S.C.C. File No.: 34349

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

BRENDAN DAVID AUCOIN

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE APPELLANT
(BRENDAN DAVID AUCOIN, APPELLANT)

(PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*)

BRIAN VARDIGANS
NOVA SCOTIA LEGAL AID
325 Main Street, Salon B
Kentville, NS B4N 1K5
Tel: (902) 679-6110
Fax: (902) 679-6177
CO-COUNSEL FOR APPELLANT

MARIE-FRANCE MAJOR
MCMILLAN LLP
300-50 O'Connor Street
Ottawa, ON K1P 6L2
Tel: (613) 232-7171 Ext. 131
Fax: (613) 231-3191
OTTAWA AGENT FOR APPELLANT

ROGER BURRILL
NOVA SCOTIA LEGAL AID
400-5475 Spring Garden Road
Halifax, NS B3J 3T2
Tel: (902) 420-6580
Fax: (902) 420-1260
CO-COUNSEL FOR APPELLANT

LEONARD J. MACKAY
PUBLIC PROSECUTION SERVICE
1400-5251 Duke Street
Halifax, NS B3J 1P3
Tel: (902) 426-0965
Fax: (902) 426-1351
COUNSEL FOR RESPONDENT

FRANCOIS LACASSE
DIRECTOR OF PUBLIC PROSECUTIONS
284 Wellington Street, 2nd Floor
Ottawa ON K1A 0H8
Tel: (613) 957-4770
Fax: (613) 941-7865
OTTAWA AGENT FOR RESPONDENT

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS

Overview of Position

1. This appeal concerns the impact of **R. v. Mann 2004 SCC 52** and the limits of an investigative detention and search incidental thereto. In this case, the Court of Appeal determined that a police search of the appellant prior to being placed in the backseat of a police cruiser for purposes of filling out a summary offence ticket for a motor vehicle offence was reasonable and that this police action did not violate the section 8 *Charter* rights of the appellant. The appellant says that, in accordance with the dissenting Judgment of Beveridge J., such a search is unreasonable and non-conforming with the principles emergent from *Mann*. The Reasons of the majority of the Court of Appeal disproportionately elevate the constitutional importance of police convenience at the expense of individual liberties. Moreover, the implications of the majority decision are such as to create a new sub-category of justifiable detention. The Court of Appeal's endorsement of this type of "process detention" is not, and cannot be, justified by established principles of law.

Statement of Facts

2. Constable Christopher Michael Burke of the Kentville Police Department was engaged in routine patrol around midnight on May 31, 2008. He happened upon a "black Chevy" on Aberdeen St. in downtown Kentville, Nova Scotia. He followed the vehicle and queried its license plate. The officer determined that the plate on the black Chevy was that of another vehicle.
[Trial Transcript, Testimony of Cst. Burke, p. 14, line 15, Record of Appellant ("R.A."), Tab D2]

3. Officer Burke pulled the black Chevy over and approached the driver's side of the car. The appellant was the driver and sole occupant.

4. Officer Burke obtained the driver's paperwork upon request and determined that the driver was the appellant.

5. The officer noticed what he thought was the smell of alcohol "emitting from his breath". Officer Burke undertook an investigation into alcohol driving related activity and requested details of the appellant's previous consumption. The officer received two different responses to his questions. Officer Burke also noticed that the appellant was a newly licensed driver.
[Trial Transcript, Testimony of Cst. Burke, p. 15, line 11, R.A., Tab D2]

6. Officer Burke requested that the appellant step out of his vehicle and accompany him back to the police vehicle. The appellant was invited to sit in the back seat of the police car with the door open to permit his feet to rest outside the vehicle.
[Trial Transcript, Testimony of Cst. Burke, p. 16, line 6, R.A., Tab D2]

7. The roadside screening device demand was read. The test was administered. The appellant blew "[p]oint-2-zero milligrams percent".
[Trial Transcript, Testimony of Cst. Burke, p. 16, line 22, R.A., Tab D2]

8. Throughout this process, Cadet Tyler Lynk "monitored" the situation from his position outside the police vehicle, near the stopped vehicle. Cadet Lynk described the appellant, from his vantage point, as "very cooperative" and "cooperative throughout". [Trial Transcript, Testimony of Cadet Tyler Lynk, p. 70, line 7, R.A., Tab D4; and Trial Transcript, Testimony of Cadet Tyler Lynk, p. 78, line 7, R.A., Tab D4]

9. Officer Burke decided to "give him a certificate of a ticket for driving with alcohol in his blood as a new driver" and to place the appellant in the back seat of the police vehicle to facilitate this.
[Trial Transcript, Testimony of Cst. Burke, p. 17, line 4, R.A., Tab D2]

10. The officer asked the appellant to step out of the vehicle and asked "if he didn't mind if I gave him a quick pat-down search…"
[Trial Transcript, Testimony of Cst. Burke, p. 17, line 11, R.A.**,** Tab D2]

11. The appellant "complied". The appellant testified that he felt he "really didn't have a choice in the matter"
[Trial Transcript, Testimony of Cst. Burke, p. 17, line 12, R.A.**,** Tab D2; and Trial Transcript, Testimony of Brendan David Aucoin, p. 134, line 17, R.A.**,** Tab D10].

12. Officer Burke checked the left side of the appellant's body. He noticed a square hard object and asked the appellant what it was. The appellant responded that it was his wallet. The officer then checked the right side of the appellant's body. When the officer got to the right pants pocket, he felt "something" and asked what it was. The appellant responded: "ecstasy".
[Trial Transcript, Testimony of Cst. Burke, p. 17, line 19, R.A.**,** Tab D2; and Testimony of Brendan David Aucoin, p. 133, line 15, R.A. Tab D10]

13. The appellant was then arrested. Officer Burke reached in the appellant's right pocket and found two small baggies of pills and some bags of white powder. Officer Burke asked the appellant what the drugs were. The appellant responded that it was ecstasy and cocaine. The appellant was handcuffed, re-searched, and his wallet, with sums of money, was seized.
[Trial Transcript, Testimony of Cst. Burke, p. 19, line 18, R.A.**,** Tab D2; and Trial Transcript, Testimony of Cst. Burke, p. 20, lines. 16-20, R.A.**,** Tab D2]

14. Officer Burke testified that it was his "standard practice" to do a pat-down search of someone who is going to be placed in his car while he completed the documentation of a ticket. [Trial Transcript, Testimony of Cst. Burke, p. 19, line 5, R.A., Tab D2; and Trial Transcript, Testimony of Cst. Burke, p. 37, line 22, R.A., Tab D2]. When, in cross-examination, he was asked why it was standard practice the following exchange occurred:

Q: So this was a stop based on the licence plate, a motor vehicle matter to start with. And at some point in time, you decided that you were going to detain him further than that.
A: Detain him further meaning?
Q: At that point, officer, was Mr. Aucoin from your point of view free to leave that evening?
A: After he was issued his documents.
Q: And why did you feel it necessary to put him in the police car and close him in a locked situation in the back of your car while you were doing up simple motor vehicle documents?
A: Well, it's common when we're out, especially when it's busy, Apple Blossom …
Q: I wasn't asking you what the common thing was. I was asking why you felt it was necessary to put him in that car with the doors locked.
A: Because it's practice for me to do that.
Q: Why?
A: Because that's what I've done. That's what I'm comfortable with.
Q: What you're comfortable with.
A: Yes.
Q: You recognized at that point he's sitting in a locked police car with no way out, right?
A: That's right.

[Trial Transcript, Testimony of Cst. Burke, p. 37, line 7 – p. 38, line 8, R.A.**,** Tab D2]

15. The officer further testified that he put the appellant in his car because:

A: His car was being removed so he couldn't go back to his vehicle. And it's Apple Blossom weekend. It was busy. And I felt if he was on the side of the road, possibly he could walk away. As I'm writing the ticket, he could disappear.

[Trial Transcript, Testimony of Cst. Burke, p. 18, line 21 – p. 19, line 2, R.A.**,** Tab D2]

16. Officer Burke additionally testified as follows in response to cross examination:

Q: And you would agree that at that point in time, when he was with you in the car, he was not free to leave.

A: The door was shut. If he would have asked the question, he was more than free to leave. But like I told you, practice for me as an alcohol-related offence, he's back in the car. It's convenient. I can watch so he doesn't walk away. He can't re-enter his vehicle. That's why.

[Trial Transcript, Testimony of Cst. Burke, p. 48, paras. 14-20, R.A.**,** Tab D2]

17. Finally, the officer, on cross-examination, testified:

Q: You knew by his licence he was a 20-year-old.
A: Yes, I did.
Q: You knew he didn't have a criminal record that you knew of.
A: That's right.
Q: You had no reason to suspect there were any drugs or alcohol or anything in that car.
A: No.
Q: Or weapons.
A: No.
Q: And yet you decided for officer-safety reasons, you claim, to do a pat-down search.
A: Yes.

[Trial Transcript, Testimony of Cst. Burke, p. 38, line 22 – p. 39, line 12, R.A.**,** Tab D2]

18. On December 8, 2009, the trial Judge rendered a decision regarding the admissibility of evidence seized by the officer as a result of the search. She made findings of fact consistent with the information provided above.

[Reasons for Judgment on *Voir Dire*, p. 202, line 20 – p. 204, line 21, R.A.**,** Tab B1]

19. The trial Judge found that: "we're dealing here with a situation that has in my view and I'm satisfied has some very unusual circumstances at play". Her Honour listed a number of factors including:

- it was late at night;
- there was no place for the officer to write out the ticket other than in the police car;
- there was no natural light there;
- the Aucoin vehicle was being removed;
- the appellant could not have been placed back in his vehicle due to his licence restrictions and alcohol consumption for fear of

> continuation of an offence under s. 100A(1) of the *Motor Vehicle Act*;
> - it was very busy during Apple Blossom time; and
> - the appellant could easily have walked away.
>
> [Reasons for Judgment on *Voir Dire*, p. 209, line 16 – p. 211, line 2, R.A.**,** Tab B1]

20. The trial Judge found that there had been no breach of the appellant's s. 8 *Charter* rights.

21. On June 25, 2010, after completion of the trial evidence, the trial Judge convicted the appellant of the charge that he:

> On or about the 31st day of May, 2008, at or near Kentville, Kings County, Nova Scotia, did unlawfully have in his possession, for the purpose of trafficking, cocaine, a substance included in Schedule I of the *Controlled Drugs and Substances Act*, S.C. 1996, c.19, and did thereby commit an offence contrary to Section 5(2) of the said Act.
> [R.A., Tab C1]

22. On August 11, 2010, the appellant was sentenced to two (2) years federal incarceration.
[Trial Transcript on Sentencing, p. 54, line 2,, R.A., Tab D29]

23. The appellant appealed to the Nova Scotia Court of Appeal on September 13, 2010, citing a number of grounds, including an error of law with respect to the admissibility of evidence ruling on December 8, 2009.

24. Hamilton J.A., (Fichaud J.A., concurring) in Reasons delivered on July 13, 2011, dismissed the appeal. Beveridge J.A., dissented on the s. 8 *Charter* ground, and ruled that the evidence seized contrary to the *Charter* breach should be held inadmissible under s. 24(2) of the *Charter*. Beveridge, J.A., would have allowed the appeal and entered an acquittal.

25. The appellant appeals to this Court as of right pursuant to s. 691(1)(a) of the *Criminal Code of Canada*.

PART II – STATEMENT OF ISSUES

26. This appeal raises the following question:

> Did the majority of the Nova Scotia Court of Appeal err in law by agreeing with the trial Judge that there was no breach of s. 8 of the *Charter of Rights* such that evidence obtained as a result of a search of the appellant's person should not be excluded from evidence pursuant to s. 24(2) of the *Charter* and the conviction upheld?

PART III – STATEMENT OF ARGUMENT

27. There are three inter-related fundamental issues that arise in this case:

1) were there lawful grounds to detain the appellant in the back seat of the police car;
2) if so, were there lawful grounds to search the appellant prior to placing him in the back seat of the police car; and,
3) if so, was the search of the appellant reasonably carried out?

Introduction

28. The pivotal case for consideration is **R. v. Mann 2004 SCC 52** [Book of Authorities of the Appellant ("B.A.A."), Tab 13]. Justice Iacobucci commenced his analysis in *Mann* with the following comments at paragraph 15:

> As stated earlier, the issues in this case require the Court to balance individual liberty rights and privacy interests with a societal interest in effective policing. Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law. The vibrancy of a democracy is apparent by how wisely

> it navigates through those critical junctures where state action intersects with, and threatens to impinge upon, individual liberties.

29. Iacobucci J. drew on the legacy of **R. v. Waterfield [1963] 1 All E.R. 659** [B.A.A., Tab 20] as incorporated into Canadian constitutional jurisprudence initially in **R. v. Dedman [1985] 2 S.C.R. 2** [B.A.A., Tab 7]. It is, perhaps, of some note that a similar historical review of the jurisprudence arising from *Waterfield* was undertaken by Beveridge J., in his analysis of the issue(s) in dissent.

30. *Waterfield*, and the "ancillary powers doctrine" has been referred to by this Court in a number of different constitutional contexts: *Dedman, supra*, (the arbitrary detention of motorists); **Cloutier v. Langlois, 1990 1 S.C.R. 158** (search incidental to lawful arrest) [B.A.A., Tab 1]; **R. v. Godoy 1999 1 S.C.R. 311** (warrantless entry into home in a 911 call situation) [B.A.A., Tab 9]; **R. v. Mann**, *supra* (investigative detention) [B.A.A., Tab 13]; **R. v. Clayton 2007 2 S.C.R. 32** (roadblock search) [B.A.A., Tab 5]; **R. v. Orbanski; R. v. Elias 2005 SCC 37** (roadside sobriety testing) [B.A.A., Tab 17]; and **R. v. Kang-Brown, 2008 1 SCC 18** (sniffer-dog searches) [B.A.A., Tab 12]. Iacobucci J. acknowledged the ancillary powers doctrine as the basis for a common law authority of investigative detention.

31. In determining the extent of the power of investigative detention, Iacobucci J. outlined some clear limitations. In assessing the *Waterfield* criteria, Iacobucci J. stated at paragraph 26:

> At the first stage of the *Waterfield* test, police powers are recognized as deriving from the nature and scope of police duties, including, at common law, "the preservation of the peace, the prevention of crime, and the protection of life and property" (*Dedman*, supra, at p. 32). The second stage of the test requires a balance between the competing interests of the police duty and of the liberty interests at stake. This aspect of the test requires a consideration of:
>
> > … whether an invasion of individual rights is necessary in order for the peace officers to perform their duty, and whether such invasion is reasonable in light of the public

> purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals.
> (*Cloutier*, supra, at pp. 181-82)

> The reasonable necessity or justification of the police conduct in the specific circumstances is highlighted at this stage. Specifically, in *Dedman*, supra, at p. 35, Le Dain J. provided that the necessity and reasonableness for the interference with and the importance of the public purpose served.

32. Thus, the pivotal second stage of the inquiry requires an assessment of both reasonableness AND necessity to interfere with liberty of the subject to be assessed on a case by case basis.

33. The majority of the Nova Scotia Court of Appeal considered only the reasonableness aspect of the detention and subsequent search. It is submitted, however, that there was absolutely no consideration of the necessity aspect of the search: see *Mann*, para. 37. As such, the majority erred in their consideration of the issue. The "*Charter* must not be seen as something to be swept away in the interests of expediency": **R. v. A.M., 2008 SCC 19**, para. 97 [Tab 2].

1. Grounds for Investigative Detention

34. Iacobucci J. in *Mann, supra*, [B.A.A., Tab 13] clearly stated that the power to detain an individual cannot be exercised on the basis of a hunch, nor should it be permitted to become a *de facto* arrest (para 35): see also, **R. v. Strilec 2010 BCCA 198**, paras. 31 – 40 [B.A.A., Tab 19]. It is respectfully submitted that, in addition to these limitations, the police should not have the power to detain for their convenience in the issuance of a motor vehicle summary offence ticket.

35. In *Mann*, this Court determined that the delicate balance between crime detection and individual freedoms was best met by recognition that police have a limited power to carry out investigative detentions in proscribed circumstances:

> The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the Simpson articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test. (*Mann*, para. 34) [B.A.A., Tab 13]

36. There are many interesting issues arising from the principles emergent from *Mann*. There has been recent judicial commentary on whether the police must be aware of a clear nexus between the detainee and a specific "recent or on-going criminal offence" to validate an investigative detention; or, whether it is only necessary to be suspicious that criminal activity has taken place: see **R. v. Yeh 2009 SKCA 582** [B.A.A., Tab 21]; **R. v. Nguyen 2008 SKCA 160** [B.A.A., Tab 16]; **R. v. Nesbeth 2008 ONCA 579** [B.A.A., Tab 15]; **R. v. Duong 2006 BCCA 325** [B.A.A., Tab 8]. Also, issues have emerged over the physical breadth/limitations of a proper search incidental to an investigative detention beyond the body to the environs of a detainee: see **R. v. Plummer 2011 ONCA 350** [B.A.A., Tab 18]. Yet, short of the case at bar, there is no judicial commentary on the propriety of an investigative detention to serve process on a detainee. The jurisprudence is clear, however, that at the very least, police interference with an individual's liberty is premised on the need to do what is reasonably necessary to effectively detect crime while interfering with fundamental rights as little as possible.

37. There was no on-going criminality here. The investigation into "alcohol related" offences was complete. The reading on the "alcotest" rendered a result that determined the end of an investigation into an allegation of impaired operation of a motor vehicle.

Officer Burke had moved to a stage in the process where he was filling out a summary offence ticket for a violation of s. 100A of the *Motor Vehicle Act*, R.S.N.S., 1989, c.293. It was a convenience for the officer to have the appellant seated in his back seat. Such a detention was not necessary to permit further inquiries into the motor vehicle licensing issue. Nor was it necessary to avoid the prospect of any on-going criminality by the appellant. The detention permitted the officer with an opportunity to sit down in his car and fill out a form. And, perhaps, more importantly for these proceedings, to conduct a search of the appellant, complete with inquiries about "hard, square" and unknown objects in his pocket. While the officer advised the Court that he had no intention of searching the appellant for drugs, it is clear that a by-product of his decision to detain the appellant while he filled out the summary offence ticket was exactly that!

2. Grounds for Search Incidental to the Detention

38. The search power incidental to an investigative detention is strictly proscribed. In *Mann, supra*, [B.A.A., Tab 13] at paragraph 40, Iacobucci J. outlined the following limitations:

> The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see S. Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2003), 2 C.R. (6^{th}) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.

39. The search here was conducted in a setting of complete cooperation by the appellant throughout. There were no reasonable grounds to believe that anyone's safety was at risk in this encounter. On the totality of the circumstances, the appellant created no risk to the officer's safety. There was no risk to the public. The appellant was only

placed in the back seat of the police car as a matter of "standard practice": not on any assessment of risk from a "front end" (per *Mann*, para. 34) analysis of the objective circumstances.

40. The trial Judge stated a number of factors that gave rise to the officer's concerns over safety (see paragraph 39 above). The majority of the Court of Appeal endorsed these factors at paragraph 26 of the Reasons for judgment:

> The issuance of the motor vehicle ticket to Mr. Aucoin was the final step of Cst. Burke's investigation into Mr. Aucoin's breach of the *MVA*. He had a duty to complete this stage of the process. He had to do this in a situation where he had essentially no back-up, it was late at night, he needed the light in the front seat of the police car to write the ticket, he could not place the appellant in the car he had been driving because it was being removed, and because it may be a continuing offence given the alcohol in the appellant's blood, and he was concerned the appellant may take off if left on his own outside the police car. In such circumstances, the brief detention of the appellant in the back seat of the police car is within the scope of the doctrine of investigative detention and is reasonable.
> [Reasons for Judgment of the Nova Scotia Court of Appeal, p. 10, para. 26, R.A., Tab B3]

41. All of these factors were indeed present in the dynamic between police officer and individual on the night of May 31, 2008. They inform the totality of the circumstances. But none of these factors speak to a necessity to search the appellant, even if the detention in the back seat of the vehicle could possibly be held to be a reasonable use of police powers. The fact that it was late at night and that the Apple Blossom festival was in full swing provides colour to the context – but not the required necessity to detain. While it is true that the Court recognized the officer's need for lighting from the front seat to write the ticket – such a point speaks to officer convenience more than necessity to restrict the mobility of the appellant. And finally, any concern that the appellant would leave was simply too remote – given the appellant's complete cooperation to this point – to invite serious consideration as a factor necessitating the search of the accused for officer safety.

42. It is true that *Mann* does "not import a requirement that there be an overt indication of violence before a protective safety search may be undertaken": see **R. v. Crocker, 2009 BCCA 1816**, para. 69 [B.A.A., Tab 6]. Further, appellate Courts should be reluctant to "second guess" an officer's testimony as to an honest belief in a need for a protective search where the officer can articulate clear and focused reasons for the risk assessment. But, in this case, nothing was offered to the Court by the witnesses of this nature other than the convenience of writing out a ticket in the front seat of the police vehicle.

43. Finally, even if there were any circumstances pointing to officer safety concerns, these circumstances were created entirely by the insistence of the police that the appellant wait for his summary offence ticket in the back seat of the vehicle. It is hardly right that the police can create circumstances of perceived danger by insisting on "standard practice" policy, and then taking advantage of such insistence to create the perception of risk/danger.

3. Manner of Search

44. Iacobucci J., in *Mann, supra,* at paragraphs 48 and 49 [B.A.A., Tab 13], in applying the principles and limits of investigative detention to the facts of that case commented on the extent, or manner, of the search:

> Furthermore, there were reasonable grounds for a protective search of the appellant. There was a logical possibility that the appellant, suspected on reasonable grounds of having recently committed a break-and-enter, was in possession of break-and-enter tools, which could be used as weapons. The encounter also occurred just after midnight and there were no other people in the area. On balance, the officer was justified in conducting a pat-down search for protective purposes.
>
> The officer's decision to go beyond this initial pat-down and reach into the appellant's pocket after feeling an admittedly soft object therein is problematic. The trial Judge found that the officer had no reasonable basis for reaching into the pocket. This more intrusive part of the search was an unreasonable violation of the appellant's

> reasonable expectation of privacy in the contents of his pockets. The trial Judge found as a fact that "there was nothing from which [he could] infer that it was reasonable to proceed beyond a pat down search for security reasons". The Court of Appeal did not give due deference to this important finding, which was largely based on the credibility of witnesses, an area strictly in the domain of the trial Judge absent palpable and overriding error: Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33. Moreover, the Crown has not discharged its burden to show on the balance of probabilities that the third aspect of the Collins test has been satisfied, namely that the search was carried out in a reasonable manner.

45. Even where the detention is lawful, if police exercise the subsequent search power outside the restrictions set in *Mann*, this action would violate s. 8 rights: see **R v. Byfield [2005] O.J. 228 (C.A.)** para. 21 [B.A.A., Tab 4]; **R. v. Batzer [2005] O.J. 3929 (C.A.)** [B.A.A., Tab 3].

46. It is submitted that the search of the appellant by Officer Burke was too intrusive and went beyond a pat-down for officer protection reasons.

47. The facts at bar are very similar to *Mann*. There is a slight variation that should have no bearing on the outcome. The police in *Mann*, while conducting a reasonably necessary pat-down, felt a "soft" object in the detainee's pocket. The searching officer reached in and pulled out a small plastic bag of marijuana (*Mann*, para. 5).

48. Officer Burke, after feeling a "hard, square" object in the left pants pocket of the appellant took the next step of asking what it was. He did not reach in and pull it out. The officer was satisfied that it was a wallet – as described by the appellant in response to the police officer's inquiry. However, when Officer Burke felt "something" in the right side pocket of the appellant, he made a further inquiry as to its nature. The appellant responded: "ecstasy". [Trial Transcript, Testimony of Cst. Burke, p. 17, line 21, R.A., Tab D2]

49. These facts present no less of a "search" than had the officer reached into the appellant's pocket and pulled the "two small baggies" out on his own. Indeed, Officer

Burke did reach into the appellant's pocket and retrieve the contraband after he was furnished with a response to his inquiries over the nature of the "something" found therein.

50. Depending on the circumstances, answering police questions may amount to the commencement of a search. It is not just the physical act of recovering the item that attracts *Charter* scrutiny. Cory J., in **R. v. Mellenthin [1992] 3 S.C.R. 615** at para. 15 [B.A.A., Tab 14] determined that improper questioning may mark the beginning of an unreasonable search that eventually results in an unconstitutional seizure. In *Mellenthin*, a driver was detained at a check stop program and subsequently quizzed about the contents of a gym bag. The questioning officer had no suspicion whatsoever that illegal drugs would be carried in the vehicle. Cory J. determined that the detained individual could reasonably infer that he was compelled to respond to police questioning. This is entirely consistent with the facts at bar.

51. As well, in **R. v. Harris 2007 ONCA 574** [B.A.A., Tab 11], Doherty J.A. stated at para. 34:

> Answers to police questions may or may not give rise to a s. 8 claim. As with other aspects of the s. 8 inquiry, a fact-specific examination of the circumstances is necessary. Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide information sought in the questions, I do not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person.

52. It is submitted that there is no functional difference between an officer reaching into a pocket and removing contraband, and asking a detainee to describe the nature of the substance and receiving a response. In either case, the searching officer did not have a concern over the "safety" aspect of the substance. The proof is in the pudding in this case -- had Officer Burke felt the substance in the right pocket of the appellant created a risk for his, or others', safety, he would have seized it on this basis. Instead, he asked the appellant to describe its nature, in the same way he had done seconds earlier with the

wallet. The officer had no real concerns over safety. The impact of his search was to have the detainee/appellant effectively turn out his pockets by honestly describing the nature of their contents. It is interesting to note that had the appellant the wherewithal to lie to the officer by referring to the contents of his right pocket as "cough drops", then the officer would not have taken further steps. The Court of Appeal's decision in this case would seem to actively encourage misleading the police in this type of setting. In any event, the inquiry by the officer had the identical impact of either having gone through the pockets themselves indiscriminately, or having had the appellant turn out his pockets on his own. In any of these three scenarios, the search was more invasive than necessary under the circumstances.
[Trial Transcript, Testimony of Cst. Burke, p. 58, line 19, R.A., Tab D2]

Conclusion

53. There is a great concern, in light of the Court of Appeal's judgment, in Nova Scotia at least, that there has been an extension of the principles outlined in *Mann* at the expense of individual liberty to accommodate the process requirements of police agencies while engaged in the execution of their duties. This is so, in the sense that police must often deal with motor vehicle infractions while alone in isolated locations (or for that matter, in very busy areas) late at night. Indeed, it would be convenient for them to adopt a "standard policy" of detaining and searching a person to whom a legitimate *Motor Vehicle Act* citation is to be prepared and issued.

54. There is an attraction to the argument that such a detention should only be of short duration, would save the state resources by ensuring efficient process of summary offence tickets, and would allow a detainee to appreciate the solemnity of the occasion.

55. Yet, this type of rationale would create a *carte blanche* to detain – precisely the situation explicitly rejected by Iacobucci J. in *Mann*. There is no such thing as "process detention" in Nova Scotia or elsewhere in the country. Nor should there be.

56. The majority of the Court of Appeal, of course, having agreed with the trial Judge made no remarks with respect to *Charter* remedies. Beveridge, J.A., however, in dissent, considered and applied the appropriate tests for exclusion/inclusion of evidence under s. 24(2) in compliance with the principles set down by this court in **R. v. Grant 2009 SCC 32** [B.A.A., Tab 10]. There can be no issue arising from this analysis. It is submitted that Beveridge J.A.'s analysis with respect to s. 24(2) is unassailable and that the evidence was properly excluded resulting in an acquittal.

PART IV – SUBMISSIONS CONCERNING COSTS

57. No costs are being sought.

PART V – NATURE OF ORDER SOUGHT

58. The appellant requests that the appeal be allowed and an acquittal be entered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of October, 2011.

ROGER BURRILL
Counsel for the Appellant

BRIAN VARDIGANS
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

CASE	**TAB**	**PARA. NO.**
Cloutier v. Langlois, 1990 1 S.C.R. 158	1	30
R. v. A.M., 2008 SCC 19	2	33
R. v. Batzer [2005] O.J. 3929	3	45
R. v. Byfield [2005] O.J. 228 (C.A.)	4	45
R. v. Clayton 2007 2 S.C.R. 32	5	30
R. v. Crocker, 2009 BCCA 1816	6	42
R. v. Dedman [1985] 2 S.C.R. 2	7	29, 30
R. v. Duong 2006 BCCA 325	8	36
R. v. Godoy 1999 1 S.C.R. 311	9	30
R. v. Grant 2009 SCC 32	10	56
R. v. Harris 2007 ONCA 574	11	51
R. v. Kang-Brown, 2008 1 SCC 18	12	30
R. v. Mann 2004 SCC 52	13	1, 28, 30, 33, 35, 36, 38, 39, 42, 44, 45, 47, 53, 55
R. v. Mellenthin [1992] 3 S.C.R. 615	14	50
R. v. Nesbeth 2008 ONCA 579	15	36
R. v. Nguyen 2008 SKCA 160	16	36
R. v. Orbanski, R. v. Elias 2005 SCC 37	17	30
R. v. Plummer 2011 ONCA 350	18	36
R. v. Strilec 2010 BCCA 198	19	34

PART VII – STATUTORY PROVISIONS

MOTOR VEHICLE ACT

Consumption of alcohol by certain drivers

100A (1) Any person who

(a) is a licensed learner;

(b) is a newly licensed driver; or

(c) has been issued a driver's license prior to the coming into force of this Section but has less than two years of experience as the holder of a class 1, 2, 3, 4, 5 or 6 driver's license as set out in regulations made pursuant to Section 66,

operating or having care and control of a motor vehicle, whether it is in motion or not, having consumed alcohol in such a quantity that the concentration in the person's blood exceeds zero milligrams of alcohol in one hundred millilitres of blood is guilty of an offence.

R.S., c. 293, s. 100(A).

Arrest without warrant

261 (1) A peace officer may arrest without warrant a person whom he finds committing an offence or has reason to believe has recently committed an offence against this Act.

(2) A peace officer making such arrest without warrant shall with reasonable diligence take the person arrested before a judge of the provincial court or justice of the peace to be dealt with according to law.

R.S., c. 293, s. 261.

CONTROLLED DRUGS AND SUBSTANCES ACT

Possession for purpose of trafficking

5(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

S.C. 1996, c. 19

Possession en vue du trafic

5(2) Il est interdit d'avoir en sa possession, en vue d'en faire le trafic, toute substance inscrite aux annexes I, II, III ou IV.

L.C. 1996, ch. 19

CRIMINAL CODE OF CANADA

Limitation

495 (2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

R.S.C., 1985, c. C-46

Restriction

(2) Un agent de la paix ne peut arrêter une personne sans mandat :

a) soit pour un acte criminel mentionné à l'article 553;

b) soit pour une infraction pour laquelle la personne peut être poursuivie sur acte d'accusation ou punie sur déclaration de culpabilité par procédure sommaire;

c) soit pour une infraction punissable sur déclaration de culpabilité par procédure sommaire,

dans aucun cas où :

d) d'une part, il a des motifs raisonnables de croire que l'intérêt public, eu égard aux circonstances, y compris la nécessité :

(i) d'identifier la personne,

(ii) de recueillir ou conserver une preuve de l'infraction ou une preuve y relative,

(iii) d'empêcher que l'infraction se poursuive ou se répète, ou qu'une autre infraction soit commise,

peut être sauvegardé sans arrêter la personne sans mandat;

e) d'autre part, il n'a aucun motif raisonnable de croire que, s'il n'arrête pas la personne sans mandat, celle-ci omettra d'être présente au tribunal pour être traitée selon la loi.

1985, ch. C-46

SUMMARY PROCEEDINGS ACT

Summary conviction provisions of Criminal Code

7 (1) Except where and to the extent that it is otherwise specially enacted, the provisions of the Criminal Code (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, mutatis mutandis, to every proceeding under this Act.

R.S., c. 450, s. 7; 1996, c. 23, s. 45.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Détention ou emprisonnement

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

Enforcement of guaranteed rights and freedoms

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

24(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.