires; and
>
> (c) remain stopped until they are permitted by the peace officer to leave.

[38] The defence contends that Cst. Cook, in pulling over Mr. Sanddar, was attempting to fill a self-imposed quota of motor vehicle stops, which it is argued was his general practice. I do not find this argument compelling. Although Cst. Cook stated that he attempted each shift to stop between five and 10 vehicles, there was no indication in his testimony that he felt obliged to do so, or that he did so in an arbitrary manner. Indeed, in the matter before me, he did not even have a ticket book with him when he

pulled over Mr. Sanddar. He also testified that typically he gave motorists verbal warnings as opposed to tickets.

[39] In the present case, I accept the officer's testimony that he initiated a traffic stop because he believed the driver of the white pickup truck, who turned out to be Mr. Sanddar, had contravened the *MVA*, by crossing over a yellow line and by not signalling.

[40] Additionally, I am unable to accept the defence contention that because Cst. Cook testified in cross-examination, upon reviewing in court the Watchguard video taken from his police vehicle, that Mr. Sanddar had not, in fact, crossed a solid yellow line on the highway, as the officer had initially testified, that the motor vehicle stop was arbitrary. Cst. Cook initially testified that he was 100 to 150 metres behind the truck when he noted the truck cross a yellow line without signalling. The incident in question occurred at twilight. The WatchGuard video (Exhibit 1 on the *voir dire*), from the vehicle Cst. Cook was operating, depicts the truck moving into a turning lane (marked with left arrows) without signalling, and passing the vehicle in front of it. In further examining the video, it appears that the truck accessed this turning lane by driving over a painted median with yellow stripes.

[41] It is important to note that as soon as the truck moved, without signalling, into the lane marked with left arrows, Cst. Cook turned on his emergency lights and sped up to ultimately pull over Mr. Sanddar. I accept Cst. Cook's testimony that he believed the driver of the truck had violated two provisions of the *MVA*. I therefore find that Cst.

Cook's detention of Mr. Sanddar for *MVA* contraventions, that he believed had occurred, was perfectly lawful.

[42] Objectively, having reviewed the video, in my view, Cst. Cook, as stated in his testimony, had, at the very least, grounds to pull over the truck based on Mr. Sanddar not signalling his intention to move from one traffic lane to another (s. 147(2)(a) of the *MVA*). Additionally, as noted, Mr. Sanddar appears to have accessed this turning lane by driving over a painted median with yellow stripes. Finally, he used the left turning lane as a passing lane, which would appear to be an offence under s. 159(1) of the *MVA*.

[43] I find that Cst. Cook's motor vehicle stop of Mr. Sanddar was not arbitrary.

2. Did the detention of Mr. Sanddar outside of his truck result in an arbitrary detention and an unlawful search?

[44] Cst. Cook detained Mr. Sanddar roadside pursuant to s. 106 of the *MVA*. He did so to enforce provisions of the *MVA* which he believed Mr. Sanddar had contravened. It is without question that the police have the authority to enforce laws relating to the operation of a motor vehicle on a public highway. In ***R.*** v. ***Woody***, 2018 BCSC 2275, at para. 34, the Court considered the power of the police under British Columbia motor vehicle legislation.

> If the officer's basis for stopping the vehicle relates to enforcement of traffic or vehicle safety laws, then the resulting detention may be authorized or justified by the *Motor Vehicle Act*, R.S.B.C. 1996 c. 319. To be more precise, there are two different bases on which a vehicle stop related to enforcement of traffic or vehicle safety laws will be authorized under the *Motor Vehicle Act*. On the one hand, where the vehicle stop is based on an observed traffic infraction or violation of the *Motor Vehicle*

> *Act* or its regulations, then the resulting "detention" is authorized under the *Act* and therefore does not infringe s. 9 of the *Charter*: *R. v. Kaddoura*, 2009 BCCA 113 at para. 12-13. On the other hand, where the vehicle stop is a random stop to enforce traffic or vehicle safety laws, the detention of the driver is arbitrary under s. 9 of the *Charter*, but justified as a reasonable limit under s. 1 of the *Charter* so long as the actions of the police fit within the pressing and substantial objective of promoting traffic safety: *R. v. Nolet*, 2010 SCC 24, at para. 22.

[45] This passage regarding the authority of police is equally applicable with respect to motor vehicle legislation of other provinces and territories, including the Yukon *MVA*.

[46] Cst. Cook intended to ticket Mr. Sanddar for driving while suspended, since he was driving without an authorizing licence. He had not written the ticket because he was awaiting another officer to bring him his ticket book and because he wanted another officer present due to safety concerns. As he had called for a tow truck to attend to remove the vehicle from the highway, Mr. Sanddar could not remain in the vehicle. Mr. Sanddar continued to be lawfully detained during this process.

[47] The issue to be determined is whether the removal of Mr. Sanddar from his vehicle and the subsequent pat-down search of Mr. Sanddar was reasonably necessary. Cst. Cook testified that he intended to do a pat-down search of Mr. Sanddar before placing him in the rear of the police vehicle.

[48] In ***Aucoin***, the Supreme Court of Canada considered the police's authority to detain a motorist in the rear of a police vehicle during a roadside stop for regulatory infractions. The Court clarified, at the outset, that it was not an investigative detention case. The driver's detention for the motor vehicle infractions was lawful because the officer believed the driver had violated two provisions of the motor vehicle legislation.

The pat-down search and detention in the police vehicle occurred after the investigation was complete. The driver was to be detained in the police vehicle while the officer wrote up motor vehicle tickets.

[49] The Court found that the ensuing problem arose due to the change in the driver's detention in the context of being searched and placed in the police vehicle. This "altered the nature and extent" of the driver's "detention in a fairly dramatic way" (para. 34). The Court described the police decision as having "fundamentally altered the nature of [the driver's] ongoing detention" (para. 30).

[50] The majority of the Court pointed out that the issue was not whether the officer had the authority to detain the driver in the rear of the police vehicle, the question was "whether he was justified in" exercising his authority in the manner in which he did in the circumstances of the case (para. 35). In other words, the question to be asked was whether the detention in the police vehicle was reasonably necessary.

[51] In the matter before me, Cst. Cook decided to have Mr. Sanddar exit his truck. This resulted in increased restrictions on Mr. Sanddar's liberty and privacy interests. However, the context of stop must be remembered. It occurred on a high-speed highway, in the early morning hours, prompting Cst. Cook to ensure that it was conducted safely. Mr. Sanddar could not remain in his vehicle because it was going to be towed. Importantly, Cst. Cook had relevant and specific information about Mr. Sanddar which raised significant officer safety concerns. In the circumstances, the change in the nature of the detention of Mr. Sanddar did not render it arbitrary, because the detention was reasonably necessary.

[52] Although Cst. Cook initially intended to have Mr. Sanddar sit in the back of his police cruiser while he wrote out the ticket, he testified that had Mr. Sanddar refused to enter the police vehicle, he would have nonetheless conducted a pat-down safety search, before allowing him to remain standing outside the police vehicle while he wrote the ticket.

[53] In fact, it was during Cst. Cook's attempt to perform a pat-down search of Mr. Sanddar, and while telling him he would be arrested for obstruction of justice for non-compliance, that Mr. Sanddar advised Cst. Cook that he was carrying a loaded firearm in his jacket pocket.

[54] The Supreme Court of Canada and Courts of Appeal have considered the issue of pat-down or frisk searches in a number of cases.

[55] In the context of an investigative detention, in ***R.*** v. ***Mann***, 2004 SCC 52, the Court discussed issues of police officer safety, at para. 43:

> … Police officers face any number of risks everyday 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. As noted by L'Heureux-Dubé J. in *Cloutier*, *supra*, at p. 185, a frisk search is a "relatively non-intrusive procedure", the duration of which is "only a few seconds". Where an officer has reasonable grounds to believe that 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.

[56] In ***R.*** v. ***Dhillon***, 2023 BCCA 38, the Court helpfully reviewed the history and the state of the law in regard to safety or pat-down searches. In that case, police conducted a Motor Vehicle Act stop in the Downtown East side of Vancouver. The police decided

to conduct a pat-down search because of safety concerns stemming from Mr. Dhillon's behaviour. He was uncooperative when one of the police officers attempted a pat-down search. He began turning his body and moving away from the officer to shield a bag or "man-purse" that was hanging from him. As the officer was concerned that there was something in the bag that could harm her, she placed Mr. Dhillon in handcuffs. Based on her observations, the officer then detained him for a drug investigation and read him his *Charter* rights. When the officer continued her pat-down of Mr. Dhillon, she realized that he could still reach the bag. She had the other officer pin down one of his arms against the vehicle to allow her to continue the search. She put her hand on the bag and recognized a bulge in the bag to be a gun.

[57] The main issue on appeal was whether the trial judge had applied the correct test in determining that the police officer was justified in conducting the safety search that led to the discovery of the handgun. Mr. Dhillon argued that before conducting a protective or safety search, the police must have objectively reasonable grounds to believe that there is an "imminent threat" to their safety or the safety of others.

[58] The Court of Appeal disagreed. It held, at para. 101, that:

> Ultimately, the test for justifying a safety search incident to investigative detention must balance the privacy interests of the detained individual with the interests of the police officers in maintaining their safety and the safety of the public. <u>That balance is maintained by permitting an officer to engage in a protective or safety pat-down search of a detained individual when the officer has reasonable grounds to suspect that there is a risk to their safety, or the safety of others, which would be addressed by an immediate search.</u> The reasonable suspicion must be based on "objectively discernible facts", rather than on a hunch or vague concern for safety, and must be conducted in a reasonable and minimally intrusive manner... [emphasis added]

See also, ***R.*** v. ***Webber***, 2019 BCCA 208, at paras. 59 to 61.

[59] The Court of Appeal found that the trial judge had correctly held that the police had not breached Mr. Dhillon's rights under s. 8 of the *Charter*.

[60] The defence argues that the nature of Mr. Sanddar's detention is comparable to the decision in ***Aucoin***, as opposed to other jurisprudence related to investigative detention. However, in ***R.*** v. ***Patrick***, 2017 BCCA 57, leave to appeal to SCC ref'd [2017] S.C.C.A. No. 108, the Court of Appeal held that there could not be two different tests for safety searches, i.e. one standard for a stand-alone safety search and another standard for a safety search incidental to investigative detention. At para. 93, the Court stated:

> ...It would be incongruous to bring a more restrictive interpretation to the scope of permissible searches in an investigative detention context – a context in which the police have already formed reasonable grounds to suspect that the detained individual is connected to a particular crime and that his or her detention is necessary – than in the safety search context.

[61] In ***R.*** v. ***Anderson***, 2019 NSPC 29, a decision analogous to the one before me, police determined that Mr. Anderson was a revoked driver when they stopped him at a random checkpoint. He had a criminal record, including convictions for violence, and had links to criminal files involving serious offences of violence. The police officer dealing with Mr. Anderson was very concerned about this information and advised his partner about the safety risk. The officers decided to have Mr. Anderson exit his vehicle and pat him down for officer safety reasons prior to issuing a ticket and having the vehicle towed. The Court held that the pat-down search, which led to the discovery of a loaded handgun, was reasonable in all the circumstances.

[62] In the matter before me, Cst. Cook considered the following circumstances in regards to the risk of officer safety:

- The non-residential location of the motor vehicle stop, in an area where vehicles travelled at high speeds;

- The information from the dispatch operator of a complaint from the previous night of Mr. Sanddar “carrying”. Cst. Cook understood this to mean that there had been a report of Mr. Sanddar carrying a firearm the previous evening.

- Cst Cook’s awareness of previous police files involving Mr. Sanddar and firearms, including information he had received “word of mouth” of a seizure of a firearm from Mr. Sanddar’s residence a few weeks prior.

[63] As a result, Cst. Cook had “significant officer safety concerns” and asked that another officer attend the scene. Cst. Cook suspected that Mr. Sanddar could have a firearm on him because of the complaint from the previous evening, as well as the information of a firearm having been seized from his house.

[64] I am satisfied that Cst. Cook articulated his suspicions as to why a pat-down search was reasonably necessary in these circumstances. He had a genuine concern for his safety and the safety of his partner.

[65] Additionally, I find that Cst. Cook’s suspicion was, in fact, objectively reasonable in all the circumstances. The location of the traffic stop was in a secluded non-residential area, at a time when the lighting was low. Cst. Cook had knowledge of

previous police files involving Mr. Sanddar and firearms. He had relatively recent information of a firearm having been seized from Mr. Sanddar's house, and, importantly, there was a complaint from the previous evening of Mr. Sanddar carrying a firearm. Police are entitled to minimize risks to themselves and others to the greatest extent possible. Cst. Cook intended to issue a ticket to Mr. Sanddar, and he was obligated to exit his vehicle prior to it being towed. Evidence of recent and ongoing involvement with firearms is sufficient grounds to warrant a brief, non-intrusive safety search. In all the circumstances, it was reasonably necessary for Cst. Cook to perform a minimally invasive pat-down search to ensure that Mr. Sanddar had no weapons.

[66] The detention of Mr. Sanddar outside of his truck did not result in an arbitrary detention or an unlawful search.

3. Section 10(b) of the *Charter* - Was there an informational and/or implementational breach?

[67] Although the defence submits that the ss. 8 and 9 breach allegations are the crux of Mr. Sanddar's argument on this *Charter* application, it is also alleged that there are breaches of his right to counsel. The defence maintains that Cst. Cook delayed providing the informational and implementational components of Mr. Sanddar's right to counsel after he was detained. However, as in the ***Aucoin*** case, the case at bar does not involve an investigative detention of Mr. Sanddar. He was detained initially because the officer believed he crossed a solid yellow line and did not signal his lane change. Mr. Sanddar was subsequently detained because his licence was suspended, and he was driving without an authorizing licence.

[68] There is no dispute that the police have the power to detain an individual while investigating traffic offences (***John*** v. ***Office of Independent Police Review Director***, 2017 ONSC 42, at para. 25). Although the investigation in the case at bar was complete prior to the pat-down search of Mr. Sanddar, the ticket had not yet been issued to him. Section 10(b) rights are suspended during a *bona fide* traffic stop (***R.*** v. ***Johnson***, 2013 ONCA 177; ***R.*** v. ***Samuels***, 2019 ONCJ 213, at para. 42).

[69] After the pat-down search and subsequent arrest, Cst. Cook informed Mr. Sanddar as to the reason for his arrest. Mr. Sanddar asserted his right to contact counsel at approximately 4:52 a.m. when he indicated that he wished to speak to legal aid. Soon thereafter, Cst. Cook asked Mr. Sanddar if he wanted to speak to a lawyer at that time. He added the caveat, however, that Mr. Sanddar would not be able to make a private call at roadside. Mr. Sanddar indicated that he could wait to speak to a lawyer. He ultimately spoke to a lawyer at the APU.

[70] Before leaving the scene, Mr. Sanddar asked police if he could smoke a cigarette and have his coffee mug. Cst. Cook agreed to these requests. He also searched the Pelican case, incident to the initial arrest, that had been in the truck driven by Mr. Sanddar. He located another firearm. Once Cst. Cook arrived at the APU, at approximately 5:14 a.m., he initiated efforts for Mr. Sanddar to contact counsel.

[71] Section 10(b) of the *Charter* provides that everyone has the right on arrest or detention “to retain or instruct counsel without delay and to be informed of that right”. Once a detainee is informed of this right without delay, if they have indicated a desire to exercise that right, police must provide them with a reasonable opportunity to exercise

that right (except in urgent and dangerous circumstances); and police are to refrain from eliciting evidence from them until they have had that reasonable opportunity (again, except in cases of urgency or danger) (***R.*** v. ***Bartle***, [1994] 3 S.C.R. 173 at p. 192).

[72] In ***R.*** v. ***Brunelle***, 2024 SCC 3, at para. 84, the Supreme Court of Canada reiterated that "…the law does not as yet impose a specific duty on police officers to provide their own telephones to detainees or to have inexpensive devices on hand so that detainees can exercise their right to retain and instruct counsel without delay…". However, in this matter, Cst. Cook suggested to Mr. Sanddar that a phone call to counsel could be made roadside, but that it would not be in private. Yet, he agreed that with other detainees, he had arranged for them to have private calls with counsel while seated in his police car. He offered no real explanation as to why the situation was different for Mr. Sanddar. It follows, in my view, that he could have done so for Mr. Sanddar. Mr. Sanddar's decision to wait until arrival at the APU was premised on Cst. Cook providing him with inaccurate information. As such, I find that there was a breach of his s. 10(b) *Charter* right.

4. Sections 10(a) and 10(b) of the *Charter* – Was there a breach of Mr. Sanddar's s. 10 rights as a result of a failure to re-Charter him?

[73] The defence also argues that the police breached Mr. Sanddar's s. 10(a) and 10(b) rights by not informing him of a change in his jeopardy once suspected illicit drugs were located, and Cst. Cook formed reasonable grounds to believe that Mr. Sanddar was in possession of illicit drugs for the purpose of trafficking. This occurred at approximately 5:28 a.m. Cst. Savill provided Cst. Cook with a list of proposed charges at 8:14 a.m. Police ultimately informed Mr. Sanddar of these new charges and re-

Chartered him approximately two hours later. I find that there was a breach of Mr. Sanddar's s. 10(a) and 10(b) rights for a failure to re-Charter him with respect to the new charges.

5. Section 24(2) of the *Charter*

[74] In the s. 24(2) framework, Mr. Sanddar has the onus of establishing on a balance of probabilities that the admission of the impugned evidence would bring the administration of justice into disrepute.

[75] Section 24(2) of the *Charter* allows exclusion of evidence where the evidence was "obtained in a manner" that infringed a *Charter* right. Courts have interpreted the phrase "obtained in a manner" that breached an accused's *Charter* rights so as to trigger s. 24(2). In ***R.*** v. ***Tim***, 2022 SCC 12, at para. 78, the Court sets out this guidance:

> ...
>
> 1. The courts take "a purposive and generous approach" to whether evidence was "obtained in a manner" that breached an accused's *Charter* rights (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38).
> 2. The "entire chain of events" involving the *Charter* breach and the impugned evidence should be examined (*R. v. Strachan*, 1988 CanLII 25 (SCC), [1988] 2 S.C.R. 980, at pp. 1005-6).
> 3. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct" (*Mack*, at para. 38; see also *Wittwer*, at para. 21).

4. The connection between the *Charter* breach and the impugned evidence can be "temporal, contextual, causal or a combination of the three" (*Wittwer*, at para. 21, quoting *R. v. Plaha* (2004), 2004 CanLII 21043 (ON CA), 189 O.A.C. 376, at para. 45). A causal connection is not required (*Wittwer*, at para. 21; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 83; *Strachan*, at pp. 1000-1002).

5. A remote or tenuous connection between the *Charter* breach and the impugned evidence will not suffice to trigger s. 24(2) (*Mack*, at para. 38; *Wittwer*, at para. 21; *R. v. Goldhart*, 1996 CanLII 214 (SCC), [1996] 2 S.C.R. 463, at para. 40; *Strachan*, at pp. 1005-6). Such situations should be dealt with on a case by case basis. There is "no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote" (*Strachan*, at p. 1006).

[76] The analysis is objective in that it considers whether a reasonable person informed of *Charter* values, and informed of all relevant circumstances, would view the admission of evidence in question as bringing the administration of justice into disrepute (***R.*** v. ***Le***, 2019 SCC 34, at paras. 139 and 140).

[77] I now consider the three lines of inquiry under s. 24(2) of the *Charter*.

(a) The seriousness of the *Charter*-infringing state conduct

[78] The implementation of the right to counsel was delayed from 4:52 a.m. to approximately 5:14 a.m. However, a portion of the time at roadside involved Cst. Cook searching the Pelican case, and locating a firearm, incident to the arrest of Mr. Sanddar. Another part of the time at roadside was dedicated to allowing Mr. Sanddar to smoke a cigarette and drink from his coffee mug. It is concerning that Cst. Cook offered the accused a telephone call at the scene but advised him it could not be private. On the

other hand, he acceded to and accommodated Mr. Sanddar's requests to smoke a cigarette and drink from his coffee mug. Considering the amount of time that was legitimately used by the officer to properly search the Pelican case and respond to Mr. Sanddar's requests, the delay in Mr. Sanddar being able to contact counsel was not significant. However, Cst. Cook did ask Mr. Sanddar one question with respect to the operability of the firearm found in the Pelican case. The accused replied that it was disabled. The fact that the police did not hold off in asking this question increases the seriousness of the breach.

[79] In terms of the police failing to inform Mr. Sanddar of his change in jeopardy, the discovery of the illicit drugs marked a significant change in the accused's jeopardy, as the *Controlled Drugs and Substances Act*, SC 1996, c. 19 ("*CDSA*") charges, for example, are significant - with a maximum penalty of life imprisonment. Cst. Cook could have advised Mr. Sanddar of the new charges soon after he learned about the discovery of illicit drugs and permitted him to speak to counsel. In fact, at that very time, Mr. Sanddar was in conversation with duty counsel. It would have been an appropriate time to advise him of the drug charges. At the same time, as stated in ***R.*** v. ***Arsenault***, 2023 NSCA 10, at para. 42, these s. 10(a) and s. 10(b) breaches were technical in nature. The violation did not seriously compromise the interests underlying the s. 10(b) rights. Although the risk of self-incrimination existed, the police did not question him, and he did not inadvertently incriminate himself.

[80] In ***Arsenault*** the Court stated, at para 42, "…A merely technical breach goes to the issue of the seriousness of the *Charter*-infringing state conduct and is much less likely to pull toward the exclusion of the evidence…".

[81] Overall, having considered the impact of the *Charter*-infringing state conduct, this factor moderately favours exclusion of the officer's question and Mr. Sanddar's response at roadside.

(b) Impact of the breach on Mr. Sanddar's *Charter*-Protected rights

[82] Although the delay in Mr. Sanddar being able to speak to counsel initially was not significant, it is nonetheless important that police be mindful that the right to retain and instruct counsel is without delay. If an offer is being made to an accused to access counsel at the scene of the arrest, accurate information should be provided. Also, as indicated, Cst. Cook did question Mr. Sanddar briefly with respect to the operability of the firearm found in the Pelican case. I would characterize this breach as having a moderate impact on Mr. Sanddar's *Charter*-protected interests.

[83] In terms of the failure to advise Mr. Sanddar of his change in jeopardy, I accept that he was unable to speak to counsel in a timely manner about how long his detention was likely to be and what could be done to regain his liberty. On the other hand, he did ultimately speak to a lawyer who had been made aware of all of his charges. As I understand it, he waived his right to speak to a lawyer on a third occasion prior to Cst. Savill attempting to take a statement from him. Also, it is of some significance that the Crown agreed to his release from custody later that day.

[84] Overall, this line of inquiry pulls moderately toward exclusion of the officer's question and Mr. Sanddar's response at the scene.

(c) Society's interest in the adjudication of the case on its merits

[85] It is without question that for the third line of inquiry, society's interest in an adjudication on its merits almost always favours admission of the evidence (***R.*** v. ***McGuffie***, 2016 ONCA 365, at paras. 62 and 63). That is the case here, especially given the relatively serious nature of the offences.

[86] On balance, I would not exclude any physical evidence seized, but I would exclude the question and answer about the operability of the firearm seized from the Pelican case, as it is evidence that flows directly from the breach of the right to counsel at roadside.

_____

CHISHOLM T.C.J.