

# ONTARIO COURT OF JUSTICE

**B E T W E E N :**

**HER MAJESTY THE QUEEN**

**— AND —**

**MERINA NEWMAN**

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Before Justice Fergus ODonnell  
Reasons for judgment delivered orally on 1 December, 2017

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**Mr. D. Anger and Mr. P. Wenglowski ..... for the Crown**  
**Mr. V. Singh .....for the defendant, Merina Newman**

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**Fergus ODonnell, J.:**

**Two Solitudes**  
**He Said**

1. He said he drove by and saw a car parked in a motel parking lot. He said there was a woman leaning in the passenger window of the car. He said the motel had a bad reputation for drugs. He said the police had done a search warrant there about a month earlier. He said the woman left the side of the car after a short while and he followed the car when it left the hotel parking lot. He said he stopped the car because he was suspicious of drug involvement. He said that the driver lied about having been at the hotel and then said she had been visiting a friend, Sarah, whose last name she did not recall.
2. He asked if there were drugs in the car and she said there were not. He said that the driver volunteered to get out of the car to let him search it. He felt that he had a valid consent to search the car based on that offer.
3. He said that he did not feel that she was detained while he talked to her. He said that she was free to leave at any time. He did not bother mentioning that to her.

4. She got out. She had a purse. He said he was worried for his safety because she was close to him and it made him "really nervous". He was thirty-four and in rude health; she was sixty and frail and shaking. He did not call for assistance. Ever.
5. He looked in the purse and found drugs, a lot of prescription drugs. There was a lot of cash also. There were three paper packages, each noted with a name and the number of pills in the package. There were debt lists.<sup>1</sup>
6. He arrested her for possession of a controlled substance. He told her about her right to counsel but did nothing to implement it for a very long time, even though she had told him she wanted to speak with a lawyer. He searched her car, for a very long time. About an hour later he took her to the police station. She gave a statement. They searched her house. They found more drugs.

### **She Said**

7. She said she was at the hotel looking not for Sarah, but for her friend Lisa, (whose surname she did not know), because she was supposed to pick Lisa up two hours later to take her to a medical appointment. She said that his cruiser was on the street before she arrived; she drove past it to get into the hotel. The police computer records may support her version on this point. After arriving, she concluded that Lisa was not up, although she did not go so far as to knock on her door or call her, but just honked her horn outside Lisa's door.
8. She said there was no woman leaning in the car. She said that when he pulled her over he told her that she had allowed her front tire to touch the white line before coming to a stop at one of the stop signs en route. After checking her identification, he asked if she had anything in her car. When she said she had nothing, he just opened the passenger door and looked inside. He then asked her to get out and asked how one would open the trunk. As a result, she grabbed her purse and got out of the car and he reached in and activated the trunk opener and then searched the trunk.
9. After a long time searching the trunk, she said he came over and asked if she had any weapons in her purse. He grabbed her purse and asked what was in it as he looked through it. He dropped the purse three times as he was looking

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<sup>1</sup>This was a blended trial, but the evidence of the Crown expert on the issue of possession for the purpose of trafficking was not called pending the ruling on the *Charter* application, so there was no evidence called to prove that the "debt lists" were debt lists. I did not take the defence to dispute that they were debt lists, although there was no formal concession of the point. I give Mr. Singh more credit than to expect him to dispute that point on this evidence. Mrs. Newman gave an explanation about how she came into possession of the "debt lists". (It was not a good explanation.) In any event, without belabouring the issue of when judges can take judicial notice of things, even if Mr. Singh had disputed that these were debt lists, I would have found that they were without asking the Crown to call evidence. If a duck walked into court, I would not likely insist on expert evidence that it was a duck. Some debt lists are so obviously debt lists that they are as indisputable as a duck.

through it and then suggested they get out of the way of traffic. She said that he eventually handcuffed her to the rear and left her by his driver door. When she asked what she was under arrest for he told her, "I don't know yet". It was only after he had gone through her purse in detail on the trunk of her car that he came over and told her she was under arrest and read her her rights and put her in his car.

10. "He" is Constable Derek Mills, a uniformed patrol officer with the Niagara Regional Police Service. "She" is Merina Newman, a defendant facing serious charges of possession for the purpose of various prescription drugs.

### **The Lawyers Said**

11. Mr. Singh said this was a blatant pattern of violations of Mrs. Newman's *Charter* rights and that the evidence should be excluded.
12. For the Crown, Mr. Anger said that there was a valid investigative detention, albeit borderline for the grounds, and a valid officer safety search leading to a valid warrantless seizure.

### **The Charter of Rights Says**

13. Before 17 April, 1982, the Crown would have had a point: a police officer acts on a hunch, that hunch leads to the seizure of a large amount of hard drugs, charges ensue and the public is safer as a result. That is how things play out when the law looks only to outcomes rather than balancing outcomes and processes.
14. People have hunches all the time. The problem is that hunches have a sort of Dr. Jekyll and Mr. Hyde quality to them. Sometimes they are right and they lead to the apprehension of serious criminals. On the other hand, sometimes they are wrong and they violate a citizen's right to be left alone by the state. The real problem with hunches is that only those that lead to criminal charges are subjected to judicial scrutiny; by contrast, there is no realistic way of determining how many thousands of hunches have led nowhere other than to the alienation of the citizen and the violation of her fundamental rights. It also bears noting that the nature of hunches is such that they may very well be partially rooted in prejudice and stereotype and acted out as a result of a huge power imbalance between the holder of the hunch and the target of the hunch.
15. Since 17 April, 1982, the Crown's position becomes more challenging. The *Charter of Rights* has, for the past thirty-five years, thirty-three years at the time of these allegations, enshrined rights such as freedom from arbitrary detention, freedom from unreasonable search and rights to counsel.
16. Constitutional rights such as those also have a bit of a Dr. Jekyll and Mr. Hyde quality to them. They protect the citizen from unrestrained state power, but those same protections make crime-prevention more challenging. Arguably one of the

most succinct characterizations of the tensions between crime prevention and individual rights is Justice Doherty's play on H.L. Mencken in *Brown v. Durham Police Service Board*, 1998 CanLII 7198, at paragraph 79, where he observes, that, "we want to be safe, but we need to be free."

17. The full quote is instructive:

The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. In some situations, the requirement that there must be a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime. The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.

18. I have concluded that Constable Mills did detain Mrs. Newman arbitrarily, that he did search her purse and her car unlawfully, that he denied her timely access to counsel by keeping her at the roadside for almost an hour after her arrest and that the subsequent search of her home is fatally flawed as a result of its direct link to the arbitrary detention and unreasonable search. I have concluded that to admit in evidence the drugs, money and other items of evidentiary value seized from Mrs. Newman would bring the administration of justice into disrepute and accordingly exclude those items of evidence from Mrs. Newman's trial. I note that no challenge was made with respect to the admission of Mrs. Newman's inculpatory statement to the police.

19. I also note that in excluding those items of evidence, I have applied the s. 24(2) analysis in relation to the Crown's desire to use that evidence for the purpose of prosecuting Mrs. Newman. I leave open for another day, if the issue is disputed, the question of whether or not the evidence would be excluded in a forfeiture application in which Mrs. Newman's liberty interests would not be engaged.

### **Observations On The Evidence**

20. I heard evidence from three witnesses, Constable Mills, Mrs. Newman and Mrs. Newman's daughter, Gloria. Frankly, I have spent more time contemplating whose evidence was more troubling than I have spent contemplating whose evidence was more impressive.

21. Constable Mills's evidence was compromised by the fact that neither his notes nor his memory of events was as strong as it might have been. For example, in a case involving police observations of events, details such as distances, lines of sight, length of observations, obstacles and distractions are potentially relevant.

22. However, Constable Mills's notes on such things were not very impressive. He seemed to have no idea about how busy the road was from which he was making his observations or whether or not the area of his observations was also

a construction site, for example. His notes did not help him explain why it took him so long to search Mrs. Newman's car and to get her to the station after her arrest. He failed to note the precise words of her supposed "offer" to search the car, a non-trivial detail when a person's privacy interests are engaged and a supposed "consent" has been given. His recollection of whether or not he was running other licence plates while observing Mrs. Newman's car was poor and did not seem to sit well with the police computer records, all of that being relevant to the duration of his observations and to the general reliability of his evidence.

23. Constable Mills's testimony that he did not call for another officer to attend to provide security on Mrs. Newman while he searched because, "I didn't want to have to grab my radio", made absolutely no sense. Grabbing one's radio and maintaining safety observations of a detainee are not mutually exclusive functions. I felt he was equivocating when he suggested that Mrs. Newman would have faced no consequences if she had just driven off after the stop. He was non-responsive to a rather direct question about how long it would have taken for a back-up officer to arrive.
24. Gloria Newman's evidence, which was essentially related to the issue of whether her mother's car was stopped at Second Avenue or Fourth Avenue, started to come a bit unraveled when she admitted that she wasn't very sure about streets and the like and when she mis-stated which street was which. I cannot take any comfort in her ultimate confirmation of her mother's evidence about where she was pulled over. Fortunately, I find that issue to be entirely irrelevant. On another point, I have no reason to disbelieve her evidence that when she recovered the bag she had left in her mother's car, it had all been turned inside out, presumably by Constable Mills's search. Unfortunately, I am not sure what relevance that evidence has either; police officers doing searches are not Molly Maid. Also, the issue was not canvassed with Constable Mills in cross-examination so he did not get to comment on the irrelevant issue, which is a violation of the rule in *Browne v. Dunn*. Ultimately, her evidence would have been "much" ado about nothing, except for the fact it was so brief so it was not really "much" ado.
25. Merina Newman's evidence, I shall call her Mrs. Newman for simplicity, was a mixed bag. On the one hand, parts of what she testified to seemed a bit odd. I have no reason to doubt that she started off her day by dropping her granddaughter at day care and her daughter Gloria at an initiation session for a job in St. Catharines before returning to Niagara Falls. Indeed, Gloria confirms that. However, things started to get a bit odd once Mrs. Newman got back to Niagara Falls. She was scheduled to meet a friend at the Red Carpet Inn at ten a.m. to take her to a doctor's appointment. She got back from St. Catharines almost two hours early. She said she thought perhaps they could go for a coffee en route. She did not call her passenger ahead of time. Mrs. Newman's route from St. Catharines would have taken her past her own home. When she got to the Red Carpet Inn, she saw her friend's blinds were drawn. She did not call or

text or knock on the door. She simply honked her horn and nobody came out. It all seems like a rather peculiar way of going about things. Of all the rooms in the inn, how would her passenger know the honking was for her? How would anyone know the honking was meant to summons someone as opposed to being meant to warn another car of impending danger? This was not Mrs. Newman's finest hour in the witness stand.

26. Mrs. Newman had some other not very fine moments in the witness stand. Her evidence that Constable Mills told her to get out of the way of traffic and then left her standing by his driver's-side door in handcuffs a few minutes later did not make sense. It is hard to imagine any officer leaving a handcuffed subject in that vulnerable position while he went through her purse with his back to her.
27. She gave an explanation for why she had so much cash; it came from savings, she said. It was going to be used to buy a car that was driven in from London for her to inspect. Yes, she would have records to show where the money came from, but they were not presented. Her explanation that she had all those drugs but was not selling drugs is hard to reconcile with her inculpatory statement after arrest, with the presence of various scraps of paper that look rather like debt lists (she said they were someone else's) and with the presence in her purse not only of bulk pills but also of little packages of pills with people's names and prices on them.
28. One cannot consider Mrs. Newman's credibility without considering her statement to the police, the admissibility of which was conceded. It was an inculpatory statement. In that statement, she admitted at least limited drug trafficking, even if only for the purpose of getting herself additional painkillers beyond what her doctors allowed her. However, in her testimony, she seemed to back away from what was clearly said in the statement. That did not enhance her credibility at all.
29. On the other hand, her testimony, given without notes, was substantially more detailed than Constable Mills's testimony. Whether it was true or not, it had a certain flow and logic to it. Her testimony about Constable Mills being unsure of what she would be charged with had a ring of truth to it; it was consistent with his limited experience with drug offences and the fact that the drugs involved were all prescription drugs, some of them in bottles with her name on them. Sadly, her testimony about how the cell sergeant reacted to her complaint about things missing from her property was worded in such a way that it, too, cannot be dismissed out of hand.
30. I shall go through the various complaints made by the defence on this *Charter* application.

## **The Detention**

31. The first complaint is that Constable Mills's detention of Mrs. Newman was arbitrary. The Crown says this was a valid investigative detention of Mrs. Newman. It is self-evident that the concept of investigative detention as a potentially legitimate use of police power has long-established recognition in our law. See, for example, *R. v. Simpson*, 1993 CanLII 3379 (ON CA). It is essential to recognize however, that a valid investigative detention is dependent upon "reasonable suspicion". Mere suspicion or a mere hunch does not suffice. The standard of "reasonable suspicion" is not a very onerous one, but it does require a constellation of objective facts by which the officer's conduct will be judged. What did we have here?
32. I note that Constable Mills said that Mrs. Newman was not even detained. It goes without saying that the legal meaning of "detention" does not track the colloquial meaning and that not every police intervention, however brief, in a person's freedom to go about his business will constitute a detention in law and trigger the rights to which a detained person is entitled.
33. Since 2009, the definition of what constitutes a "detention" to trigger *Charter* rights has been defined by the decisions of the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32 and *R. v. Suberu*, 2009 SCC 33. A detention in that sense requires a significant suspension of a person's liberty by either physical or psychological restraint. Physical restraint may be easier to determine than psychological restraint. If the person reasonably believes in light of the conduct of the police that he or she has no choice, psychological restraint will be made out. I am satisfied that Mrs. Newman's description of what happened after the stop is more accurate than Constable Mills's description and that the more aggressive and non-consensual searches described by her are more likely to have taken place than the version advanced by Constable Mills. It is also inescapable on the evidence, that Constable Mills, armed, in uniform and, at least theoretically aware of the limits of his powers, had a significant power advantage over Mrs. Newman, with whom he failed to share the fact that she was entitled to refuse a search and all of the other requirements of a valid "consent" search as was presented in his version of what happened. I am satisfied that there was a detention here.
34. Section 9 of the *Charter*, however, does not prohibit detention, but only arbitrary detention. An arbitrary detention will include one that is not based on an objectively reasonable standard, including reasonable suspicion. On an allegation of a breach of s. 9 of the *Charter*, the onus is on the defendant. There is a discrepancy between Constable Mills's version of events and Mrs. Newman's. He says there was a woman leaning into the passenger window, for a short time. Mrs. Newman says there was no such woman. Frankly, the weaknesses in each of their evidence are such that I am unable to decide whom to believe. Where the onus lies on the defendant, as in that particular application, I must find that it is more likely that there was a woman leaning in the car than not. In other words, Mrs. Newman, on this application bears the burden

of proof and I find that in a tie between her and Constable Mills on this point, she has failed to prove that there was no woman at her car window.

35. However, that is not the end of the matter. It was Constable Mills's point that the woman was leaning into the car for only a short time, which, in the context of the Red Carpet Inn, to which I shall come momentarily, was indicative to him of a possible drug transaction. Unfortunately, there is no basis at all to say how long the woman was leaning into the car. Constable Mills said he observed her for only a couple of minutes before seeing her leave the car (given the ICAD entries, there is some dispute over how long he was actually watching the hotel). However, Constable Mills did not see the woman approach the car, so he actually has no idea how long she was there. I note that he failed to have any note of the woman's description, a lack of attention to detail that does not reflect well.
36. I also note that, unlike many cases that do provide the police with either reasonable suspicion or reasonable grounds to stop a person under investigation for drug trafficking, Constable Mills had only a single observation of an interaction involving Mrs. Newman. I also note that Mrs. Newman had absolutely no prior police history and there was absolutely no confidential informer information to suggest she should be a person of interest to the police. That is not to say that any one of these various components is essential to the formulation of reasonable grounds or reasonable suspicion, simply that those elements that are often found in these cases were not available to bulk up Constable Mills's grounds for stopping and eventually searching Mrs. Newman.
37. The determination of reasonable grounds or reasonable suspicion, of course, is not a surgical process in which items of evidence are seen in isolation from one another. All of the grounds have to be seen in their totality. The totality of the grounds here is that Constable Mills said the Inn had a reputation for drugs, that there had been a warrant executed there about a month earlier and that Mrs. Newman had told him things that were inconsistent with his observations of the woman at the car (although this latter observation was after the detention began; it was clear that although Constable Mills said he observed a Highway Traffic Act violation on Mrs. Newman's part, he was going to stop her car no matter what before that observation and he was going to stop it for a drug investigation).
38. Keeping in mind the low standard for an investigative detention, I find that the totality of the grounds falls short. As I put to Mr. Anger during submissions, the woman at the window of the car could have been Aunt Sophie saying goodbye to the driver who had dropped her off. It could have been a hotel employee giving directions to a guest. It could have been anyone and Mr. Anger said that on all the grounds, Constable Mills was entitled to stop that anyone. I disagree.
39. Mr. Anger said that Constable Mills's grounds were "borderline"; the problem is that he was on the wrong side of the border.



40. Of course, all of this happens against the backdrop of the Inn supposedly being a bad place for drugs. That may be true; I do not know one way or the other. However, if there was a meaningful history of drug activity at the Inn, Constable Mills's evidence failed entirely to articulate that to the extent that any such history contributes to the formulation of grounds. His evidence on that point was fatally vague. When it comes to the execution of a drugs search warrant at the hotel about a month earlier, once again there was little detail. However, it appears to have been one drug warrant about a month before. Whatever relevance such an event might have in relation to a single-family dwelling, its relevance dilutes into virtual nothingness when it relates to a residence of perhaps as many as a hundred rooms with occupants who are at least partially transient.
41. There was no constellation of objective facts underlying Constable Mills's suspicion here. What very few stars there were in his constellation of facts were dim indeed. Constable Mills had a hunch, but it was not an objectively reasonable one. The fact that it resulted in a drug seizure does not reach back and render that which was unreasonable reasonable after the fact. The detention of Mrs. Newman was an arbitrary one.

### **The Search**

42. The defence also challenged the search of Mrs. Newman's purse and car. Realistically, the purse was the object of argument since that is where all the drugs were found (other than those found later that day at her home). The search of the purse was a warrantless search, so the onus is on the Crown to prove that it was reasonable. The Crown relies on it as an "officer safety" search as a lawful incident to the investigative detention.
43. There are two problems with this argument. The first, obviously, is that I have found that there was no lawful investigative detention here and thus no foundation upon which to base an officer safety search in that context.
44. The second problem is that "officer safety" searches have a certain Jekyll and Hyde character to them. On the one hand, police officers are entitled to take reasonable steps to ensure their safety and they are entitled to consider that obvious threats are not the only threats. On the other hand, if not subject to any limitations at all, the "officer safety" rationale could largely obliterate the citizen's freedom from unreasonable search. That has been clearly recognized in the cases.
45. There was no substance to Constable Mills's supposed officer safety concerns. This was not a valid officer safety search and would not have been even if the investigative detention had been valid.

46. The words of the Supreme Court of Canada in *R. v. Mann*, 2004 SCC 52, bear repeating:
- 40 The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see S. Coughlan, "Search Based on Articulate Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.
47. At best, assuming that "officer safety" was not a complete ruse here, there is no basis upon which I can conclude that the supposed "officer safety" search in this case was based on anything other than a "vague or non-existent concern for safety."
48. There was also discussion of the search being a valid consent search. Mr. Anger said the consent search was a non-issue because this was a valid officer safety search. I have already disposed of that argument. Insofar as a consent search is involved, Mr. Anger agreed that the simple fact that a detainee "offered" to the police to search their car does not safeguard the police from their obligations with respect to a valid consent search. A more nuanced inquiry is required as set out by the Court of Appeal in *R. v. Sebben*, 2015 ONCA 270.
49. This case, however, is not *Sebben*. The onus on a warrantless search is on the Crown. The evidence before me differs starkly: Constable Mills said Mrs. Newman confidently offered up her purse, whereas Mrs. Newman characterized Constable Mills as an irresistible force when it came to his intrusion into her car and purse. Constable Mills's evidence is certainly not powerful enough to make me prefer his version over hers.
50. In general terms, I think the evidence here is also that Constable Mills did not even turn his mind to the issue of a valid consent. He did not even think he had consent search forms with him, which one would think should be in every officer's tool kit. Like the law on investigative detention, the law on valid consent searches is not new. The governing case, *R. v. Wills*, 1992 CanLII 2780 (ON CA) dates back twenty-three years before Mrs. Newman's arrest and clearly sets out six preconditions for the admission of evidence that has been obtained through "consent". When one runs through that list of conditions, even if I were convinced that she had offered up her purse to Constable Mills as he claims, there was clearly no valid consent on Mrs. Newman's part.

### **The Denial of Access To Counsel**

51. Mr. Singh also complains of what happened to Mrs. Newman after arrest. After he arrested Mrs. Newman, Constable Mills took the time to search her purse and her car. He must have been exceedingly thorough. That process took about three-quarters of an hour. I am entirely at a loss as to why that process would have taken so long. Indeed, the mind boggles. The mind boggles all the more when one considers that while that process played out, Mrs. Newman, an arrestee who had been given her rights to counsel, sat in Constable Mills's cruiser without any opportunity to exercise those rights. This is all the more peculiar when one considers that the location of the stop was quite close to the then Niagara Falls division of the Niagara Regional Police. It appears that Constable Mills gave absolutely no consideration to Mrs. Newman's right to access counsel and gave no consideration to having another officer attend to transport her to the police station. Mr. Singh used the word "cavalier" to describe Constable Mills's attentiveness to Mrs. Newman's *Charter* rights, a word that Mr. Anger took issue with. I am satisfied that the word was aptly used.

52. The onus is on the defence to prove a breach of Mrs. Newman's right to access counsel under s. 10(b) of the *Charter*. There is really no dispute over the times involved and there is no evidence to justify that delay. I am satisfied that Mrs. Newman has made out the breach.

### **Should the Evidence From the Car and House Be Excluded Under s. 24(2) of the Charter?**

53. Section 24(2) of the *Charter of Rights* allows a court to exclude evidence if its admission could bring the administration of justice into disrepute. The meaning of those words has been the object of much judicial writing over the past thirty-five years. I note that the introductory words setting out a court's power to exclude evidence because of a *Charter* breach speaks of evidence that was, "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*". I also note that the French language version of the *Charter* conveys the same meaning. Before a court can consider excluding evidence under s. 24(2), it must first be satisfied that the precondition has been met. This creates no issue with respect to the arbitrary detention and unreasonable search issues. Without those violations, the evidence that the Crown seeks to admit at trial would never have been found. That is true for both the items in Mrs. Newman's possession at the roadside and those seized from her home.

54. The issue is linguistically more problematic with respect to the relevance of the denial of access to counsel while Mrs. Newman was left in the police cruiser for close to an hour. For a native speaker of English (or French), or even any reasonably fluent speaker of either language it is hard to see how the denial of access to counsel after Mrs. Newman had been arbitrarily detained and searched and after the discovery of the drugs in the purse could possibly satisfy the "obtained in a manner" requirement. Given that access to counsel would certainly not have precluded the subsequent warrant at Mrs. Newman's house,

the same is true of the drugs seized there. In short, the question is how the subsequent breach of s. 10(b) of the *Charter* can possibly affect the admissibility of the drugs, money, debt lists, etc.

55. Fortunately for Mrs. Newman, that which is linguistically impossible can be legally binding. In *R. v. Pino*, 2016 ONCA 389 the Court of Appeal for Ontario, twice characterized this as a "difficult issue" and then proceeded to extend what it described as the Supreme Court of Canada's, "increasingly generous and broad approach to the "obtained in a manner" requirement in s. 24(2)," beyond the seemingly inescapable linguistic limitations on the "obtained in a manner" precondition, boldly going to a conclusion to which neither the Court of Appeal nor the Supreme Court of Canada had gone before.
56. However much difficulty one might have in wrapping one's mind around the conclusion in *Pino*, the simple reality is that it is the law in Ontario. As a result, the fact of Mrs. Newman's s. 10(b) *Charter* violation is a matter that can be taken into account in the s. 24(2) analysis. Ultimately, however, I am not sure that it makes any difference at all in the analysis in this case, as the two breaches that actually led up to the discovery of the evidence were themselves so troubling.

#### **Exclusion Or Admission Of Evidence**

57. In order to determine whether or not evidence should be excluded under s. 24(2), I must look at the seriousness of the breach, the impact of the breach on Mrs. Newman's *Charter*-protected rights and the public interest in a determination of criminal cases on their merits.

#### **The Seriousness of the Breaches**

58. There are two separate breaches here, three when one includes the denial of access to counsel under *Pino, supra*. All of the breaches were serious. To a certain extent, the first and second breaches blend into one another temporally: the arbitrary stop and the unlawful search. Effectively, on grounds that, at least as articulated here, were gossamer thin, Constable Mills stopped and detained Mrs. Newman. Purporting to act initially on a "consent search" basis, which he knew or absolutely ought to have known would only be valid if several preconditions were met, largely preconditions about Mrs. Newman's knowledge of her options and the consequences of her choices, Constable Mills failed entirely to make sure that Mrs. Newman had any idea of her rights. I am satisfied that she did not know of those rights and that she was simply going along with a situation that she felt powerless to change or control. In addition to being arbitrary, the detention was unnecessarily long. As I have said, the amount of time taken at the roadside for the limited purposes of searching Mrs. Newman's car and purse, is hard to fathom. This was far from a trivial or transitory interference with Mrs. Newman's freedom of movement.
59. The search is also a serious violation. There was no consent. There can have been no reasonable belief in a valid consent. The notion of a genuine officer

safety concern is implausible at the highest. One is left with the inescapable conclusion that Constable Mills was going to go the distance no matter what.

60. While I say that I am confounded by the outcome in *Pino*, I do not wish to be taken as diminishing the seriousness of the third breach that morning, the delay in access to counsel arising from Mrs. Newman being held at the side of the road for so long during the search rather than being transported by another officer to the station. While there may be circumstances where delay in access to counsel in a case like this might be understandable (such as a sole officer in a remote northern part of the province, far away from both the detachment and back-up), it is hard to believe that such delay could even be contemplated in Niagara Falls on a weekday morning. The evidence was clear also that Mrs. Newman was somewhat frail and that she was shaking for much of the time. Her frailty was evident both in court and in the video evidence of her statement. That is not to say that denying a more robust person access to counsel for so long would be acceptable, simply to point out the particular vulnerability of this defendant.
61. The Court of Appeal says that this third violation is a relevant factor in the s. 24(2) analysis. They are the Court of Appeal and I am not. Applying the law as defined by them, this third violation compounds the seriousness of the first two violations.

### **The Impact Of The Breaches On Mrs. Newman's Charter-protected Interests**

62. The *Charter* is intended in large measure to safeguard the right of every citizen to be left alone. The more poetic language of the Fourth Amendment to the United States Constitution expresses that thought amply: "The right of the people to be secure in their persons, houses, papers, and effects, ... shall not be violated." The same is true of a person's right to go about their business without arbitrary interference or detention. A free society involves freedom of movement. When there is an infringement of a person's right to be left alone, s. 10 of the *Charter* ensures that that person will have access to counsel in order to ensure that they are not kept in a knowledge vacuum and to ensure that they have someone on their side in what will usually be a serious power imbalance between the citizen and the state.
63. Constable Mills's actions impacted substantially and directly on Mrs. Newman's privacy interests in her purse, her car and eventually in her home, the place most highly protected in s. 8 jurisprudence. Her freedom of movement was curtailed. She was denied timely access to counsel. She was not released from custody until almost midnight. Even if the search of the home was done with a warrant, the reality is that that warrant could never have been issued without the antecedent breach of s. 8 and s. 9 at the roadside.
64. The impact on Mrs. Newman's *Charter*-protected interests was severe.

### **Society's Interest In An Adjudication On The Merits**

65. It is inherent in enshrined rights against arbitrary detention, search and seizure and the like that relevant evidence will sometimes be denied to the state for purposes of prosecution. There is no question that the evidence here is vital to the Crown's case. The drugs, cash and debt lists seized are the classic building blocks of a prosecution for these offences, even if Mrs. Newman offered some explanations in mitigation or denial of guilt. The amounts involved and the nature of the substances are matters of genuine concern. It is a reasonable presumption that without the items seized the Crown's case will fail.

### **Balancing The Interests**

66. As I said at the outset, I have concluded that the evidence must be excluded, at least insofar as the Crown seeks to rely on it to prosecute Mrs. Newman (as opposed to seeking to use it for any forfeiture application where different considerations may apply). Quite simply, the very significant public interest in the prosecution cannot outweigh the seriousness of the three breaches (or even just the first two) and the impact of the breaches on Mrs. Newman's *Charter*-protected interests.

### **Conclusion**

67. Accordingly, the evidence seized from Mrs. Newman at the roadside and in her home is excluded.

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