



***THE COURT OF APPEAL FOR SASKATCHEWAN***

Citation: 2007 SKCA 147

Date: 20071214

---

Between:

Docket: 1218

Her Majesty the Queen

Appellant

- and -

Archibald Valentine Janvier

Respondent

---

Coram:

Klebuc C.J.S., Jackson & Smith JJ.A.

Counsel:

Douglas G. Curliss for the Appellant

Ronald P. Piche for the Respondent

Appeal:

From: Provincial Court

Heard: June 4, 2007

Disposition: Appeal Dismissed

Written Reasons: December 14, 2007

By: The Honourable Madam Justice Jackson

In Concurrence: The Honourable Chief Justice Klebuc

The Honourable Madam Justice Smith

## **Jackson J.A.**

### I. Introduction

[1] This appeal concerns the question whether the law permits a police officer to arrest or search someone for the summary conviction offence of possession of marihuana, without a warrant to do so, if the officer smells burned marihuana alone.

[2] Archibald Janvier was originally charged with possession of marihuana based on the smell of burned marihuana. Subsequent searches of his person and vehicle revealed eight grams of marihuana and what was thought to be a list of contacts, resulting in a charge of possession of marihuana for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.<sup>1</sup>

[3] Kalenith P.C.J. found that the search was unreasonable, excluded the evidence of marihuana and acquitted Mr. Janvier. The Crown appeals, pursuant to s. 676(1)(a) of the *Criminal Code*. I would dismiss the Crown's appeal, and sustain the acquittal.

### II. Issues

[4] The Crown sought to support the police authority to conduct the search on three separate bases: (i) pursuant to the common law power incidental to a warrantless arrest made in accordance with s. 495(1) of the *Criminal Code*;

---

<sup>1</sup> S.C. 1996, c. 19.

(ii) pursuant to the warrantless search power contained in s. 11(7) of the *Controlled Drugs and Substances Act*; and (iii) pursuant to the common law power incidental to a lawful detention.

[5] Section 676(1)(a) permits the Crown a right of appeal from an acquittal on any ground of appeal that involves a question of law alone. These are the questions of law:

1. Does s. 495(1)(b) of the *Criminal Code* permit a police officer to arrest someone for possession of marihuana based on the smell of burned marihuana alone?
2. If not, does the smell of burned marihuana alone give rise to reasonable grounds to effect a warrantless search under s. 11(7) of the *Controlled Drugs and Substances Act*?
3. If not, does a lawful detention justify a search based on the smell of burned marihuana alone?
4. If the trial judge did not err in finding the search to be unreasonable, did he err in excluding the evidence, resulting from the search, pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*?

Defence counsel did not assert that if the arrest was found to be unlawful, it was also arbitrary so as to engage s. 9 of the *Charter*. Nothing turns on this in the result, such that the issue need not be addressed.

### III. Circumstances of the Case

[6] On February 1, 2004, at 1:04 a.m., a police officer, Cst. Amundsen, saw a truck with a broken front headlight being driven by Mr. Janvier in La Loche

in northern Saskatchewan, and stopped him directly in front of the RCMP Detachment Office.

[7] Cst. Amundsen testified that when he was within a meter of the truck, he could smell burned marihuana. The strength of the odour of burned marihuana led him to conclude that someone had been smoking marihuana in the truck possibly within the past 20 minutes:

Q Okay. Just backing up, you were describing a smell and I'm not sure if the Judge was observing you. You were motioning with your hands. Can you give us a sense of how strong the smell was.

A It was very strong and it was windy out that night, windy and cold, and for me there was – it was no question that in my opinion that either someone, him I presume, had either been smoking marihuana in there as I pulled the vehicle over or possibly within the last 20 minutes, something like that.

Q Okay.

A But it was very strong.

Q Okay. And this very strong smell of marihuana, could you identify – I think you – you mentioned about somebody possibly smoking. Can you identify whether it was burning marihuana or raw marihuana product that you smelled?

A Well, my experiences, though aren't vast, I find that burnt marihuana has a more pungent odour, has a different odour to it, and in my opinion it was burnt marihuana, not packaged or raw or unburnt marihuana.

Q Okay. If you could just talk for a minute, please, about your – your experience and training, if that applies, regarding the smell of marihuana, burnt or unburnt.

A Right. Well, my life prior to becoming a police officer I was exposed to marihuana on various occasions in social situations but once I became a police officer it was – I would estimate that I made 10 to 15 very similar arrests in Assiniboia Detachment area, traffic stop, the smell of burnt marihuana coming from a vehicle and search based on that and arrest – or arrest and then search based on that and finding marihuana. Similar circumstances on previous occasions.

Q Okay. And then did you have some experience with marihuana smell after you were posted to La Loche but before this particular stop.

A I believe this was the first marihuana seizure that I made in La Loche.

Q Okay. And since this incident of February 1, 2004, have you had other investigations or opportunities to smell marihuana?

A Yes, I have.

Q Tell us about that, please.

A Well, we did a search – executed a search warrant on a house in November of 2004 where there was a lot of marihuana in that residence. Numerous times we've arrested people and searched them and found various states of marihuana, either in baggies or little pinners they call them up here, they're, little tiny, thin joints. There's been other vehicle stops made by other members where there's –

Q Okay. I'm interested in what –

A – similar smell.

Q I'm interested in what your observations –

A Oh, well, but I was with –

Q All right.

A – that they initiated where a similar smell could be identified coming from a vehicle.

Q Okay. You mentioned earlier that the – the smell from Mr. Janvier's vehicle that he was operating was very strong and you mentioned the – the wind. Why did you mention the wind?

A Because it was—it was surprising to me that even prior to – on previous occasions you might get a hint of marihuana when the driver rolls the window down and so you'll try and get closer to get a better, I guess, olfactory indication as to whether or not there is marihuana in the vehicle, but I was still probably from here to the table away, the edge of the table.<sup>2</sup>

[8] Cst. Amundsen immediately arrested Mr. Janvier, the truck's sole occupant, and proceeded to search him and his truck. He found one gram of marihuana in a clothing pocket, seven grams in a boot and a trace amount in the truck's console. The officer also found what he believed to be a list of contacts and money in denominations consistent with trafficking; hence, the replacement of the charge of possession with a trafficking charge.

---

<sup>2</sup> Trial Transcript, p. 8, line 5 to p. 10, line 25.

#### IV. Trial Judge's Decision

[9] The trial judge found that the officer's basis for proceeding to arrest and then to search Mr. Janvier for possession of marihuana was the smell of burned marihuana and suspicion as to the presence of more, unsmoked marihuana. He held that this was insufficient to provide the necessary grounds to arrest or search:

... the odour of burnt marihuana alone does not provide the necessary grounds to arrest someone. They do not provide the necessary reasonable and probable grounds. And I come to that conclusion with respect to the reasonable and probable grounds because it's my view, having considered a number of cases that have considered this, that the odour of marihuana alone indicates only that marihuana has been consumed. When it's in a confined space and, as the Crown argues in this case it being in a confined space provides reasonable and probable grounds to arrest the person who's in that confined space, I disagree with that argument. I conclude that the odour in a confined space causes suspicion, a reasonable suspicion that a person has consumed marihuana but does not provide the reasonable and probable grounds for arrest or for search. It's my view, considering the case law, that something more than mere odour is necessary.

For example, when considering that issue in the – in the decision – the *Cornell* decision, a decision of Judge Stanfield of British Columbia who is now the Head Chief Judge of the Provincial Court of British Columbia, he made reference to a situation, a personal experience where he and his wife entered onto a gondola at a ski hill area and in entering onto the gondola he stepped into a cloud of marihuana smoke, a thick, dense cloud of marihuana smoke, he indicated, and he suggested that had he been asked at the time he would have thought it absurd to suggest there weren't reasonable and probable grounds to believe the persons who just exited from the confined space had been in possession of marihuana and would have thought it would have been reasonable for a police officer to go to the next step and undertake an investigation. What existed in that case, though, was not just the odour of marihuana smoke but the dense cloud and that is one of the things that the cases refer to. The cases, in my view, refer to something more than simply the odour. The presence of a dense cloud, in my view – it doesn't even have to be a dense cloud – the actual visible smoke indicates recency of marihuana having been consumed.

In other cases the odour of marihuana on an accused person's breath, signs of the accused that are consistent with consumption of marihuana or in this case other physical things such as ash from consumption of the marihuana or butts that would indicate recent consumption are all consistent with the person in the confined space having consumed the marihuana but there is no evidence of any of

those things in this case and it's my view that, given the evidence of Constable Amundsen that he hadn't been following the vehicle before, that consumption – or that the detection of the odour could mean anything from recent consumption to consumption as long ago as 20 minutes, that while it is suspicious that the accused is present in the vehicle I conclude it shows only that marihuana was consumed in the vehicle, not necessarily that the accused is the person who consumed the marihuana in the vehicle and it's my view in the circumstances that therefore there are no the reasonable and probable grounds for arrest and there also are not the reasonable and probable grounds necessary for – that are necessary for search and that in the circumstances that amounts to a violation of section 8 which protects the accused against unreasonable search and seizure.<sup>3</sup>

Having found no authority for the warrantless search, the trial judge found a violation of Mr. Janvier's s. 8 *Charter* right to be free from unreasonable search and seizure. The trial judge then proceeded to determine the appropriate remedy for the *Charter* breach. After assessing the factors to be examined under s. 24(2) of the *Charter*, he excluded the evidence and acquitted the accused. From this, the Crown took the within appeal, arguing error with respect to the trial judge's conclusions regarding the arrest power, s. 8 and s. 24(2) of the *Charter*.

## V. Analysis

### 1. Search Incident to Arrest

#### 1.1 Was Mr. Janvier arrested under s. 495(1)(a) or (b) of the *Criminal Code*?

[10] The starting point in a case concerning the power to arrest is to determine under what authority the accused was arrested. Police powers of arrest without warrant are contained in s. 495(1) of the *Criminal Code*:

**495 (1) Arrest without warrant by peace officer** – A peace officer may arrest without warrant

---

<sup>3</sup> *Ibid.* at p. 94, line 16 to p. 97, line 6.

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence,
- (b) a person whom he finds committing a criminal offence, or
- (c) [not applicable].

Thus, the arrest power depends on the type of offence for which the person is being arrested. A police officer may arrest anyone he or she finds committing an offence. But if a police officer only believes, albeit on reasonable grounds, that someone has committed or is about to commit an offence, the offence must be an indictable one before the police officer can arrest. The distinction is a significant one in that it means, with respect to summary conviction offences, a police officer can only arrest a person he or she finds committing the offence.

[11] Cst. Amundsen testified that he arrested Mr. Janvier for possession of marihuana:

A Okay. As I approached the vehicle I approached on the driver's side and as I walked up to the window the driver, who was the lone occupant of the vehicle, rolled the window down and as soon as I got there, there was the smell of marihuana coming from the vehicle and my first words were to him – it was either, "step out of the vehicle, you're under arrest for possession of marihuana," or, "you're under arrest for possession of marihuana, please step out of the vehicle." It was one of those things.<sup>4</sup>

[12] The Crown raised the possibility that Cst. Amundsen had arrested Mr. Janvier for transporting marihuana, which is an indictable offence created by s. 5(1) of the *Controlled Drugs and Substances Act*, so as to be able to rely on

---

<sup>4</sup> *Ibid.* at p. 7, lines 7 to 17.

s. 495(1)(a) of the *Criminal Code* as opposed to s. 495(1)(b), but this is contrary to the above evidence.

[13] Section 495(1)(a) does not refer to an offence that may be either indictable or summary conviction, but to "an indictable offence." Possession of marihuana, however, can be either an indictable or a summary conviction offence depending, in part, on the quantity of the drug. Sections 4(1), (4) and (5) of the *Controlled Drugs and Substances Act* provide:

4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

...

(4) Subject to subsection (5), every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.

Marihuana is a substance included in Schedule II, but the quantity established in Schedule VIII is 30 grams. Thus, in relation to the simple possession of marihuana, s. 4(5) applies in this case to dictate summary conviction proceedings as Mr. Janvier had less than 30 grams of marihuana in his possession.

[14] In any event, Cst. Amundsen never advised Mr. Janvier that he was being charged with possession of marihuana as an indictable offence. There was no other evidence that might have persuaded Cst. Amundsen to believe in a quantity in excess of 30 grams and there would be no basis, on smell alone, to determine a precise quantity. Thus, he must be taken to have placed Mr. Janvier under arrest for the summary conviction offence of possession of marihuana, which means that the police authority to arrest must be found in s. 495(1)(b).

[15] The trial judge spoke of "reasonable and probable grounds" and did not identify the section under which he was addressing the police power of arrest. Judges and authors continue to speak of "reasonable and probable grounds" (see, e.g., *R. v. Storrey*<sup>5</sup>), perhaps because of the way in which s. 495(1)(a) was amended. Section 495(1)(a) was re-enacted as part of the 1985 revision of statutes (see *Criminal Code*, R.S.C. 1985, c. C-46 which came into effect December 12, 1988). Section 495(1)(a) was formerly s. 450(1)(a), prior to the 1985 revision, which read:

450. (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable *and probable* grounds, he believes has committed or is about to commit an indictable offence. [Emphasis added.]

"[A]nd probable" was dropped in the revision, but s. 4 of the *Revised Statutes of Canada, 1985*<sup>6</sup> makes it clear that no change in the law was effected:

4. The Revised Statutes shall not be held to operate as new law, but shall be construed and have effect as a consolidation of the law as contained in the Acts and

---

<sup>5</sup> [1990] 1 S.C.R. 241.

<sup>6</sup> c. 40 (3<sup>rd</sup> Supp.)

portions of Acts repealed by section 3 and for which the Revised Statutes are substituted.

[16] In *Baron v. Canada*,<sup>7</sup> the Supreme Court of Canada indicated that "reasonable grounds" and "reasonable and probable grounds" import the same standard, as the word "reasonable" alone encompasses a requirement of probability. The standard is the same for both "reasonable grounds" and "reasonable and probable grounds": one of credibly based probability.<sup>8</sup> The normal statutory phrase, however, is "reasonable grounds."<sup>9</sup> Thus, I do not read anything more into the trial judge's reasons than a repetition of a common error, which is permitted by s. 4 of the *Revised Statutes of Canada, 1985*, and conclude Mr. Janvier could only have been arrested under s. 495(1)(b).

1.2 What is the meaning of "finds" a person "committing a criminal offence" in s. 495(1)(b)?

[17] I agree with Crown counsel that possession of marihuana at a determined and proven time in the past is an offence, assuming such a crime to be provable. We are not, however, addressing the question of whether the crime of having possessed marihuana exists, which would be a relevant inquiry for the purposes of s. 495(1)(a), but instead we are interpreting s. 495(1)(b) to determine whether a police officer can be said to find a person committing the offence of possession of marihuana based on the smell of

---

<sup>7</sup> [1993] 1 S.C.R. 416. See also *R. v. Jacques*, [1996] 3 S.C.R. 312 at para. 20; *R. v. Schafer*, [1994] 7 W.W.R. 670 at paras. 3-4, leave to appeal to S.C.C. refused [1994] 3 S.C.R. xi.

<sup>8</sup> *Ibid.* at pp. 446-47.

<sup>9</sup> *Ibid.*

burned marihuana alone and the suspicion that a search will reveal more, unsmoked marihuana.

[18] In the within appeal, it cannot be said that the statutory provision in question, s. 495(1)(b), is ambiguous (see: *Application under s. 83.28 of the Criminal Code (Re)*,<sup>10</sup> and *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*).<sup>11</sup> Indeed, it is asserted on behalf of Mr. Janvier that the clause is clear. In contradistinction to s. 495(1)(a), which permits searches based on reasonable grounds, s. 495(1)(b) requires the investigating officer to "find" the person committing the offence, which, I note, is the same in the French version with the use of the words "trouve en train de commettre." Even when a legislative provision is not ambiguous, nonetheless, as was said in *Re s. 83.28*, "[t]extual considerations must be read in concert with legislative intent and established legal norms."<sup>12</sup> A textual consideration at play in construing s. 495(1)(b) is that it establishes the parameters of a police power of arrest.

[19] Oddly enough, there is little authority in Canada as to what is meant by "finds" a person "committing a criminal offence" in s. 495(1)(b). The two Supreme Court of Canada decisions that construe s. 495(1)(b) do so not in the context faced here, where it is necessary to determine powers of arrest to delineate a search power, but in the context of assessing police comportment for other purposes.

---

<sup>10</sup>2004 SCC 42, [2004] 2 S.C.R. 248.

<sup>11</sup>[1999] 1 S.C.R. 743.

<sup>12</sup>*Re s. 83.28*, *supra* note 10 at para. 34.

[20] In *R. v. Biron*<sup>13</sup> the issue was whether a person could be found guilty of resisting arrest for a summary conviction offence if the officer had no authority to make the arrest because he did not "find" the accused "committing a criminal offence." There were several reasons given for sustaining the conviction for resisting arrest, even though the accused had been acquitted of the charge for which he had been arrested. One reason related to the construction of s. 495(1)(b).

[21] Martland J., writing for the majority in *Biron*, concluded that a police officer may arrest a person he or she finds "apparently committing" any offence. Notwithstanding this seeming expansion of s. 495(1)(b), he wrote:

Paragraph (b) applies in relation to any criminal offence and it deals with the situation in which the peace officer himself finds an offence being committed. His power to arrest is based upon his own observation. Because it is based on his own discovery of an offence actually being committed there is no reason to refer to a belief based upon reasonable and probable grounds.

If the reasoning in the *Pritchard* [(1961), 130 C.C.C. 61] case is sound, the validity of an arrest under s. 450(1)(b) can only be determined after the trial of the person arrested and after the determination of any subsequent appeals. My view is that the validity of an arrest under this paragraph must be determined in relation to the circumstances which were apparent to the peace officer at the time the arrest was made.

...

... In my opinion the wording used in para. (b), which is oversimplified, means that the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is apparently committing an offence.<sup>14</sup>

[Emphasis added.]

---

<sup>13</sup>[1976] 2 S.C.R. 56.

<sup>14</sup>*Ibid.* at pp. 72-75.

[22] In *Roberge v. The Queen*<sup>15</sup> s. 450(1)(a) [now s. 495(1)(a)] was considered in the context of assessing the conviction of a police officer for having, without lawful excuse, used his revolver in a careless manner contrary to s. 84(2)(b) of the *Criminal Code*. Lamer J., as he then was, wrote that "the test a police officer must meet, in order to be empowered to arrest without a warrant under s. 450(1)(a) is, to the extent that it differs, at least as easily satisfied as that under s. 450(1)(b)."<sup>16</sup> *Roberge* does not eliminate the distinction between "has committed" in s. 495(1)(a) and "finds committing" in s. 495(1)(b) but instead is directed to the belief the officer has as to the presence of the grounds for either type of offence in order to arrest. In this regard, Lamer J. writes later: "I do not read the test laid down by Martland J. as suggesting that it is sufficient that it be 'apparent' to the police officer even though it would be unreasonable for the police officer to come to that conclusion. Surely it must be 'apparent' to a reasonable person placed in the circumstances of the arresting officer at the time."<sup>17</sup>

[23] Of lower court authority, few authorities have specifically considered s. 495(1)(b). In *R. v. Wright*,<sup>18</sup> a man was arrested for the summary conviction offence of indecent exposure based on information from others and seeing the accused zipping up his slacks. The arresting officer did not see any indecent act. In acquitting the accused, Brown J. wrote:

65 In my view, what *Biron* stands for is that when the officer with his or her own eyes and ears observes all the elements of a summary conviction offence, the fact

---

<sup>15</sup> [1983] 1 S.C.R. 312.

<sup>16</sup> *Ibid.* at p. 318.

<sup>17</sup> *Ibid.* at p. 324-25.

<sup>18</sup> 2007 ONCJ 493.

that the accused is later acquitted on a technicality does not negate that the officer "found him committing" the offence.

66 ... [T]he offence was complete when Constable Whalen happened upon him. Because the offence may have been completed mere moments before does not, in my view, allow me to extend the words "apparently committing" to the circumstances of this case.

[24] In *R. v. McBurney*,<sup>19</sup> which predates *Biron*, the charge was that the accused "did unlawfully have in his possession a narcotic drug."<sup>20</sup> The majority of the Court of Appeal upheld an acquittal on the basis that there is no present offence, of having, at some unknown and indeterminable time and place in the past, possessed cannabis resin.

[25] In *R. v. Beilard*,<sup>21</sup> the accused was a passenger in a motor vehicle, riding with four other young men, when the vehicle was stopped by a peace officer. Upon speaking to the driver, the peace officer detected a smell of what he believed to be burned marihuana in the car. He proceeded to conduct a groin search of all occupants, and on one of them discovered a small quantity of cannabis resin. A charge of possession ensued. On an application to determine whether the accused's s. 8 *Charter* rights were infringed, Porter P.C.J. wrote:

[3] ... It is trite law to point out that it is not an offense "to have smoked" marihuana but rather it is the current possession of the substance which is proscribed. In the absence of obtaining more information either by enquiry, observation or from a third party, the officer could have had nothing more than a mere suspicion that there might be a narcotic around somewhere, hence his setting about to search all five occupants at random. The fact that he found something does

---

<sup>19</sup> [1974] 3 W.W.R. 546 (B.C.S.C.), affirmed [1975] 5 W.W.R. 554 (B.C.C.A.). I do note, however, that insofar as trace amounts of a drug are merely evidence of past possession, *McBurney* is contrary to our judgment in *R. v. Atkinson* (30 April 1971), Regina, 4845 (Sask. C.A.).

<sup>20</sup> *Ibid.* at p. 555 (C.A.)

<sup>21</sup> (1985), 61 A.R. 321 (Alta. Prov. Ct.).

not alter that situation as to take the result into consideration would be rather like raising oneself from the ground by pulling on one's own boot straps. In other words the end does not justify the means, but rather the means themselves must be lawful and reasonable. Clearly here the officer was simply on a fishing expedition.

[Emphasis added]

Porter P.C.J., as I have indicated, must be taken to have overstated the law when he said that it is only the "current possession of the substance" that is proscribed. It is possible, as I have indicated, assuming the offence is capable of proof, to charge someone with having possessed cannabis resin even though the offence occurred in the past. But leaving that aside, *Beilard* makes the distinction between having possessed and present possession, which is relevant to the issue in this appeal.

[26] In *R. v. Fotheringham*,<sup>22</sup> the issue was whether an arbitrary detention could be justified under s. 1 of the *Charter*. While not strictly necessary to do so, Baird Ellan P.C.J. (as she then was) considered whether the smell of freshly smoked marihuana forms a sufficient basis for concluding that the offence of possession is being committed by the occupant of the vehicle. She concluded that:

26 As I understand it, that the test to be employed in determining the sufficiency of grounds to make a search is the same as that pertaining to the grounds to make the arrest, as discussed by Ryan J.A. in *R. v. Smellie*, [1994] B.C.J. No. 2850, B.C.C.A., December 14, 1994. That is, the Crown must establish on a balance of probabilities that the circumstances are such that "credibly-based probability replaces suspicion," (at p. 13, quoting from *Hunter v. Southam Inc.* [[1984] 2 S.C.R. 145]).

27 After careful consideration, I have come to the conclusion that the smell of fresh marijuana smoke, as described by the officers, given that the accused was the only individual in the vehicle at the time, was sufficient to give Cst. Gillespie reasonable grounds to believe that Mr. Fotheringham was in possession of at least

---

<sup>22</sup> [1995] B.C.J. No. 1795 (Prov. Ct.) (QL).

a small quantity of the narcotic. It would be speculative to conclude instead that, while apparently very recently having smoked it, the driver had disposed of it before being stopped by the police. In drawing this conclusion, I rely upon the experience of the officers, and accept that they could distinguish between stale and fresh marijuana smoke.

To similar effect is *R. v. Prussick*,<sup>23</sup> *R. v. Dubois*<sup>24</sup> and *R. v. Chatta*.<sup>25</sup> But among other features, including the presence of other indicia of the offence of possession of marihuana, *Dubois* and *Chatta* do not mention s. 495(1)(b) let alone construe it to determine its meaning.

[27] For a police officer to arrest someone under s. 495(1)(b) of the *Criminal Code*, the officer must find the person to be "committing" the offence. According to Martland J. in *Biron*, s. 495(1)(b) "deals with the situation in which the peace officer himself finds an offence being committed. His power to arrest is based upon his own observation."<sup>26</sup> While the reference to "observation" may be qualified by adding "smell," this does not change the principle in *Biron* that in order for the officer to arrest a person, the officer must actually observe or smell the offence—for which the person is arrested—being committed.

[28] Thus, I conclude that the standard for arrest without a warrant for the commission of a summary conviction offence pursuant to s. 495(1)(b) is more strict than the standard for arrest for an indictable offence under s. 495(1)(a).

---

<sup>23</sup> [2000] O.J. No. 3224 (Ct. of J.) (QL).

<sup>24</sup> 2004 BCCA 589.

<sup>25</sup> (10 August 2006), Moose Jaw (Sask. Prov. Ct.).

<sup>26</sup> *Biron*, *supra* note 13 at p. 72.

[29] Applying this principle to the case at hand, the police officer did not see, hear or smell Mr. Janvier committing the offence of possession of marihuana, and therefore, did not find him committing that offence.

1.3 Does the phrase "finds committing a criminal offence" in s. 495(1)(b) permit reliance upon an inference that more marihuana is present based on the smell of burned marihuana alone?

[30] When one examines the decisions where courts have sustained an arrest based on the smell of burned marihuana, and no other sensory perception, they rely, in addition to the smell of burned marihuana, upon an inference that more marihuana will be discovered. In *Biron*, however, Martland J. makes it clear that the Court interprets the phrase "finds [a person] committing a criminal offence" as implying that the officer's belief an offence is being committed is based on his or her observation of that offence being committed (or apparently being committed) and not merely an inference from some other observation. That is why Martland J. went on to say "there is no reason to refer to a belief based upon reasonable and probable grounds."<sup>27</sup> Thus, s. 495(1)(b) does not permit the officer to say "based on my experience, I believed I would find other marihuana present because I smelled recently burned marihuana." Observation (i.e., the smell) of recently smoked marihuana is not an observation of current possession of additional unsmoked marihuana. One might infer the presence of more marihuana, but one is not observing or smelling it and one is therefore not finding the person committing the offence of possession of additional, unsmoked, marihuana within the meaning of s.

---

<sup>27</sup> *Ibid.*

495(1)(b). Section 495(1)(b) does not permit an arrest made on inference derived from the smell of burned marihuana alone.

1.4 In the alternative, if s. 495(1)(b) permits an inference derived from the smell of burned marihuana alone, is the smell of recently burned marihuana by itself sufficient to give objectively reasonable grounds for the belief that more, unsmoked marihuana is present, so as to permit a warrantless arrest?

[31] As I have indicated, s. 495(1)(b) does not permit an arrest based on inference, at least in these circumstances, but if I am wrong on this, I will address the Crown's alternative argument, which is that an officer is entitled to infer from the presence of the smell of burned marihuana alone that there will be more, unsmoked marihuana present. My view, formed by a review of the case law, is that the inference suggested by the Crown is not objectively reasonable.

[32] This issue arises most often in the case law in terms of the search power contained in s. 11(7) of the *Controlled Drugs and Substances Act*.

[33] In *R. v. Huebschwerlen*<sup>28</sup> Chief Judge Lilles reviewed numerous cases in which the issue was whether or not the smell of burned marihuana constitutes reasonable grounds to search. He concluded that, for the most part, the courts have been reluctant to find reasonable grounds based on the smell of burned marihuana alone. Chief Judge Lilles summarized his conclusions regarding the jurisprudence:

---

<sup>28</sup> (1997), 10 C.R. (5th) 121.

19 As the above cases indicate, courts have been reluctant to find reasonable and probable grounds based on the presence of burnt marihuana odour alone, unless it is established, as in *Guberman* [(1985), 23 C.C.C. (3d) 406], that the smell was fresh, recent and very strong. More often, other observations are made in conjunction with the odour, such as evidence of some other offence justifying arrest (open liquor), physical observations of drug impairment, some marihuana in the vehicle, or an admission by the accused that he/she had been using drugs earlier in the evening.

20 A detailed and most helpful analysis of the relevant considerations in such cases is found in the American case of *People v. Hilber* (1978) 269 N.W.2d 159 (U.S. Mich. S.C. 1978). The following points have been summarized from that decision.

1. A distinction is to be made between the odour of unburned and burned marihuana. The former indicates the actual presence of marihuana, while the odour of burned marihuana indicates only that at some time in the past marihuana was present and burned.

2. Reliance on the smell of burnt marihuana as the basis for reasonable and probable grounds relies on several inferences:

- that the odour in the vehicle was caused by the driver/occupant having smoked marihuana
- that marihuana smokers, like tobacco smokers, carry a supply with them

But we know that other odours in vehicles, such as tobacco, beer, spoiled food, etc. are often caused by someone other than the driver/occupant at the time the odour is detected. And there is no reason to believe that tobacco smokers and their behaviours provide standards from which to judge marihuana smokers. Because of the multiple inferences involved, it is not reasonable to infer that an occupant of a motor vehicle either smoked marihuana or has it in his/her possession, solely from a residual odour of marihuana in a motor vehicle. [Emphasis added.]

He concluded that it is not reasonable to infer that an occupant of a motor vehicle having smoked marihuana would have more in his or her possession.

[34] I note that *People v. Hilber*<sup>29</sup> mentioned by Chief Judge Lilles has been overruled by *People of the State of Michigan v. Kazmierczak*<sup>30</sup> but this fact does not take away the force of the reasoning contained in *Hilber*. I note as

---

<sup>29</sup> 269 N.W.2d 159 (Mich. Sup. Ct. 1978).

<sup>30</sup> 2000 Mich. Lexis 272; 605 N.W.2d 667 (Mich. Sup. Ct. 2000).

well how varied the individual state response has been to searches based on raw, burning and burned marihuana. (See: *Mario McLorren Wilson v. State of Maryland*<sup>31</sup>).

[35] Since Chief Judge Lilles's decision, almost all of the reported decisions have concluded, as he did, that the smell of burned marihuana alone does not provide an objective basis for a reasonable belief that there is more marihuana present.

[36] In *R. v. Zagar (M.)*<sup>32</sup> the accused made an illegal U-turn. The police followed him into a parking lot of a hotel where the accused was staying. A police officer exited his vehicle and approached the accused, who left his vehicle and began walking to the front doors of the hotel. A short conversation ensued. The police officer "detected a strong odour of burnt marihuana emanating from the person of the accused,"<sup>33</sup> and from this, he "immediately formed the belief that the accused was in possession of marihuana."<sup>34</sup> The accused was asked to hold out his arms, at which point the police officer searched the accused's vest and jacket pockets, finding one joint of marihuana in a cigarette package in the accused's vest. The trial judge found that the police officers had considerable experience dealing with drugs, having acted on numerous occasions in an undercover capacity purchasing drugs and so on. Nonetheless, Gilbert P.C.J. wrote:

[11] I am satisfied that the smell of burnt marihuana alone did not give Corporal Young reasonable grounds to search the accused as he did and that there was a

---

<sup>31</sup> 2007 Md. App. Lexis 67; 921 A.2d 881 (Md. C.A. 2007).

<sup>32</sup> 1998 ABPC 59, (1998), 222 A.R. 195.

<sup>33</sup> *Ibid.* at para 2.

<sup>34</sup> *Ibid.*

violation of his Section 8 rights under the *Charter*. In my opinion where a peace officer acts solely on the basis of the smell of burnt marihuana, with no other indicia or indication, and performs a warrantless search of a person he is acting merely on suspicion that such search will uncover a small amount of a soft drug. Such action is contrary to the liberty of the subject to be free from arbitrary search and seizure. I do not find it necessary to consider whether or not there was also a violation of his s. 10(b) rights.<sup>35</sup>

He acquitted the accused.

[37] In *R. v. Barter*,<sup>36</sup> a police officer stopped a motor vehicle leaving a cemetery in the evening hours. Upon approaching the vehicle, the police officer smelled "burned marihuana, as opposed to ... the substance in its unburned state."<sup>37</sup> As a result, he conducted a search of the person of the accused and, in his jacket pocket, found a small quantity of cannabis. Brien P.C.J. ultimately concluded that the officer did not have reasonable grounds to search the person of the accused and acquitted him.

[38] In *R. v. Cavdarov*,<sup>38</sup> a police officer stopped a speeding vehicle. Upon approaching the vehicle and observing the three male occupants, the constable testified that he detected a "faint odour of burnt marihuana"<sup>39</sup> coming from the vehicle. As a result, the police officer decided to detain the vehicle and its occupants. Upon asking the occupants to exit the vehicle, the police officer noted an odour of burned marihuana coming from the clothing of one of the men. A subsequent search of outer garments and underwear of the accused revealed cocaine. Bruce P.C.J. wrote:

---

<sup>35</sup> *Ibid.*

<sup>36</sup> [1998] N.B.J. No. 67 (QL).

<sup>37</sup> *Ibid.* at para. 4.

<sup>38</sup> 2003 BCPC 145, (2003), 106 C.R.R. (2d) 152.

<sup>39</sup> *Ibid.* at para. 5.

38 The circumstances that turned an ordinary stop for speeding into a drug investigation for Constable Thibodeau were the very faint odour of burnt marihuana emanating from the vehicle and the rolled up money observed on the floor by the front passenger's seat. While Constable Thibodeau testified the rear passenger seemed nervous because his hand shook when asked for identification, this observation occurred subsequent to the detention of the accused beyond that necessary for the motor vehicle stop. It was because the constable suspected any one of the occupants may have had possession of marihuana that he asked the passengers to provide identification. Consequently, I cannot conclude that this observation formed part of the initial grounds for the detention.

...

44 In my view, a strong odour of burnt marihuana, coupled with evidence from a trained officer that the odour was fresh or recent, can constitute articulable cause without proof of any other incriminating or suspicious circumstances. Anything less might raise the suspicions of the officer, but those suspicions would not be reasonably based upon an objective foundation.<sup>40</sup> [Emphasis added.]

[39] In *R. v. Coote*,<sup>41</sup> the police officer sought to justify a detention and arrest based on the smell of burned marihuana, the driver's bloodshot eyes and his fumbling for his driver's licence:

70 In the case at bar, the criteria by which Officer Ashby determined he had grounds to continue to detain and to arrest Mr. Coote for possession of marijuana are all highly subjective. As pointed out by the defence, Constable Ashby had no measure by which he could say Mr. Coote's eyes were any redder or glossier than usual. He obviously did not consider them extremely so, as he said he did not have evidence of impairment. As I said earlier, Constable Ashby's belief as to fumbling would not suffice as reasonable grounds to suspect marijuana possession, nor does it, with the other subjective indicators, provide reasonable and probable grounds for an arrest.

71 There were absolutely no objectively discernable facts in this case to permit the continued detention, nor did the officer have reasonable and probable grounds to arrest Mr. Coote for possession of marijuana upon this continued unlawful detention. He had made the decision to arrest when he called for the other officers as backup, at which point he had no evidence of marijuana possession.

The accused was acquitted.

---

<sup>40</sup> *Ibid.*

<sup>41</sup> [2005] O.J. No. 5913 (Ont. S.C.J.) (QL).

[40] While these cases are not binding on this Court, their consistency supports a conclusion that a reasonable person standing in the shoes of the officer would be unable objectively to conclude from the smell of burned marihuana alone that there was more marihuana present.

[41] The cases to the contrary, *R. v. Cornell*,<sup>42</sup> *R. v. Meadows*<sup>43</sup> and *R. v. Chen*,<sup>44</sup> are clearly distinguishable if for no other reason than that the trial judges, in these cases, do not discuss how the smell of smoked (or burned) marihuana can constitute reasonable grounds to believe objectively that there is other unsmoked marihuana present.

[42] The assessment of objective reasonableness of a search must obviously depend on a number of factors. One factor, to which I give particular weight, is that it is not a search for evidence in relation to the offence that gave rise to the smell, i.e., that the individual has committed the offence of possession, but to another offence, that the individual is committing the offence of possession. It is a search for evidence of the commission of the offence of possession of marihuana in sufficient quantity to sustain a conviction and is based on speculation that such evidence might be present.

[43] As this Court said in *R. v. (D.)I.D.*<sup>45</sup>

... However, the Supreme Court in *Hunter v. Southam*, quoted above, cautioned against "fishing expeditions". In *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278, ... the court said that the manner of the search must be reasonable. It is to be

---

<sup>42</sup> 2001 BCPC 265.

<sup>43</sup> (1995), 168 A.R. 174 (Alta. Prov. Ct.).

<sup>44</sup> [2006] O.J. No. 3130 (Ont. Ct. of J.) (QL).

<sup>45</sup> [1988] 1 W.W.R. 673.

taken from those cases that the manner and scope of the search must bear some reasonable relationship to the offence suspected and the evidence relating to that offence which is sought.<sup>46</sup>

The search in the instant case could not be to find evidence to charge with possession of the marihuana that was consumed, but rather it has to have been for the purposes of finding some other marihuana or marihuana residue, which may or may not exist, and thus takes on the characteristics of a fishing expedition rather than a police search in relation to a specific offence.

[44] With raw marihuana, in relation to a charge of possession, there is a direct relationship between the smell and the search for the source of the smell. It will be possible for the police officer, and the court, to verify whether the smell is linked to what is found. This is the point that distinguishes this Court's decision in *R. v. Sewell*.<sup>47</sup> The smell of raw marihuana is a sensory observation of the presence of raw marihuana, just as the sight of marihuana is. The smell of burned marihuana is a sensory observation of marihuana having recently been smoked. The latter, unlike the former, is not the offence that gives grounds for arrest without a warrant.

[45] In this case, the inference from the smell of recently burned marihuana to the presence of more unconsumed marihuana relies on two further assumptions for which there is only weak support on the facts of this case: (i) that Mr. Janvier is the person who smoked the marihuana, and (ii) that when a person has recently smoked marihuana he probably possesses more, unsmoked marihuana. As to the first, the officer could only testify as to his

---

<sup>46</sup> *Ibid.* at p. 680.

<sup>47</sup> 2003 SKCA 52, [2004] 6 W.W.R. 694.

opinion that marihuana had been smoked in the truck within the previous 20 minutes. As the truck had not been under observation within those 20 minutes, as the trial judge pointed out, there was no basis to assume that the accused "is the person who consumed the marihuana in the vehicle."<sup>48</sup>

[46] As to the second proposition, as I have indicated, no support is offered for it and it remains speculative at best. In any event, given the time lapse, if another person had been in the truck and had smoked the marihuana, constructive possession under s. 4 of the *Criminal Code*, implicating Mr. Janvier, would only be a relevant inquiry in relation to the offence of having committed the offence of possession of marihuana. Thus, even if it were possible to conclude objectively that a person who has recently smoked marihuana possesses additional marihuana, it would follow in this case that if Mr. Janvier had not been the person who smoked the marihuana, the person who did would have taken it with him or her.

[47] Thus, I conclude that it was not objectively reasonable for Cst. Amundsen to conclude that the smell of burned marihuana alone meant that Mr. Janvier had more marihuana in his possession.

### 1.5 Summary and Conclusion in Relation to s. 495(1)(b)

[48] In summary, as a matter of statutory construction, s. 495(1)(b) does not permit an arrest based on the smell of burned marihuana alone. An officer smelling burned marihuana does not find a person committing the offence of

---

<sup>48</sup> Trial Transcript, *supra* note 3.

possession of marihuana. If, contrary to my primary conclusion, s. 495(1)(b) permits reliance upon an inference based on observation (i.e., smell), the smell of burned marihuana alone is not sufficient to support a reasonable inference that more, unsmoked marihuana will be present. Arresting someone is the penultimate interference with liberty, short of being in custody. In the circumstances of a summary conviction offence, which is recognized to be a less serious offence, Parliament has established a more constrained arrest power.

[49] While the trial judge focused on the question of whether the police officer had reasonable and probable grounds to arrest and did not mention s.495(1)(b), the trial judge reached the same conclusion that I have for essentially the same reasons regarding evidence of past consumption and testimony as to suspicion or inference. I would sustain the trial judge's conclusion that the police officer lacked the authority to arrest Mr. Janvier.

[50] For the search incident to arrest to be lawful, it is trite law that the arrest itself must be authorized by law. Having found that the arrest was not lawful, it follows that the police officer could not rely on the common law power to search incident to arrest.

## 2. Authority to Search based on Reasonable Grounds

[51] The next issue is whether the police officer, nonetheless, had the authority to conduct a search pursuant to s. 11 of the *Controlled Drugs and Substances Act*:

11. (1) A justice who, on *ex parte* application, is satisfied by information on oath that there are reasonable grounds to believe that

- (a) a controlled substance or precursor in respect of which this Act has been contravened,
- (b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
- (c) offence-related property, or
- (d) any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the *Criminal Code*

is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

...

(5) Where a peace officer who executes a warrant issued under subsection (1) has reasonable grounds to believe that any person found in the place set out in the warrant has on their person any controlled substance, precursor, property or thing set out in the warrant, the peace officer may search the person for the controlled substance, precursor, property or thing and seize it.

...

(7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

According to s. 11(7) of the *Controlled Drugs and Substances Act*, a police officer may exercise any of the powers in ss. 11(1) or (5) without warrant if the conditions for obtaining a warrant exist but exigent circumstances make it impracticable to obtain one. Only ss. 11(1)(a) and (5) are applicable: the officer must have reasonable grounds to believe a controlled substance is on a person or in a place before searching the person or the place, without a warrant, if exigent circumstances exist making it impracticable to obtain a warrant. The trial judge in the within case did not reach the point of considering whether exigent circumstances existed, as he was not satisfied that there were reasonable grounds to conduct the search.

[52] Did the police officer have reasonable grounds to believe that marihuana was on Mr. Janvier's person or in his truck to justify a warrantless search under s. 11(7)? This is the same question that was posed above in relation to the reasonableness of the inference that can be drawn from the smell of burned marihuana that more, unsmoked marihuana is present, and the answer must be the same.

[53] As I have indicated, the authorities come consistently to the response that it is not objectively reasonable to conclude that more, unsmoked marihuana is present based on the smell of burned marihuana alone.

[54] Plain smell evidence is recognized by this Court. The smell of burned marihuana is evidence. When the offence is possession of marihuana, the smell of burned marihuana will be one factor to determine whether there are reasonable grounds to search. Taken alone, the smell of recently burned marihuana does not reasonably support the inference that additional marihuana is present.

[55] While the trial judge did not analyze the issue in terms of s. 11(7) of the *Controlled Drugs and Substances Act*, he, nonetheless, reached the same conclusion that I have: the officer did not have reasonable grounds to search Mr. Janvier.

### 3. Search as an Incident to Detention

[56] Crown counsel mentioned, but did not vigorously pursue, the possibility of a power of search as an adjunct to an investigative detention as discussed in *R. v. Mann*.<sup>49</sup> This is not the authority relied upon by the police officer to search Mr. Janvier and it is also not the footing upon which the matter was argued before the trial judge. That being said, I note the limits placed on investigative detentions for the purposes of safety in *Mann*, which do not appear to be present in this case.

### 4. Exclusion of the Evidence

[57] Since I have concluded that the trial judge did not err in finding a violation of s. 8, I must go on to consider whether he erred in excluding the evidence, resulting from the subsequent search, pursuant to s. 24(2) of the *Charter*. The trial judge's reasons why he excluded the evidence are quoted in their entirety:

Of course, having found a section 8 breach does not in and of itself mean that the evidence is excluded. It is then necessary to conduct the analysis under section 24(2) to determine whether or not the admission of the evidence would bring the administration of justice into disrepute and in doing that I follow the three-step inquiry that has most recently been adopted by the Supreme Court of Canada in *Buhay* which is cited as (2003), 174 C.C.C. (3d) 624 and that I am to consider what is the effect of the exclusion or admission of the evidence on fairness of the trial, seriousness of the breach and ultimately whether the exclusion of the evidence would adversely affect the administration of justice.

As to the issue of fairness of the trial, I conclude that the marihuana that was found on the accused was non-conscriptive evidence and following the presumptions in *Buhay* and in *Stillman* and in *Law*, all Supreme Court of Canada decisions, that they would not affect the fairness of the trial.

As to the seriousness of the breach, I conclude that I am to have regard to whether the breach was committed in good faith or what was the obtrusiveness of

---

<sup>49</sup>2004 SCC 52, [2004] 3 S.C.R.59.

the search, what was the expectation of privacy in the area searched and the existence of reasonable grounds. As I have already indicated, I conclude that in this case there were not reasonable grounds for the search. I conclude that the accused's expectation of privacy in the area searched is more limited, that is that there is a lessened expectation of privacy in a vehicle as compared to a dwelling house but that nonetheless, as Courts have held, there is an expectation of privacy in a vehicle, that the obtrusiveness of the search in this case I conclude to be moderate. It did amount to searching the accused's person, both his boot and his coat, where the marihuana was found and add to the issue of good faith. In the circumstances I accept Constable Amundsen's evidence that he honestly believed that he had reasonable grounds to conduct the search, albeit I find it in the circumstances that he did not have such reasonable grounds.

And as other cases have done in considering the issue, I conclude that in this case while he honestly had reasonable grounds, in law, as I have indicated, he did not have the scope of authority that would permit him to conduct the search at this time.

I conclude that in these circumstances, that is the issue of searching a person in a vehicle where there is a reasonable expectation of privacy without reasonable grounds, that as other cases have similarly held, it is a serious breach of the section 8 right under the *Charter*.

A final consideration is whether the exclusion of evidence would adversely affect the administration of justice and it's clear that in this case without the drugs seized the Crown would have no case. I conclude in this case that the nature and amount of drugs seized is not serious. As Courts have otherwise held, marihuana is a soft drug and in this case the amount involved is less than 30 grams. That being said, of course, the focus is to balance the interests of justice with the integrity of the justice system. In this case I conclude that the nature of the fundamental right in issue, that is involving the unlawful search of the private vehicle where there is an expectation of privacy, albeit a more reduced one from a private residence, and the lack of reasonable grounds for the search would suggest that admitting the evidence would adversely affect the administration of justice and I conclude, therefore, in applying that test that the drugs that were seized must be excluded and I make an order to exclude that evidence from this case.<sup>50</sup>

[58] On my review of the cases, the trial judge has covered all the requisite issues. He proceeded through the steps in *R. v. Collins*.<sup>51</sup> He placed the case for the Crown at its highest: he recognized that this is non-conscriptive

---

<sup>50</sup> Trial Transcript, p. 97, line 7 to p. 100, line 8.

<sup>51</sup> [1987] 1 S.C.R. 265.

evidence, and as a result, trial fairness is not affected; he observed correctly that there is a reduced expectation of privacy in a vehicle and he noted the importance of the evidence to the Crown's case. The trial judge balanced these factors against the intrusiveness of the search of the accused's person and the extent of the accused's privacy interest in his person to find what appeared to the trial judge to have been a serious breach. When he proceeded to the third step of the *Collins* test, he noted that not only was Mr. Janvier searched without authority, he was arrested without authority. He also found that the nature and amount of the drug seized meant that this was not the most serious of crimes. He then referred to the fact of other decisions with similar circumstances having come to the same result of excluding the evidence. While the trial judge did not mention them, he could have, for example, referred to such cases as: *R. v. Lamy*<sup>52</sup> (marihuana trafficking) and *R. v. Simpson*<sup>53</sup> (cocaine trafficking) where vehicles were searched on the mere suspicion that they contained drugs, the *Charter* breaches were judged serious and the evidence excluded in both cases. I note, too, that in the decisions referred to earlier in this judgment, where the trial judge found a search based on the smell of burned marihuana alone to be unreasonable, the acquired evidence was excluded under s. 24(2) and the accused was acquitted.

[59] Given the balance and cogency of the trial judge's reasons, I can do no more than acknowledge the standard of review for such a decision and abide

---

<sup>52</sup> (1993), 80 C.C.C. (3d) 558 (Man. C.A.).

<sup>53</sup> (1993), 79 C.C.C. (3d) 482 (Ont. C.A.).

by it. Cory J., speaking for a unanimous Court, referred to the deferential standard of review pertaining to s. 24(2) rulings in *R. v. Mellenthin*:<sup>54</sup>

A decision to exclude evidence on the grounds that it would bring the administration of justice into disrepute pursuant to s. 24(2) of the *Charter* raises a question of law (see *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 275). It has also been held that generally a deferential approach will be adopted when reviewing a decision of a provincial appellate court dealing with the exclusion of evidence pursuant to s. 24(2) of the *Charter*. In *R. v. Greffe*, [1990] 1 S.C.R. 755, Lamer J., as he then was, wrote at p. 783:

I note that it is not the proper function of this Court, absent some apparent error as to the applicable principles or rules of law, or absent a finding that is unreasonable, to review findings of courts below in respect of s. 24(2) of the *Charter* and substitute its opinion for that arrived at by the Court of Appeal: see *R. v. Duguay*, [1989] 1 S.C.R. 93, at p. 98.

See also *R. v. Wise*, [1992] 1 S.C.R. 527.

However it is significant that in *R. v. Collins*, *supra*, Lamer J., also cautioned the provincial courts of appeal that they should not too readily interfere with the decision of trial judges on s. 24(2) issues. On p. 283 of that decision the following appears:

In effect, the judge will have met this test if the judges of the Court of Appeal will decline to interfere with his decision, even though they might have decided the matter differently, using the well-known statement that they are of the view that the decision was not unreasonable.<sup>55</sup>

[60] I note, as well, that in *R. v. Buhay*<sup>56</sup> the Supreme Court of Canada emphasized again the deferential standard of review with respect to s. 24(2) rulings.

[61] The trial judge's decision with respect to the application of s. 24(2) was not unreasonable. I see no apparent error as to the applicable principles or rules of law.

---

<sup>54</sup> [1992] 3 S.C.R. 615.

<sup>55</sup> *Ibid.* at pp. 625-26.

<sup>56</sup> 2003 SCC 30, [2003] 1 S.C.R. 631.

VI. Conclusion

[62] The appeal is dismissed.

DATED at the City of Regina, in the Province of Saskatchewan,  
this 14th day of December, A.D. 2007.

\_\_\_\_\_  
"Jackson J.A."  
Jackson J.A.

I concur \_\_\_\_\_  
"Klebuc C.J.S."  
Klebuc C.J.S.

I concur \_\_\_\_\_  
"Smith J.A."  
Smith J.A.