



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Squires*, 2016 NLCA 54

Date: October 17, 2016

Docket: 201501H0027

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

JOHN PETER RICHARD SQUIRES

RESPONDENT

Coram: Green C.J.N.L., Welsh, Rowe, Barry and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador

Appeal Heard: December 14, 2015

Judgment Rendered: October 17, 2016

Reasons for Judgment By: Green C.J.N.L.

Concurred In By: Barry and Hoegg JJ.A.

Separate Concurring Reasons By: Rowe J.A.

Dissenting Reasons By: Welsh J.A.

Counsel for the Appellant: Iain R.W. Hollett

Counsel for the Respondent: Derek J. Hogan

Green C.J.N.L.:

[1] In this appeal by the Crown of acquittals on charges for a number of firearms offences, the questions are whether the trial judge erred in concluding that the respondent's (Squires') rights under sections 9 (arbitrary detention) and 8 (unreasonable search and seizure) of the *Canadian Charter of Rights and Freedoms* were infringed by the way in which the police interacted with him, and in concluding that the evidence of a gun and ammunition seized from Mr. Squires' vehicle should be excluded under section 24(2) of the *Charter*.

[2] In essence, the case addresses the problem of balancing the importance of protecting citizens from the illegitimate use of force by police while at the same time trying to ensure that the police are not unduly hampered in the way they carry out their important public duties and responsibilities, especially when safety issues relating to firearms are potentially involved.

[3] The basic factual background is this: the police received an anonymous phone tip, in the early hours of the morning, that a male in a "black jeep" near the Froude Avenue Community Centre in St. John's had a firearm, possibly a shotgun or rifle. The first officer on the scene saw a lone black sport utility vehicle with a male occupant in the parking lot. A second officer arrived in another car a few minutes later. The first officer activated his vehicle's emergency lights, exited the vehicle, drew his firearm and told the male, whom he recognized as Mr. Squires from a previous occasion, to put his hands out the window. Mr. Squires fully cooperated.

[4] Upon the second officer's arrival, she also drew her gun. Mr. Squires was told to exit his vehicle and lie face down on the ground, whereupon the second officer handcuffed him and brought him to her police vehicle. He was read his rights and caution and was told the police were investigating a weapons complaint. Mr. Squires admitted there was a shotgun in his vehicle.

[5] Not knowing of Mr. Squires' statement that there was a gun in the vehicle, the first officer, using a flashlight, looked through the tinted glass in Mr. Squires' vehicle to determine if there was anyone else there and to ensure the officers' safety. Not seeing any other occupant, he looked again and saw the partially covered barrel of a shotgun on the back seat. He opened the door, seized the gun and shotgun shells and told the other officer

to arrest Mr. Squires for unsafe handling of a firearm. He was re-advised of his rights and cautioned and then arrested for careless use of a firearm and breach of a weapons prohibition. The second officer claimed reasonable grounds for the arrest based on the original complaint that had been phoned in, Mr. Squires' admission that there was a shotgun in the vehicle and the fact that the first officer had seen the firearm in the vehicle.

[6] The first officer confirmed in evidence that he did not have grounds to arrest Mr. Squires prior to observing the firearm but he asserted that he searched the vehicle incident to the arrest. It is clear, however, that the formal arrest performed by the second officer back in the vehicle had not occurred before the gun and shells were actually seized.

[7] On these facts, the trial judge concluded that Mr. Squires' rights under sections 9 and 8 of the *Charter* were infringed, and excluded the evidence of the shotgun and shells. As a result, Mr. Squires was acquitted for lack of admissible evidence.

GENERAL OBSERVATIONS

[8] There are limits to the degree of interference with a citizen's liberty that the police can employ when interacting with a citizen short of arrest. Nevertheless, the law recognizes that, especially in situations potentially dangerous to the public or to the police, a degree of intrusion may be justified. Moldaver and Wagner JJ. explained the balance that must be struck in terms of a "fundamental bargain" in *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37 as follows:

[64] Every day, throughout this country, police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others. In return, they are entitled to know that when potentially dangerous situations arise, the law permits them to conduct *minimally intrusive* safety searches to alleviate the risks they face. That is the fundamental bargain we, as a society, have struck with the police – and it is a fundamental commitment upon which the police are entitled to rely.

[Emphasis added.]

[9] Such a minimally intrusive safety search must still generally be based upon lawful actions of the police such as a lawful arrest or a lawful investigative detention. Thus, if a safety search is conducted incident to a detention that is arbitrary under section 9, the search will be regarded as an

unreasonable search in violation of section 8. While *MacDonald* recognizes that, in exigent circumstances or circumstances of an imminent threat, a search for weapons based on safety concerns does not necessarily have to be incident to either a lawful arrest or lawful detention, it presupposes that the actions of the police prior to the search are otherwise lawful. On its facts, *MacDonald* does not extend to permitting a safety search as incident to an arbitrary (*i.e. otherwise unlawful*) detention. Exigent circumstances do not in themselves provide a justification for a search; rather, they provide a justification for proceeding to search without a warrant which would have been available had there been time to apply for it, *i.e.* the circumstances provide an otherwise lawful basis for the search.

[10] Professor Steve Coughlan, in a very helpful annotation to the Ontario Court of Appeal decision in *R. v. Fountain*, 2015 ONCA 354, 2015 Carswell Ont 7166, put it this way:

... it has been necessary to point to some source of power for searching other than exigent circumstances. The police must be doing some lawful thing when the need for a “shortcut” in doing it arises through exigent circumstances.

(Emphasis in original.)

[11] That said, it must be recognized that there may be good practical reasons to allow police, where safety issues are at play, to carry out investigative detentions (tailored in their nature to the factual circumstances) and searches incidental to such detentions. Allowing such detentions and searches may be more beneficial to a suspect than requiring a warrant. As noted recently in *R. v. Saeed*, 2016 SCC 24, at para. 65, if police are required to keep an accused for an indefinite period in an uncomfortable and potentially degrading position while waiting to obtain a warrant, this may be more intrusive upon individual liberty than allowing police to exercise a common law power of search incidental to arrest or to investigative detention.

SECTION 9 OF THE CHARTER: INVESTIGATIVE DETENTION

Investigative Detention

[12] The trial judge framed the issue relating to the events leading up to the discovery and seizure of the shotgun and shells as to whether there had been an infringement of “...the right not to be arbitrarily detained...” within section 9. The police officers had testified that they did not have grounds to

arrest, and did not arrest, Mr. Squires until the firearm was observed in the backseat of the vehicle. The question therefore became whether the actions of the police in interfering with Mr. Squires' liberty could be characterized as a legitimate investigative detention short of arrest.

Section 9 of the *Charter* provides:

Everyone has the right not to be arbitrarily detained or imprisoned

The judge concluded that:

Ordering the accused out onto the ground and searching him, in my view, exceeded what would be warranted in encompassing an investigative detention.

[13] The Crown submits that the trial judge erred in his analysis in that, although correctly treating the issue as whether the police could justify their actions as an investigative detention, he effectively applied a standard applicable for justifying an arrest (i.e. whether there were reasonable grounds to believe that an offence had been or was about to be committed, as per section 495(1)(a) of the *Criminal Code*). Had he applied the appropriate standard, so it was argued, he should have found the interference with Mr. Squires' liberty to be lawful.

[14] The only detentions prohibited by section 9 of the *Charter* are "arbitrary" detentions. As recognized in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, an investigative detention carried out in accordance with the common law power of detention will not generally be considered arbitrary and, accordingly will not infringe a detainee's rights under the *Charter* (see para. 20). This is because the common law power, as developed to date, has been regarded as being consistent with *Charter* values. As noted in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, the common law power:

[21] ... requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.

The Trial Decision - Detention

[15] The trial judge analyzed the facts and the law as follows:

Courts have held that investigative detentions should be of brief duration, although “brief” is not defined. There’s no indication, also, in the case law as to how far to move a detainee, but some authorities suggest you can move a detainee to the rear of a police car, certainly when detaining motorists...

With respect to the reasonable grounds standard, reasonable and probable grounds has been defined as an honest belief in the guilt of the accused, based on a full conviction, founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent man placed in the position of the accused to the conclusion that the person charged is probably guilty of the offence. The standard has both objective and subjective components...

Constable McGuire had not formed a subjective belief in the truthfulness of the tip he had received. There was no objective evidence in support of that tip beyond the presence of a black vehicle at the community centre. By removing the accused and handcuffing and searching him, from the vehicle, he arbitrarily detained the accused and violated his section 9 rights.

[16] Counsel for the Crown submits that the trial judge made two errors in his analysis: (i) by focusing on whether the first officer had formed a subjective belief in the truthfulness of the tip he received and whether there was any objective evidence in support of the tip, he incorrectly commingled the test for arrest with the test for justifying an investigative detention; and (ii) he erred in his conclusion that the degree of the invasion of Mr. Squire’s liberty exceeded what was needed for the purpose of investigative detention.

[17] The first ground of appeal involves a question of law, importing a correctness standard of appellate review. The second ground involves the application of the proper standard for effecting an investigative detention to the facts as found and is also a question of law which also requires a standard of correctness: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527 at para. 20.

The Applicable Standard Justifying Investigative Detention

[18] I agree with Crown counsel that the trial judge, in determining whether there was justification for an investigative detention, appears to have applied a standard that was more akin to the standard of reasonable grounds for an arrest. The standard to be applied to justify investigative detention is considerably lower. Here, the officers acted on a tip that a man was in a black utility vehicle at the community centre with a shotgun or

rifle. That was sufficient to justify investigating. In the absence of anything indicating worthlessness or substantial unreliability of the information received, the police are entitled to rely on such information for the purpose of investigating further; see, *Clayton*, at para. 34. It is the duty of a police officer to investigate potential crimes and to ask questions of citizens in relation to that investigation. It is not necessary that the police must have a subjective belief in the accuracy of the information at the time of commencing an investigation or that, at these early stages, there need be any objective corroboration of the information suggesting the need for investigation.

[19] That said, the right and duty to investigate does not automatically imply a right to detain or use force short of arrest. The degree of detention that is justifiable in pursuance of the investigation will depend, on a view of the totality of circumstances, on what is reasonably necessary to facilitate that investigation. At that point, the officer must have reasonable grounds to suspect that in all the circumstances the targeted person “is connected to a particular crime and that such detention is necessary”; *Mann* at para. 45.

[20] Upon arrival at the scene, the first officer observed a man in a vehicle that roughly fit the description given in the tip. No one else fitting the description was present. Given the possible presence of a firearm, it was perfectly reasonable for the officer to suspect that Mr. Squires was connected with the alleged crime and to seek to detain him to investigate further; see *Clayton*, at para. 34. The safety of the public and the investigating officers was potentially engaged.

[21] The more difficult question, however, is whether the police acted appropriately in the manner in which they purported to effect the detention.

The Manner of Effecting the Detention

[22] The trial judge concluded that “ordering the accused out onto the ground and searching him ... exceeded what would be warranted in encompassing an investigative detention.”

[23] The Crown argues that the judge erred in that assessment because he was applying too high a standard for the justification of investigative detention and that, when all the circumstances are considered, especially the possible presence of firearms and the uncertainty of what they were being presented with, it was not unreasonable to subdue and secure the suspect by

ordering him to the ground, handcuffing him and confining him in a police car. The Crown submits that, recognizing the potentially fluid, uncertain and volatile situations the police may be presented with, an appellate court ought to be chary of viewing the behavior as a “Monday morning quarterback” and thereby applying a standard of perfection *ex post facto*.

[24] The Crown submits that it is difficult to conceive how the police could have approached the situation differently without significantly increasing the risk to themselves, the community or Mr. Squires; in the circumstances their response was tailored to the circumstances as they unfolded. I do not agree.

[25] In *Clayton* at paragraph 31, the Court stressed the importance of balancing the liberty interests of the suspect against the risks to the public and the police “to determine whether, given the extent of the risk, the nature of the stop is *no more intrusive of liberty interests than is reasonably necessary* to address the risk” (emphasis added). Assessment of police actions must be undertaken in light of such strictures as well as in light of the comments in *Mann*, at paragraphs 17-18, that there is “a limited sphere for state intrusion” by way of investigative detention. Applying this approach does not amount to Monday morning quarterbacking, which the Supreme Court, in *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142 at paragraph 24, in another context, cautioned against, as being “unfair and inappropriate” to the police when exercising discretion in difficult and fluid circumstances.

[26] In *Clayton* itself, which has some factual similarities to the current case, the police responded to a 911 call to the effect that ten people with handguns were in a parking lot outside a strip club. Four vehicles were dispatched to the scene and encountered a number of cars that generally matched the description given by the 911 caller. The police set up a perimeter and blocked a car (in which Farmer was the driver and Clayton the passenger) from leaving. The car did not match the described vehicles. Informing Farmer there had been a gun complaint, the police told Farmer to get out of the car. After a delay, he reluctantly complied and was told to put his hands on the top of the car. This was done for officer safety, preparatory to a search for weapons. Clayton was also asked to exit the vehicle but did not comply with a request to move to the rear of the car and to place his hands on the car where they could be seen. Clayton shoved the officer and ran to the front of the building where he was subdued by other officers, put on the ground, handcuffed and then placed in a police cruiser. On the way

to the cruiser, Clayton acknowledged he had a gun on his person. When he heard that it had been confirmed that Clayton was in custody and had a gun, another officer arrested Farmer for possession of the gun found on Clayton.

[27] These actions were regarded as reasonable and appropriate in the circumstances to effect an investigative detention. Unlike the current case, the manner of detention initially involved asking the suspects to step out of the vehicle and put their hands on it so that they were in plain sight. It was only after one of them failed to cooperate and attempted to flee that handcuffing and detention in a police cruiser were employed. Unlike *Clayton*, Mr. Squires was fully cooperative and gave no indication of reluctance to comply. He was told to put both his hands out of the car window in plain sight. He did so. Instead of requiring him to exit the vehicle, face it and put his hands on the roof, as was done in *Clayton*, he was immediately told to lie face down on the ground, handcuffed and removed to a police cruiser.

[28] In *R. v. McGuffie*, 2016 ONCA 365, the Ontario Court of Appeal affirmed a trial judge's finding that detaining, handcuffing and then placing the detainee, a potential suspect, in a police car for thirty minutes without grounds for arrest while police were investigating a report that five men were at a bar passing around a handgun, exceeded what was appropriate for an investigative detention because it ignored the obligation to minimize the length and nature of the detention that was reasonably necessary on an objective view of the totality of the circumstances. Doherty J.A. expressed his analysis this way [citations omitted]:

[33] The appellant was detained from the moment that Constable Greenwood stopped him on the street. The detention was made all the more obvious when Constable Greenwood handcuffed the appellant. The appellant was entirely under Constable Greenwood's control from that point forward...

[34] When Constable Greenwood detained the appellant he had reasonable grounds to suspect that the appellant was in illegal possession of a handgun. ... While Constable Greenwood did not have grounds to arrest the appellant, he did have a duty to investigate the gun-related incident and the appellant's potential connection to it.

[35] An individual may be detained for investigative purposes if the police are acting in the exercise of their duty and the detention is *justified as reasonably necessary in the totality of the circumstances*...

[36] In my view, the appellant's initial detention on the street was a lawful exercise of the police power to detain persons in the course of a criminal investigation.

[37] In *Mann*, at para. 35, Iacobucci J. stressed that an investigative detention was not the same thing as an arrest and could not be allowed to become "a *de facto* arrest". The significant interference with individual liberty occasioned by an arrest is justified because the police have reasonable and probable grounds to believe that the arrested person has committed an offence. Investigative detention does not require the same strong connection between the detained individual and the offence being investigated. *The detention contemplated by an investigative detention cannot interfere with individual liberty to the extent contemplated by a full arrest.*

[38] The duration and nature of a detention justified as an investigative detention must be tailored to the investigative purpose of the detention and the circumstances in which the detention occurs. A brief detention on the street to question an individual implicated in a criminal investigation involving ongoing events may be justifiable under the *Mann* criteria, but under those same criteria imprisonment in a police cruiser while handcuffed for some indefinite period while an officer carries out other aspects of a criminal investigation cannot be justified. The police cannot use investigative detention as an excuse for holding suspects while police search for evidence that might justify the arrest of the suspect. Nor does investigative detention mean that the police can detain suspects indefinitely while they carry out their investigation.

[39] Constable Greenwood was justified in briefly detaining the appellant to question him about his knowledge of the handgun. However, after that brief detention, he was required to release the appellant unless he had grounds to arrest him. There is no suggestion that he had grounds to arrest the appellant. Constable Greenwood was therefore required to release the appellant. Instead, he imprisoned the appellant while he pursued his investigation elsewhere. In doing so, he completely disregarded the appellant's right to liberty and rendered him vulnerable to further police investigation. The appellant's right to be free from arbitrary detention was infringed by Constable Greenwood when he confined the appellant in the back of Constable McDonnell's cruiser.

(Emphasis added.)

[29] In *McGuffie*, Doherty J.A. relied on the statement in *Mann* at paragraph 35, that an investigative detention should not be allowed to become a *de facto* arrest and stated that the duration and nature of the detention must be tailored to the investigative purpose of the detention. Generally, subduing and immobilizing by threatening force, handcuffing and placement in a police vehicle will not be necessary to carry out an

offence investigation. In most cases, a direction to cease movement, exit a vehicle, keep one's hands visible and respond to questioning will be sufficient. Obviously, as the events following the initial interaction with the suspects in *Clayton* demonstrate, handcuffing and other forms of physical restraint and confinement may be necessary in an investigative detention, but generally that should be the exception rather than the rule.

[30] I subscribe to the views expressed by Penney, Rondonelli and Stribopoulos in *Criminal Procedure in Canada* (Markham, ON: LexisNexis Canada, 2011) at 125:

... there is a risk that investigative detention, which is supposed to be brief and unobtrusive, may come to resemble *de facto* arrests. This would be most unfortunate. If courts were to authorize the police to routinely handcuff those detained for investigative purposes, to hold those detained for extended periods, to move those held to different locations (like the station-house) and to carry out intrusive personal searches, then investigative detentions would in time become indistinguishable from conventional arrests. This would mean that arrest-like encounters would have become licensed by the courts on the basis of a considerably lesser standard than that which Parliament has legislatively mandated for arrests: reasonable and probable grounds. In effect, such a change would impose the harsh consequences of arrest on a much greater number of innocent people.

[31] Sometimes the safety and offence investigation functions overlap, as where, in the current case, the offence being investigated involves possible possession or use of a weapon. In such circumstances, the need for intrusive measures to enable a protective search, becomes commingled with the investigation of the substantive offences. Detention for safety purposes including a protective safety search becomes in essence a search that would aid the investigation of the substantive offences.

[32] *McGuffie* amounts to a re-affirmation of the notion that an investigative detention, while capable of being tailored to the presenting circumstances, is intended to be generally a brief and limited suspension of a citizen's right to go about his or her business freely. It must be no more intrusive of liberty interests than is "reasonably necessary." If it exceeds that, it will become an unjustified detention that will be regarded as arbitrary under section 9.

[33] The use of force is usually associated with arrest rather than investigative detention. In *R. v. Whitfield*, [1970] S.C.R. 46, Judson J.

adopted the description of arrest in *Halsbury* as “the actual seizure or touching of a person’s body with a view to his detention” (at 48). It may also consist of words or conduct which make it clear that the officer will, if necessary, use force to restrain free movement: *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 43.

[34] While threats of use of force by the drawing and pointing of a weapon at the putative detainee may be permissible for detention short of arrest in some circumstances (*R. v. Gnanachandran*, 2005 Carswell Ont 3065 (S.C.) at para. 30; *R. v. Cunanan* (2008), 170 C.R.R. (2d) 69 (Ont. S.C.) at paras. 42, 44; *R. v. Agengo*, 2011 ABQB 171, 506 A.R. 344, at paras. 14-17), the justifiability of such actions will depend on the totality of circumstances insofar as they demonstrate that they are an intrusion of liberty that is reasonably necessary to the performance of the officer’s duty given the police officer’s knowledge of such things as the likelihood that the suspect possesses a firearm, his apparent purpose and any reputation for violence that he may have. The use of force such as pointing a weapon, ordering the suspect to the ground, handcuffing and confining in a police vehicle will usually be regarded as a *de facto* arrest (see, e.g., *R. v. Strilec* 2010 BCCA 198, 256 C.C.C. (3d) 403; *R. v. Orr*, 2010 BCCA 513 at paras. 10-11).

[35] Here, it is to be noted that it could not be said that the police had more than a reasonable suspicion, upon entering the parking lot and seeing a vehicle that generally matched the description in the tip, that the suspect in the vehicle had any weapon in his possession or under his control. There was no evidence led at trial of any reputation of Mr. Squires, who was known to the officer, for violence (although he was subject to a firearms prohibition). Further, the suspect was not behaving in a manner that in itself would have invoked suspicion. He was cooperative throughout and complied with all directions from the officer. The degree of force used and the intrusion into Mr. Squires’ liberty was not, at that time, necessary to protect officer or public safety or to further the investigation which had been activated by the tip that had been received or the initial observations in the parking lot. Once the police went beyond a scenario requiring Mr. Squires to keep his hands visible, exit the vehicle and put his hands on the roof of the vehicle preparatory to, perhaps, a pat down search, and instead used physical restraint, and threats of physical force, they exceeded the bounds of permissible detention and, given the conceded absence of

grounds for an actual arrest, caused the resulting detention to become arbitrary.

[36] Applying the analyses in *Clayton* and *McGuffie* against their respective factual backgrounds, I conclude, as did the trial judge, that it was reasonably necessary in the totality of the circumstances of the current case, (given the report of a firearm and the general description given by the tipster, suggesting that the appellant could be regarded as a suspect), to detain and question the appellant when he was observed in his vehicle on the community centre parking lot. However, in the absence of any indication of attempted flight, uncooperativeness or threatening behavior, that could have been accomplished by requiring the appellant to exit the vehicle and to place his hands in plain sight on the top of the vehicle, preparatory to a pat down search. It did not in the circumstances require ordering him to the ground at gunpoint, handcuffing him and placing him in the police cruiser before continuing to look for any weapons. What began as a lawful detention became unlawful when excessive force and unnecessary detention methods were employed. The detention became arbitrary and was therefore a breach of section 9 of the *Charter*.

[37] In these circumstances, I would not disturb the trial judge's findings with respect to the section 9 analysis.

SECTION 8 OF THE CHARTER: UNREASONABLE SEARCH AND SEIZURE

Search Incident to Investigative Detention

[38] Section 8 of the *Charter* provides:

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

[39] A search will not be regarded as unreasonable if it is made incidental to a lawful arrest or investigative detention and the nature of the search is reasonable in the circumstances. This presupposes, of course, that the detention in question is lawful. Where it is not, it does not provide a justification for a warrantless search. In *McGuffie*, Doherty J.A., relying on *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408 at para. 44, explained:

[54] ... In my view, the police cannot, through unlawful conduct, create a circumstance said to justify a safety search of an individual.

[55] I would draw an analogy between searches that are said to be lawful as an incident of an arrest and safety searches which are said to be lawful as an incident of a lawful investigative detention. If the arrest is unlawful, the search incidental to arrest is unlawful and contrary to section 8. ... Similarly, if an investigative detention is unlawful, a safety search said to be justified on the basis of that detention must be unlawful and contrary to section 8. [citations omitted]

[40] While there are indications in other cases (eg. *R. v. Fountain*), that in some circumstances a safety search incident to an unlawful detention may nevertheless be upheld, I prefer the approach in *McGuffie*. Further, as *MacDonald* recognized, although there may be grounds for a safety search even outside an investigative detention, provided it is necessary to deal with exigent circumstances or an imminent threat, *MacDonald* was a case where no attempted detention, whether lawful or unlawful, was involved. It does not stand for the proposition that a safety search can be lawfully undertaken in the context of an unlawful - and thus arbitrary - detention. Furthermore, it was not argued in this case that the circumstances were such that a search for safety purposes was so urgent and necessary that it could have been undertaken without first taking other investigative measures.

[41] The approach in *McGuffie* is applicable to the case here. At the time the search was undertaken, the investigative detention had become unlawful, as explained above. Accordingly, the search cannot be justified as being incident to a lawful detention.

[42] (I would also note that had the gun been discovered, say, by the officer looking in the vehicle, or perhaps by even opening the vehicle door, in conjunction with a pat down search of Mr. Squires while standing outside the vehicle with his hands on the roof, as was done initially in *Clayton*, and before the excessive force of requiring him to prostrate himself on the ground, cuffing him and confining him in the police vehicle had occurred, the search would have been a search incidental to a lawful detention and would have been permissible.).

[43] The trial judge did not employ the foregoing analysis in his reasoning. He justified his conclusion that there was a violation of section 8 on a different basis. It is to that to which I now turn.

The Trial Decision - Search

[44] Although the trial judge concluded that the search of Mr. Squires' vehicle was in violation of section 8, his reasons were brief. He stated:

By removing the accused and handcuffing and searching him, from the vehicle, he arbitrarily detained the accused and violated his section 9 rights. By performing a visual search of the vehicle by examining by flashlight through the tinted windows, he violated the section 8 rights as he was basing his search as an incident of arrest and there had been no lawful arrest.

[45] Although the trial judge had, earlier in his judgment, adverted to case law dealing with the "plain view" exception to the prohibition on otherwise unjustified seizures, he did not deal specifically with why it did or did not apply to the facts of the case. One might infer from his reference, in the passage quoted above, to the search being based as an incident of arrest – and therefore intentional - that he was concluding that the firearm and shells were not discovered inadvertently. This assumes, of course, that the plain view doctrine is limited to inadvertent discoveries. This is a subject to which I will return later.

[46] It is also not clear whether the judge's conclusion that there had been "no lawful arrest" was based on a conclusion that at no stage in the process were there reasonable grounds for arresting Mr. Squires prior to actual discovery of the firearm and shells or his erroneous application of the arrest standard to the justification for an investigative detention or whether he was simply addressing the lack of knowledge by the searching officer of the arrest of Mr. Squires in the police car at the time the search was carried out. If the latter, this engages the question of whether it is a requirement of the searching officer to know that an arrest had occurred or that grounds for arrest actually existed. This is also a matter that will be addressed later.

[47] The Crown asserts that the trial judge erred (i) in concluding that looking into the window of the vehicle amounted to a search; (ii) in not concluding that the search, ie., opening the door and seizing the firearm and shells, was a valid search and seizure incident to investigative detention or arrest; and (iii) in not concluding that, in any event, the search was justified by the application of the plain view doctrine.

[48] I have already dealt with and rejected the argument that the search was incident to a lawful investigative detention. (I note here that even though a search conducted incident to an unlawful detention may constitute

a breach of section 8, that does not decide the issue of admissibility of the products of the search. That issue must be dealt with in the context of the application of section 24(2) of the *Charter*.)

[49] The remaining issues all involve the application of proper legal standards to the facts and are questions of law, to which a standard of correctness will be applied.

“Looking” as Searching

[50] The Crown submits that the judge erred when he concluded that “performing a visual search by examining by flashlight through the tinted windows” constituted a search contrary to section 8.

[51] The Crown takes issue with the judge’s characterization of the visual inspection as a “search”, arguing that the police “needed no authority nor reason to look into the window of a motor vehicle parked in a public parking lot.” Although the cases recognize that a driver and occupier of a motor vehicle have a reasonable expectation of privacy in a motor vehicle (though reduced in comparison, say, to a private dwelling: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 at para. 22), the Crown submits that there can be no such expectation of privacy in the area of the vehicle open to observation by anyone, including the police lawfully standing outside the vehicle. On this analysis, the search in this case did not commence until the police officer opened the vehicle door, reached in and began to examine the interior further. By that time, the existence of the gun was already known.

[52] I agree with this submission. To constitute a search within section 8, the actions of the police must have intruded on a reasonable expectation of privacy: *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 8; *R. v. M.(A.)*, 2008 SCC 19, [2008] 1 S.C.R. 569 at para. 8. While it is true that whether a reasonable expectation of privacy exists is said to depend upon “the totality of the circumstances” (*R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579 at para. 26) and the fact that the subject matter being observed or seized is in public view is but one factor among many to be considered in the privacy expectation analysis (*Patrick*, paras. 27-72), the situation is different if all that is occurring is visual observation, without more, from outside the territorial zone of privacy that is involved and when what is engaged is not an issue involving personal or informational, as opposed to territorial, privacy. *Patrick* dealt with a situation (entry on property to inspect the

contents of garbage bags) involving an incursion into the complainant's zone of territorial privacy and involved aspects of personal and informational privacy as well. It did not involve merely seeing something and thereby acquiring knowledge that was relevant to the investigation. The current situation is similar to *R. v. Boersma*, [1994] 2 S.C.R. 488 where the Supreme Court of Canada upheld a British Columbia Court of Appeal decision holding that there could be no objectively reasonable expectation of privacy in marijuana plants growing in plain view and observed from outside a zone of territorial privacy. In a short judgment, Iacobucci J. stated:

[1] ... The plants were being cultivated in plain sight and were observed by police officers walking by on a dirt road. In these circumstances, we agree with Lambert J.A. of the British Columbia Court of Appeal that the appellants had no reasonable expectation of privacy with respect to the area on which marihuana was being cultivated and were thus not entitled to the protection of section 8 of the Canadian Charter of Rights and Freedoms.

[53] This surely makes sense when what is involved is simple observation in circumstances where only territorial privacy is engaged. We rightly expect more of our police forces when conducting an investigation than for them to wander aimlessly about their business in the hopes they will stumble upon something relevant. We expect them to be purposeful, focused and methodical in what they do. One of their chief tools in carrying out an investigation is their powers of observation. If they can exercise their powers of observation productively without physically invading any private space in which the owner or occupier has a reasonable expectation of territorial privacy and without invading informational and personal privacy, the person who has not taken the trouble to conceal the item observed can hardly complain: See *R. v. Robere* (1999), 181 Nfld. & P.E.I.R. 292 (Nfld. CA) at para. 26, *R. v. Grunwald*, 2010 BCCA 288, 257 C.C.C. (3d) 53 at para. 48. To restrict the police from looking or, if they have already looked, to effectively pretend that what they saw did not exist, would unreasonably, unnecessarily and arbitrarily hamper them in effectively doing their duty. It must be remembered that a police officer needs no legal authority to approach or speak to a person sitting in a vehicle in a public space like a parking lot: *R. v. Calder* (2004), 47 M.V.R. (4th) 20 (Ont. CA). In making such an approach the officer does not have to avert his or her eyes from looking in the vehicle and observing items in plain sight.

[54] Nor does the fact that the officer was aided in his observation by the use of a flashlight through tinted glass make any difference: *R. v.*

Mellenthin, [1992] 3 S.C.R. 615 at 623-624, per Cory J. In *Grunwald*, Bennett J.A. explained it this way:

[38] Mr. Grunwald argued that the officer's use of the flashlight to see through the tinting [of the vehicle] took the contents of the truck out of plain sight. It was submitted by Mr. Grunwald that this action transformed the officer's visual inspection into a search.

[39] In my view, common sense tells us that the police, working at night, will have occasion to use flashlights in the ordinary course of their duties. It is not objectively reasonable to expect that they would not. When the police are lawfully where they are permitted to be, the use of artificial illumination should not automatically constitute a search.

...

[45] ... [P]lain view is not limited to daytime hours. If a flashlight is used to see what would be visible in daylight hours, such as objects in the back of a pickup truck or the interior of a motor vehicle, the item does not cease to be in plain sight when the sun goes down.

...

[49] In these circumstances, Mr. Grunwald had no reasonable objective expectation of privacy in the back of his truck. It follows that there was no search, and therefore no section 8 violation....

[55] Accordingly, observing portions of the shotgun sufficient to identify it as a shotgun, in plain view on the backseat of the vehicle, did not amount to a search. The trial judge erred in concluding otherwise.

[56] I would also observe that this conclusion is consistent with the decision of the majority in this Court's decision in *R. v. Diamond* 2015 NLCA 60 (which was released following argument in the current appeal) that observing something in plain view in a car is not a search.

[57] Having legitimately observed the firearm and concluded it was relevant to his investigation, the police officer's authority to further search the vehicle by opening the door and seizing the item would, in the absence of having obtained a warrant, depend on whether the search and seizure was authorized as being incident to arrest or whether it was in accordance with the plain view doctrine. For this purpose of this analysis, the "search" must be regarded as having commenced at the moment the police officer opened

the vehicle door and laid hands on the gun, not at the moment he looked into the vehicle from outside and first saw the gun.

Timing of Arrest in Relation to Search

[58] On the evidence, the arrest of Mr. Squires back in the second officer's police car took place after the first officer saw the gun in the backseat of the vehicle, opened the door and seized it and the accompanying shells. How then can it be said that the search and seizure was incidental to arrest?

[59] The Crown submits, however, citing *R. v. Debot* (1986), 30 C.C.C. (3d) 207, 54 C.R. (3d) 120 (Ont. C.A.) aff'd (without a majority addressing this point) [1989] 2 S.C.R. 1140, that although the search preceded the actual words of arrest, it can still be characterized as being incidental to the arrest because the officer in fact had reasonable and probable grounds to arrest Mr. Squires as soon as he observed the firearm on the seat of the vehicle even though the actual words of arrest were not uttered until after the seizure. That brought it within the scope of a search incident to an arrest.

[60] In the Court of Appeal in *Debot*, Martin J.A. stated at 223:

Counsel for the appellant also contended that the search of the respondent was also authorized as incident to a valid arrest, even though the respondent was not arrested until after the search. It is axiomatic that a search may not precede an arrest and serve as part of its justification, for example, where prohibited drugs are found on the suspect's person in the course of the antecedent search and constitute the probable cause for the subsequent arrest. On the other hand, it is well established in the United States that where probable grounds exist for arresting a person, apart altogether from evidence discovered by a search, the fact that the search preceded the arrest does not preclude it from being a search incident to a valid arrest, where the arrest quickly follows on the search: see *People v. Simon*, 290 P. 2d 531 (1955); *United States v. Rogers*, 453 F. 2d 860 (1971); *State of Maine v. LeBlanc*, Me., 347 A. 2d 590 (1975); *In The Matter of John Doe, a Child*, 547 P. 2d 566 (1976); *Rawlings v. Kentucky*, 100 S. Ct. 2556 at 2564 (1980).

And at 224-225:

The view enunciated by Mr. Justice Traynor in *People v. Simon*, supra, has much to commend it. ...

I am of the view that Constable Birs, prior to searching the respondent, had reasonable and probable grounds to believe that DeBot had committed an indictable offence: namely, possession of a controlled drug, methamphetamine, for the purpose of trafficking. Constable Birs was justified, pursuant to section 450 of the Code, in arresting DeBot without warrant. Holding that the search in the present case was incident to a valid arrest is consistent with the policy underlying the justification for a search incident to a valid arrest and is not precluded by authority.

[61] *Debot* has been accepted and followed on this point in other cases at the appellate level: *R. v. Sinclair*, 2005 MBCA 41, 19 Man. R. (2d) 283, at para. 20, leave to appeal to SCC dismissed, [2005] S.C.C.A. No. 263; *R. v. Dubois*, 2004 BCCA 589, 125 C.R.R. (2d) 99 at para. 10; *R. v. Aslam*, 2006 BCCA 551, 149 C.R.R. (2d) 43 at para. 11; *R. v. Frieberg*, 2013 MBCA 40, 299 C.C.C. (3d) 254 at paras. 32-39.

[62] As *Frieberg* emphasizes, however, the search and the arrest must be capable of being regarded as part of one transaction. The arrest must follow immediately following the search.

[63] The *Debot* principle has application to the current case. Upon observing the shotgun through the window, that information, coupled with the information which initiated the attendance of the officers at the scene, and the admission by Mr. Squires that he had a gun in his possession, constituted reasonable and probable grounds for arrest. The subjective and objective components of the test were satisfied. Inasmuch as the observation of the gun on the backseat of the vehicle did not, as explained earlier, amount to a search in itself, this is not a case of attempting to use the results of the search to constitute the grounds for arrest. Furthermore, once the items were seized, the arrest followed immediately thereafter. The seizure was therefore incident to the arrest. It can therefore be justified on that basis.

Plain View Doctrine

[64] In my view, even if looking into the vehicle could be characterized as a search, the seizure can also be justified on the application of the plain view doctrine.

[65] The plain view doctrine allows for a seizure without warrant where the item being seized is in plain sight of the person effecting the seizure and the item is potentially related to the matter being investigated. An object to

which the plain view doctrine applies can be seized without breach of section 8 rights.

[66] In this jurisdiction, the application of the doctrine has been expressed to be dependent on the existence of three requirements: (i) the officer must be lawfully in a position from which the evidence was plainly in view; (ii) discovery of the evidence must be inadvertent; and (iii) it must be apparent to the officer at the time that the observed item may be evidence of a crime or otherwise subject to seizure: *Robere*, at para. 19; *R. v. Chaisson*, 2005 NLCA 55, 249 Nfld. & P.E.I.R. 252, at para. 33; *Diamond*, at para. 19.

[67] In this case, the police officer was, as explained above, lawfully in the place outside the vehicle from which the interior could be viewed. As well, once the firearm was observed, it would have been apparent to the officer that it may be evidence of a crime. It was the very type of item which was reported to them as being in the possession of someone in a black vehicle in the parking lot and which prompted the investigation in the first place. The first and third requirements listed above are therefore clearly satisfied.

[68] The question at issue in this case is whether the discovery was “inadvertent.” In one sense, it could be said that it was. The stated purpose of the officer in returning to the vehicle and looking inside was to check to see if there was anyone else in the vehicle and thereby ensure officer and public safety. It is true that by looking for a weapon as part of a protective search, the officer would have also been serving another purpose: searching to see if there was any evidence of a firearms offence. But that will be inevitable whenever the nature of the potential offence being investigated involves safety issues. Nevertheless, the evidence of the officer concerned was that his initial purpose was to deal with safety issues.

[69] To the extent that that purpose was the dominant one, then the discovery of a firearm could be said to be an inadvertent by-product of the viewing of the interior of the car as part of a protective safety search. If the second purpose had predominated, then it would be more difficult to say that viewing the firearm was inadvertent. Even in this situation, however, I am guided by the definition of “inadvertent” given by Welsh J.A. in *Chaisson* at para. 33: “the officer must not have knowledge of the evidence in advance.” A narrow interpretation of those words would require some degree of advance knowledge of what the officer would likely find. In that sense, the officer here did not have that degree of knowledge; he was still

investigating a complaint to determine *whether or not* the respondent was involved with a firearm. It must be remembered that at the moment of the observation, the officer was not privy to the acknowledgement by the respondent to the other officer back in the police cruiser that there was in fact a shotgun in the vehicle. Thus, it can be said that the observing officer did not have “knowledge of the evidence in advance”

[70] On the other hand, a more expansive view of the definition in *Chaisson* might require that the item seen could not be the very type of item that was the subject of the search in the first place. In other words, seeing drugs while looking for a gun would be inadvertent but seeing a gun while looking for a gun (even if for another purpose, i.e. to deal with safety concerns rather than to further evidence-gathering) would not. I see no reason why this broader definition should be applied.

[71] I am prepared to decide, therefore, that the discovery of the firearm without any advance indication that there would be one in the vehicle was inadvertent and that the test for the application of the plain view doctrine was satisfied. However, I do not in any event believe that inadvertent discovery is or should be an absolute requirement for the operation of the doctrine in all cases.

[72] In one sense, if, as I have concluded above, that in the case of observation from outside a zone of territorial privacy there cannot even be a “search” at all when the thing observed is in plain view (because no reasonable expectation of privacy is engaged), then the plain view doctrine should not have, as a requirement, that the observation be inadvertent. This should logically follow from the fact that if there is no search at all, one is perfectly entitled to make any observations one wants, whether inadvertent or not. The plain view doctrine is only said to be engaged when a reasonable expectation of privacy is potentially being infringed by something that *prima facie* constitutes a search. Put another way, if the principal underpinning of the justification for the plain view doctrine is the absence of any interference with an expectation of privacy, then there is no need for a requirement of inadvertent observation.

[73] On the other hand, if there is another rationale for the doctrine, it may be arguable that inadvertence should be a requirement. One possible rationale could be that such a requirement would be an additional safeguard against disingenuous explanations proffered by police as a pretext for not obtaining a search warrant by claiming that the item was in fact in plain

view and that it was seen while looking for something else when in fact it was the target for the search from the beginning. I am not satisfied that this sort of rationale is appropriate or necessary. Any assertions of the police as to whether they were able to see the item in plain view from a place where they were otherwise lawfully able to be can be judged against the whole circumstantial background in any event.

[74] There is also some controversy in the case law as to whether inadvertence is necessary. In addition to *Robere, Chaisson* and *Diamond*, these cases all make statements of the elements of the doctrine which include a requirement for inadvertence: *R. v. Belliveau and Loisier* (1986), 30 C.C.C. (3d) 163 (NBCA); *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241; *Frieburg, supra*; *R. v. Jackson*, 2005 ABCA 430, 376 A.R. 99; *R. v. Kouyas* (1994), 136 N.S.R. (2d) 195 (NSCA, aff'd without discussion [1996] 1 S.C.R. 70); *R. v. Lauda* (1998), 122 C.C.C. (3d) 74 (Ont. CA), aff'd [1998] 2 S.C.R. 683. The Supreme Court has also referenced the inadvertence requirement in *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227 at para. 27 by acknowledging the Crown's argument that the evidence in that case came within the view of a lawfully positioned officer that was discovered inadvertently. However, the Court did not undertake any definitive analysis of the requirement.

[75] Other cases question the requirement of inadvertence: *R. v. L.F.* (2002), 166 C.C.C. (3d) 97, 4 C.R. (6th) 52; *R. v. Spindloe*, 2001 SKCA 58, 154 C.C.C. (3d) 8.

[76] While the predominance of the case law reiterates an inadvertence requirement, I am not satisfied that is or should be an absolute requirement in all cases. I come to this conclusion, first, because, as explained above, the main rationale of the plain view doctrine is that there is no interference with a reasonable expectation of privacy. Secondly, the reliance of many of the pro-inadvertence cases on United States jurisprudence appears to have been based on a mistaken analysis of the American jurisprudence, as discussed in *L.F.* and *Spindloe*. And thirdly, as a matter of policy, if the police are merely using their powers of observation from a position that does not otherwise invade the target's zone of privacy, there does not appear to be any reason in principle to restrict the police's ability to use powers of observation in the investigation of crime. Careful and focused observing while not otherwise interfering with citizens is what police should do.

[77] I recognize that this Court has reiterated an inadvertence requirement on at least three occasions. However, the Court is sitting as a panel of five on this case and has the authority to revisit or reconsider its previous decisions. That does not mean, however, that the Court may, at its whim, discard previous authority in favour in new personal preferences. Any reconsideration must factor into its analysis respect for the considered views of previous times. The Court must always balance the important values of correctness and certainty (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 at para. 27). For a discussion of a non-exhaustive list of factors to be considered when addressing whether to depart from a previous decision in a horizontal *stare decisis* context, see: *R. v. Bernard*, [1988] 2 S.C.R. 833 at 850-861 and *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.) at paras. 118-145.

[78] In this case, given the absence of unanimity on the issue across the country, the absence of any definitive statement or analysis on the issue by the Supreme Court of Canada, the possible misunderstanding of the United States jurisprudence which formed the basis of earlier Canadian decisions, the fact that the rationale for the plain view doctrine (based on the absence of any interference with a reasonable expectation of privacy) does not support an inadvertence requirement, and the fact that the rule in this case does not involve upsetting settled police expectations and it is not a rule upon which an accused would rely, I am satisfied that the requirements for the establishment of the plain view doctrine should not include inadvertent discovery. So long as the police are lawfully in a place from where the viewing can take place without invading the suspect's zone of territorial privacy and the item is in plain view, it may be seized without a warrant. While the fact that discovery is inadvertent may reinforce the genuineness of police assertions supporting plain view, it need not be a stand-alone requirement.

[79] Accordingly, for this reason also, I would conclude that the seizure of the gun was lawful and that the items and evidence in relation to it were admissible at Mr. Squires' trial. The trial judge erred in concluding otherwise.

APPLICATION OF SECTION 24(2) OF THE CHARTER

[80] While I have concluded, based on the fact that the seizure was incident to an arrest or based on the plain view doctrine, that the evidence

of the gun had been obtained without any breach of section 8 of the *Charter*, there remains the fact that there was an arbitrary detention, based on the excessive use of force by the police, contrary to section 9.

[81] The question that must still be answered is whether, in light of the breach of section 9, the evidence ought nevertheless to be excluded by virtue of the application of section 24(2) of the *Charter*.

[82] The trial judge undertook his analysis on the basis of his conclusions that there had been a breach of section 8 as well as section 9. In light of the fact that, on my analysis, the trigger for consideration of whether evidence should be excluded under section 24(2) is different (a section 9 breach only) any analysis of the application of section 24(2) must proceed on a different basis than that facing the trial judge. The degree of deference that would normally be shown to findings of the trial judge in this regard therefore need not be shown. Furthermore, it is clear that the trial judge did not expressly consider all of the factors that should be addressed in applying the analysis mandated in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, especially with respect to the relevance of the second and third factors (impact of the breach on the *Charter*-protected interests of the accused and society's interest in adjudication of the case on its merits). An independent analysis is therefore needed.

[83] Exclusion of evidence under section 24(2) may potentially occur when it was "obtained in a manner that infringed or denied any rights or freedoms" guaranteed by the *Charter*. The question in this case is whether the section 9 breach is sufficiently connected to the obtaining of the gun and ammunition in the sense that it was "obtained in a manner" that infringed section 9.

[84] In one sense, it could be said that the section 9 infringement, by immobilizing Mr. Squires through putting him on the ground, handcuffing him and confining him in the police car, facilitated the subsequent discovery of the gun and ammunition and that the two were therefore causally connected. However, it is likely that if the police had refrained from excessive force and conducted a lawful investigative detention, by limiting their interaction with Mr. Squires to stopping him, requiring him to exit the vehicle and standing outside the vehicle with his hands in view on the roof to enable a pat down protective search, the officer would in due course have observed the shotgun by looking through the window or by

opening the door incident to the search. The evidence would have been discoverable in any event.

[85] Notwithstanding the potential discoverability of the evidence through lawful means, the Supreme Court decision in *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215 has acknowledged that if the police nevertheless follow a course of conduct which infringes the *Charter*, the discovery may nonetheless be tainted and bring the administration of justice into disrepute, thereby justifying exclusion under section 24(2). Although discoverability remains a relevant factor under the analytical approach mandated in *Grant* and its companion cases, it is not determinative. As Cromwell J. observed in *Côté* at para. 70, “[a] finding of discoverability should not be seen as *necessarily* leading to admission of evidence” (emphasis added).

[86] The approach in *Côté* has been applied by appellate courts in cases where an unlawful detention is followed by an otherwise lawful search: *Fountain*; and *R. v. Plaha* (2004), 188 C.C.C. (3d) 289, 24 C.R. (6th) 360 (Ont. C.A.).

[87] In *Plaha*, Doherty J.A. emphasized that “[a] causal relationship between the breach and the impugned evidence is not necessary” (at para. 45). It is sufficient if the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct.

[88] Here, given the short amount of time between the first interaction between the police and Mr. Squires and the time when the gun was seen and seized, as well as the general context of what was occurring. I am satisfied that the connection between the section 9 breach and the obtaining of the evidence in this case was “more than tenuous”, to use Doherty J.A.’s words in *Plaha*. It was part of the same transaction or course of conduct.

[89] Accordingly, a section 24(2) analysis is required. I am in general agreement with Rowe J.A.’s analysis of this issue, and his conclusion that the evidentiary products of the search of the vehicle should not have been excluded. Their admission would not bring the administration of justice into disrepute.

[90] Although the foregoing analysis does not afford Mr. Squires a remedy, in terms of exclusion of evidence, for the breach of his *Charter*

rights, other section 24(1) remedies, such as a possible reduction in sentence, might be available, if on a retrial he is convicted.

CONCLUSION AND DISPOSITION

[91] I conclude that:

1. The trial judge erred in his application of the test for determining the lawfulness of the police's purported investigative detention;
2. Nevertheless, the trial judge did not err in concluding that the manner adopted by the police in effecting the respondent's detention exceeded what was needed for the purpose of investigative detention and that the detention was therefore unlawful at the point where other steps relating to search and seizure were undertaken by the police;
3. The trial judge erred in concluding that looking into the respondent's vehicle amounted to a search within section 8 of the *Charter*;
4. The police were entitled to look into the vehicle and observe the gun in plain view since the act of looking did not constitute a search within section 8 of the *Charter*;
5. The seizure of the gun and ammunition was justified as a search and seizure incident to the respondent's arrest, on the basis of the principle in *R. v. Debot*;
6. The seizure of the gun was also justified by the application of the plain view doctrine;
7. The trial judge erred in his conclusion that the seizure of the gun and ammunition amounted to a breach of section 8 of the *Charter*;
8. The trial judge erred in excluding the evidentiary products of the search of Mr. Squires' vehicle under section 24(2) of the *Charter*. They should have been admitted as evidence at the trial.

[92] Accordingly, I would allow the appeal and order a new trial.

J.D. Green C.J.N.L.

I Concur: _____

L.D. Barry J.A.

I Concur: _____

L.R. Hoegg J.A.

Separate Concurring Reasons by Rowe J.A.:

INTRODUCTION

[93] I concur with the Chief Justice in the result. I agree with his statements of the law and in the application of the law, save as noted below.

ISSUES

[94] The Crown stated that the trial judge erred in law by:

- (1) finding that the Respondent was arbitrarily detained pursuant to section 9 of the *Charter*;
- (2) finding that the Respondent's motor vehicle was unlawfully searched pursuant to section 8 of the *Charter*; and
- (3) unreasonably excluding the evidence pursuant to section 24(2) of the *Charter*.

Mr. Squires accepted the foregoing statement of the issues.

ANALYSIS

“Looking” as Searching and Timing of Arrest in Relation to Search

[95] In his reasons at paragraphs 50-57, the Chief Justice says, in effect, that a police officer standing in a public place and looking through the window of a vehicle is not conducting a “search” within the meaning of section 8 of the *Charter*. I agree.

[96] I also agree with the Chief Justice’s analysis at paragraphs 58-63 that where a police officer has grounds to make an arrest and where as part of a single transaction the officer first conducts a search and seizure and then carries out the arrest, the search and seizure can properly be viewed as incidental to the arrest.

[97] Where he and I part company is with respect to his references to “plain view”. At no point in my analysis do I rely on the plain view doctrine, about which I will say more below.

Application of section 24(2) of the *Charter*

[98] I am in accord with the Chief Justice’s analysis regarding section 24(2). I would add the following, which complements what he has written.

[99] The trial judge based his decision to exclude the evidence (the shotgun) on violations of Mr. Squires’ rights under section 9 of the *Charter* (detention) and section 8 of the *Charter* (search and seizure). As set out above, the trial judge was shown to have erred in his analysis regarding section 8. Thus, his analysis under section 24(2) is undermined.

[100] Accordingly, in this case, the Court does not have to show the deference to the trial judge’s section 24(2) decision that an appellate court reviewing such a decision would ordinarily be required to show. See *R. v. Al-Amiri*, 2015 NLCA 37, 368 Nfld. & P.E.I.R. 146, at paras. 22 and 57-58.

[101] It falls to this Court to decide whether the evidence should be excluded under section 24(2) by virtue of the violation of Mr. Squires’ rights under section 9 of the *Charter*.

[102] I would note that there was no causal connection between the use of excessive force in detaining Mr. Squires and seizure of the shotgun. Nonetheless, the issue of exclusion of the evidence under section 24(2) can

arise because of the “temporal [and] contextual” connection between the detention and seizure of the shotgun. See *R. v. Plaha* at para. 45 and *R. v. Fountain*, at para. 42.

[103] It is settled law that in considering whether to exclude evidence under section 24(2) of the *Charter*, a Court is to consider:

- (1) the seriousness of the conduct that infringed the *Charter* right;
- (2) the impact of the breach on the *Charter*-protected interests of the accused;
and
- (3) society’s interest in adjudication of the case on its merits.

See *Grant*.

[104] Regarding the seriousness of the conduct that infringed Mr. Squires’ rights under section 9, while the police used excessive force in their detention of Mr. Squires, their conduct was grounded in a sense of caution related to officer safety. The officers were not cavalier or egregious in their conduct; they simply went too far in the circumstances.

[105] Regarding the impact on Mr. Squires, it was undoubtedly humiliating to be compelled to lie face down on the ground and be searched. As well, it was a constraint on his liberty to be handcuffed and placed in the back seat of the police car. However, the time during which this occurred was brief (about nine minutes). Mr. Squires was not subject to public embarrassment (there was no one present beside the officers). Mr. Squires was not harmed. There is no evidence that he was agitated or distressed. While Mr. Squires was the subject of excessive force during his detention, which violated his section 9 rights, the breach of those rights was relatively “low impact”.

[106] Regarding society’s interest in adjudication on the merits, the control of firearms is important to public safety. Mr. Squires not only had the shotgun improperly stored, he was also prohibited from possessing it. There is an important public interest in having the charges against Mr. Squires adjudicated on their merits.

[107] Balancing the three factors, I conclude that the evidence should not be excluded under section 24(2) of the *Charter*. Thus, I would set aside the trial judge’s decision to do so.

Plain View Doctrine

[108] At the hearing, argument was presented concerning the plain view doctrine. I have not had recourse to the plain view doctrine as part of my analysis; I had no reason to do so. That said, I will address the plain view doctrine, in reply to the Chief Justice's comments.

[109] The leading case in this province regarding the plain view doctrine is *Robere*, per Green J.A. (as he then was). The doctrine was described in paragraph 19:

The plain view doctrine allows for the seizure without warrant of objects in plain view of a police officer who has the right to be in position to have the view, and as a result inadvertently discovers evidence which is immediately apparent as being evidence of a crime. In *R. v. Belliveau* (1986), 30 C.C.C. (3d) 163 (N.B. C.A.), Stratton, C.J.N.B., described the requirements for the application of the doctrine as follows:

...before the plain view doctrine will permit the warrantless seizure by police of private possessions, three requirements must be satisfied. First, the police officer must lawfully make an 'initial intrusion' or otherwise properly be in a position from which he can view a particular area. Secondly, the officer must discover incriminating evidence 'inadvertently', which is to say, he may not 'know in advance the location of [certain] evidence and intend to seize it', relying on the plain view doctrine only as a pretext. Finally, it must be 'immediately apparent' to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. These requirements having been met, when police officers lawfully engaged in an activity in a particular area perceive a suspicious object, they may seize it immediately.

To the same effect see *R. v. Sanchez-Ruiz* (1991), 68 C.C.C. (3d) 500 (N.B. C.A.) and *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548 (Sask. C.A.).

I would affirm the foregoing as good law. In short, I would not extend the scope of the plain view doctrine as the Chief Justice would do in paragraphs 64-79 of his reasons.

CONCLUSION

[110] I would summarize my conclusions as follows:

(1) in the course of a lawful investigative detention, the police used excessive force, causing it to become an unlawful detention, contrary to section 9 of the *Charter*;

(2) when the officer looked through the window of the SUV and saw the shotgun, this did not constitute a “search” within the meaning of section 8 of the *Charter*;

(3) having seen the shotgun on the back seat of the SUV, the officer had grounds to arrest Mr. Squires;

(4) while the officer carried out a search and seizure by opening the door of the SUV and taking possession of the shotgun before Mr. Squires was arrested, the search and seizure and the arrest were part of a single transaction, such that the search and seizure can be treated as incidental to a lawful arrest; and

(5) the infringement of Mr. Squires’ rights under section 9 of the *Charter* (referred to in (1) above) was not such that the evidence (the shotgun) should be excluded pursuant to section 24(2) of the *Charter*.

[111] Accordingly, I would allow the appeal and order a new trial.

M. H. Rowe J.A.

Dissenting Reasons by Welsh J.A.:

BACKGROUND

[112] Mr. Squires was charged with several firearms related offences as a result of an incident that occurred on July 31, 2012. The incident began when the Royal Newfoundland Constabulary communications centre received an anonymous phone call at approximately 2:20 a.m. reporting that there was “a male in a black jeep across from the Froude Avenue Community Centre with a firearm, possibly a shotgun or rifle.” The first officer arrived at the scene at about 2:22 a.m., and the second arrived a minute or two later. The first officer saw a black SUV-type vehicle in the parking lot. He drove past the vehicle and saw one male occupant in the driver’s seat. Having ascertained that there were no other vehicles present, the officer turned his vehicle so that it was facing the black vehicle and activated his car’s emergency lights.

[113] Having gotten out of his vehicle, the officer “drew his firearm and told the male in the driver’s seat, whom he recognized as [Mr. Squires]

from a prior occasion, to put his hands out the window.” Mr. Squires complied. When the second officer arrived, the first officer told Mr. Squires to get out of the vehicle and lie face down on the ground. The second officer also drew her gun. At the first officer’s request, the second officer handcuffed Mr. Squires and took him to sit in her vehicle. At 2:27 the second officer read Mr. Squires his rights and caution and told him that the reason for his detention was that they were investigating a weapons complaint. At that time, Mr. Squires told the officer that there was a shotgun in his car.

[114] In the meantime, the first officer had returned to Mr. Squires’ car, using his flashlight to inspect the interior to ensure there was no one else in the car. He then inspected the car a second time when he saw the barrel of a firearm which “turned out to be a 12-gauge shotgun, [which] was on the rear passenger seat of the vehicle, partially covered by a gym bag.” The officer seized the shotgun and told the second officer to charge Mr. Squires with unsafe handling of a firearm. Two shotgun shells were found in the gym bag.

[115] Mr. Squires was cooperative throughout and complied with the officers’ commands. He was charged with several offences:

- (1) careless handling or storage of a firearm (section 86(1) of the *Criminal Code*);
- (2) unauthorized possession of a prohibited or restricted weapon (section 92(2) of the *Code*);
- (3) unauthorized possession of a prohibited or restricted firearm with readily accessible ammunition (section 95(1) of the *Code*);
- (4) possession of a firearm while prohibited (section 117.01 of the *Code*);
- (5) unauthorized possession of a prohibited or restricted weapon (section 91(2) of the *Code*);
- (6) unlawful possession of a firearm in a motor vehicle (section 94(1) of the *Code*); and
- (7) possession of a firearm with an altered, defaced or removed serial number (section 108(1)(b) of the *Code*).

[116] The trial judge found that Mr. Squires' rights under section 9 of the *Canadian Charter of Rights and Freedoms* were infringed because, due to the excessive use of force by the police, he had been arbitrarily detained. The judge also found a breach of section 8 of the *Charter* because the officer "was basing his search [of the vehicle] as an incident of arrest and there had been no lawful arrest" (oral reasons of the trial judge). The evidence of the gun and ammunition were then excluded under section 24(2) of the *Charter*.

ANALYSIS

General Principles

[117] Section 9 of the *Charter* provides:

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

In applying this provision, general principles regarding the use of force by police officers are discussed by LeBel J., for the Court, in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206:

[32] ... While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

[118] Nonetheless, LeBel J. continued, the courts must take into account the nature of and dangers associated with the performance of police officers' duties:

[35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. ...

[119] Regarding a police officer's authority to lawfully detain an individual, in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, Abella J., for the majority, commented that the development of the law:

[21] ... is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the

interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.

[120] Finally, in assessing police conduct, it is clear that, for public policy reasons, the police have the authority to investigate emergency or 911 calls. The police response must be assessed in light of all the circumstances (*R. v. Godoy*, [1999] 1 S.C.R. 311, at paragraph 11; *R. v. Clayton*, *supra*, concurring reasons by Binnie J., at paragraph 99).

Section 9 of the Charter

[121] Mr. Squires submits that the manner in which the officers detained him amounted to an unlawful *de facto* arrest. A *de facto* arrest in contrast to an arbitrary detention is discussed by Lamer C.J.C., for the Court, in *R. v. Latimer*, [1997] 1 S.C.R. 217:

[22] The appellant alleges that his right under section 9 against arbitrary detention was violated when he was detained at his farm on the morning of November 4, 1993. There is no doubt in my mind that the appellant was detained, and the parties agree on this point. However, I am equally certain that Mr. Latimer's detention was not arbitrary. The RCMP officers who attended at the Latimer farm put Mr. Latimer under *de facto* arrest. Moreover, on the facts of this case, that *de facto* arrest was entirely lawful because it was based on reasonable and probable grounds that Mr. Latimer had taken his daughter's life. A *de facto* arrest which is lawful, in my opinion, cannot be an arbitrary detention for the purposes of section 9.

[23] The appellant's strongest argument is that no arrest occurred because the officers deliberately chose not to arrest Mr. Latimer. ... As well, he also points to the use of the word "detention", instead of the word "arrest", as proof of that intention.

[24] However, notwithstanding what the intention of the officers may have been, their conduct had the effect of putting Mr. Latimer under arrest. To understand why, we need only turn to the definition of arrest offered by this Court in *R. v. Whitfield*, [1970] S.C.R. 46. Judson J., speaking for the majority of the Court, held that an arrest consists either of (i) the actual seizure or touching of a person's body with a view to his detention, or (ii) the pronouncing of "words of arrest" to a person who submits to the arresting officer. ... [Underlining in the original.]

[122] Lamer C.J.C. went on to explain that, to make a lawful arrest without a warrant, the officer must have reasonable grounds to believe that an

offence has been or is about to be committed (section 495(1)(a) of the *Criminal Code*). Lamer C.J.C. continued:

[26] ...

What counts as reasonable grounds was laid down by Cory J. in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51. Reasonable grounds have both a subjective and an objective aspect. The arresting officers must subjectively have reasonable and probable grounds on which to base an arrest. Moreover, those grounds must be justifiable from an objective point of view, such that a reasonable person placed in the position of the arresting officer can conclude that there were reasonable and probable grounds for the arrest. [Underlining in the original.]

[123] In *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, Iacobucci J., for the majority, cautioned:

[35] ... Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.

[124] In the case on appeal, the first officer testified that, until he found the gun, he did not believe he had reasonable grounds to arrest Mr. Squires. The second officer testified that she did not believe she had grounds to arrest Mr. Squires until he admitted that there was a gun in the car and the gun was found.

[125] It is clear, then, that the officers did not have the required subjective belief to ground an arrest of Mr. Squires when he was required to lie face down on the ground, and was handcuffed and put in the patrol car. Applying the principles set out in *Latimer*, I would conclude that the actions of the officers, particularly in handcuffing Mr. Squires, amounted to a *de facto* arrest. Since the officers did not believe they had the necessary grounds to arrest Mr. Squires at that time, the conclusion follows that the *de facto* arrest was unlawful and amounted to a contravention of section 9 of the *Charter*.

[126] This conclusion is consistent with the decision in *R. v. Cody*, 2013 NLTD(G) 181, 351 Nfld. & P.E.I.R. 1, in which Burrage J. determined:

[14] ... Cody's removal from his truck at gunpoint, his being forced to lie on the pavement while in the prone position and handcuffed, and his transport to

police headquarters handcuffed in the back of a patrol car are all consistent with an arrest rather than an investigative detention. ...

See also: *R. v. Orr*, 2010 BCCA 513, 297 B.C.A.C. 54.

[127] Before considering an appropriate remedy for the breach of section 9 of the *Charter*, I would note that, in this case, there were grounds for an investigative detention. In the circumstances, the officers had a duty to act in response to the 911 call. However, excessive force was used which would render the detention arbitrary.

[128] While the nature of the information relayed to the officers involving the presence of a gun dictated the exercise of heightened care, there was no indication from the anonymous call to the communications centre that Mr. Squires was using a gun or acting in a threatening manner. Mr. Squires immediately complied with the first officer's commands. He put his hands out the window in full view and got out of the car as directed by the officer. It would be expected that an officer in this situation would have directed Mr. Squires to place his hands on top of the car for the purpose of ensuring that his hands remained visible and to allow the officer to conduct a pat-down search to determine whether he was carrying a weapon. This would also provide the officer with an opportunity to tell the individual the reason for his detention. (See, for example, *R. v. Clayton, supra*, in which this procedure was used where there had been a report of several men outside a bar with guns.) In the circumstances of this case, to require Mr. Squires to lie face down on the ground, and to handcuff him would amount to excessive force and an arbitrary detention as well as a *de facto* arrest in breach of section 9 of the *Charter*.

Section 8 of the Charter

[129] The fact that the officers breached Mr. Squires' rights under section 9 of the *Charter* colours the application of section 8, which provides:

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

[130] In this case, in addition to the breach of section 9, the trial judge's finding that the officer was conducting a search incident to an arrest is a relevant consideration. Search incident to an arrest is discussed in *R. v. Caslake*, [1998] 1 S.C.R. 51. Lamer C.J.C., for the Court, explained:

[13] ... Rather, the right to search arises from the fact of the arrest. This is justifiable because the arrest itself requires reasonable and probable grounds (under section 494 of the *Code*) or an arrest warrant (under section 495). However, since the legality of the search is derived from the legality of arrest, if the arrest is later found to be invalid, the search will be also. As Cory J. stated in *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 27, “[n]o search, no matter how reasonable, may be upheld under this common law power [of search incident to arrest] where the arrest which gave rise to it was arbitrary or otherwise unlawful.”

[131] In *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, Moldaver J., for the majority, drew a distinction between a search for evidence and a search based on officer safety, with the latter objective at play in that case:

[47] Significantly, the trial judge found as a fact that Constable Burke was not searching for evidence when he conducted the pat-down search In other words, his request that the appellant be seated in the rear of the cruiser was not a ruse to search for incriminating evidence. On the contrary, the search was performed for reasons of officer safety and the appellant’s safety.

[132] As applied to this appeal, when the first officer initially shone the flashlight into Mr. Squires’ vehicle, he testified that he was looking to see if anyone else was in the car. He then looked into the car for a second time when he saw the partially hidden gun barrel. At that time, officer safety was not an issue since Mr. Squires was handcuffed and sitting in the patrol car.

[133] Further, the trial judge accepted the officer’s testimony that he was conducting a search incident to an arrest. Since, at that time, Mr. Squires had already been unlawfully arrested, the search incident to that arrest must also be unlawful.

[134] It follows that, in the particular circumstances of this case, Mr. Squires’ rights under section 8 of the *Charter* were breached.

Remedy for Breach of Mr. Squires’ *Charter* Rights

[135] Section 24 of the *Charter* provides for a remedy for the breach of Mr. Squires’ sections 9 and 8 *Charter* rights:

(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.

(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.

[136] The trial judge, having found a breach of sections 9 and 8 of the *Charter*, ordered that the evidence of the gun and ammunition be excluded under section 24(2). He explained (oral reasons of the trial judge):

... In my view, the *Charter*-infringing conduct in this case was serious, proceeding with the search in the absence of reasonable grounds and without a valid consent. His act does not demonstrate good faith. Absent exceptional circumstances, deliberate, negligent, or willfully blind state conduct does not equate with good faith. The effect of the state's noncompliance means – and Mr. Squires' *Charter* rights are also, in my view, of significance, even a search of a motor vehicle where there's a reduced expectation of privacy cannot be justified where there's no reasonable ground or valid consent for the use of police power. Finally, in balancing society's interest in the trial on the merits with the interest of ensuring state compliance with *Charter*-protected rights, you have to focus on the long-term effect that noncompliance would have on the overall repute of the justice system rather than the immediate reaction in the circumstances in an individual case. As a result, I'm going to exclude the search. And the evidence will be excluded under such in (*sic*) section 24(2).

[137] In conducting an analysis under section 24(2), the test to be applied is set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. After citing that decision, the trial judge referred to the summary of the *Grant* test set out in *R. v. Dhillon*, 2012 BCCA 254, 191 C.C.C. (3d) 93:

[75] ... In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (S.C.C.), the Supreme Court set out a new approach for determining if the admission of impugned evidence would bring the administration of justice into disrepute. That approach involves the consideration and balancing of the following factors:

1. The seriousness of the *Charter*-infringing state conduct;
2. The impact of the breach on the *Charter*-protected interests of the accused; and
3. Society's interest in an adjudication of the case on its merits.

[138] The trial judge's decision applying section 24(2) of the *Charter* is owed considerable deference where the judge "considered the proper factors and has not made any unreasonable finding" (*R. v. Côté*, 2011 SCC

46, [2011] 3 S.C.R. 215, at paragraph 44). In *Coté*, Cromwell J., for the majority, expanded on the above three criteria:

[47] The first line of inquiry involves an evaluation of the seriousness of the state conduct. The more serious the state conduct constituting the *Charter* breach, the greater the need for courts to distance themselves from the conduct by excluding evidence linked to the conduct. The second line of inquiry deals with the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused. The impact may range from that resulting from a minor or technical breach to that following a profoundly intrusive violation. The more serious the impact on the accused's constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute. The third line of inquiry is concerned with society's interest in an adjudication on the merits. It asks whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. The reliability of the evidence and its importance to the prosecution's case are key factors. ...

[48] After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its section 24(2) determination. ...

[139] Regarding the first criterion, Cromwell J. also cautioned against re-characterizing the trial judge's assessment of the nature of the evidence:

[51] ... The Court of Appeal, respectfully, exceeded its role by its re-characterization of the evidence which departed from express findings by the trial judge which are not tainted by any clear and determinative error. The Court of Appeal should not have substituted its own view of the police conduct [which the trial judge found to be deliberately abusive] for that of the trial judge.

[140] In the case of Mr. Squires, the trial judge was well aware of the reliability of the gun and ammunition as evidence and of their importance in prosecuting the offences (see, for example, *Coté*, at paragraph 55). Nonetheless, this was not a determining factor. The judge classified the police conduct in breaching Mr. Squires' *Charter* rights as serious. There is no basis on which to alter that conclusion. An unlawful arrest and a consequent unlawful search constitute a significant interference with an individual's rights under sections 9 and 8 of the *Charter* and, on the facts of this case, amount to serious *Charter*-infringing conduct by the police.

[141] The trial judge did not directly address the second criterion under the section 24(2) test, that is, the impact of the breach on Mr. Squires' *Charter* rights. However, in the circumstances, to require Mr. Squires to lie face down on the ground and then to handcuff him and put him in a patrol car

must be construed as a significant impact on his right not to be subjected to the unjustified use of police power. A different analysis would have applied if Mr. Squires had not cooperated with the directions of police.

[142] Regarding the third criterion, society's interest in having an adjudication of the charges on the merits, the trial judge was alive to what he referred to as a "focus on the long-term effect that noncompliance [with the *Charter* rights at issue] would have on the overall repute of the justice system." While he did not specify the factors he was considering at that point in his oral decision, it is clear from reading the decision as a whole that the judge had assessed the factual circumstances and was applying the relevant section 24(2) test. Although it would have been helpful to have a more fulsome discussion of the relevant facts under the section 24(2) analysis, I am satisfied that the judge considered the proper factors and that he did not make any unreasonable findings.

[143] In summary, the trial judge considered the proper factors and, in the circumstances, determined that the appropriate remedy for the breach of Mr. Squires' *Charter* rights was to exclude the evidence of the gun and the ammunition. There is no basis on which to set aside that decision.

SUMMARY

[144] In the particular circumstances of this case, the police conduct in requiring Mr. Squires to lie face down on the ground and then handcuffing him and putting him in the patrol car amounted to an unlawful *de facto* arrest. The officer's search of the vehicle incident to the unlawful arrest constituted an unlawful search. Accordingly, Mr. Squires' rights under sections 9 and 8 of the *Charter* were breached. The trial judge considered the proper factors and made no unreasonable findings under section 24(2) of the *Charter*.

[145] In the result, I would dismiss the appeal.

B.G. Welsh J.A.