

## The Top Five - 2004

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



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### **R.v.Mann 2004 SCC 52 (CanLII)**

<http://csc.lexum.umontreal.ca/en/2004/2004scc52/2004scc52.html>

While on their way to investigate a break and enter, two police officers stopped an individual (Mann) who matched the description of the suspect. The police officers stopped him, asked his name and “patted him down” in search of weapons hidden on his person. One of the police officers felt something soft in Mann’s pocket. He reached in and brought out a baggie containing marijuana. He also found several empty baggies in another pocket. Mann was arrested and charged with possession of marijuana for the purposes of trafficking. At trial, the judge found that the search of Mann’s pockets violated his right to be secure from unreasonable search or seizure, which is set out in s.8 of the *Canadian Charter of Rights and Freedoms (Charter)*. The trial judge ruled that he would apply s. 24 of the *Charter* which permits a judge to refuse to admit evidence where to do so would interfere with the fairness of the trial or bring the justice system into disrepute. The trial judge found that police officers are entitled to search for hidden weapons for security reasons, but that it was unreasonable for the officer to have gone into the pocket.

The Manitoba Court of Appeal disagreed with the trial judge and ordered a new trial. The Court of Appeal found that the detention and the pat-down were conducted without malicious intent, and in the circumstances, were reasonable, particularly in light of the police’s duty to preserve the peace.

The Supreme Court of Canada was asked to decide whether police have the power to detain someone for investigatory purposes and if they do, whether the police also have the power to conduct search as part of or ancillary to an investigative detention.

The majority of the Supreme Court distinguished between individuals who are detained by the police when under arrest and those who are not under arrest but are delayed while the police perform investigations. It decided that the test for whether an investigatory detention violates a person’s right to unreasonable search and seizure is the *Waterfield* test, set out in *R. v. Waterfield*, [1963] 3 All E.R.659 (English Court of Appeal) rather than the *articulable cause* test, an American legal test. The *Waterfield* test is comprised of two parts, the first recognizing that police have a duty to preserve the peace and to prevent crime. For a search to be found reasonable, the purpose of

the detention must fall within those duties. The majority of the Court incorporated the articulable cause test, permitting a search only where an officer can articulate a specific cause for the search, test into the first part of the *Waterfield* test. It noted that the police, after assessing all of the circumstances, must have reasonable grounds to suspect that an individual is linked to a crime. The second prong of the *Waterfield* test is that there must be a balance between the conflict between police duties and an individual's right to liberty.

Having articulated the test for determining whether a detention is reasonable, the majority of the Supreme Court then found that a search incidental to detention may be conducted if it is "reasonably necessary". The majority indicated that one must consider the reasonableness of the search in light of the police duty being performed as well as the extent of interference with that individual's liberty. The search cannot be conducted on a hunch or intuition. The officer must have more than a vague concern for safety. Where the police believe personal safety is at risk based on the circumstances, they may perform a pat-down search. Both the detention and the pat-down search must be conducted in a reasonable manner. The investigative detention should be brief and does not impose an obligation on the detained person to answer questions posed by the police.

The majority found that the police had reasonable grounds to detain and investigate Mann as he fit the description of the suspect and was two or three blocks from the crime scene. The judges also found that the police had the right to conduct a search of Mann's person because of their concern that he might be hiding weapons. However, the majority found that when the officer found the soft baggie in Mann's pocket, the search was no longer being conducted for the purpose of safety but rather, the purpose changed to collecting evidence. The Court's majority ruled that this was unreasonable because there was nothing in the circumstances from which it could be inferred that it was reasonable to go beyond a pat-down search for security reasons. Individuals have a reasonable expectation of privacy in their pockets. The majority noted that the bag of marijuana and the baggies were the key evidence against Mann. It found that to permit a new trial and to use the evidence could damage the reputation of the justice system. The majority of the Supreme Court set aside the Manitoba Court of Appeal's order for a new trial and restored the trial judge's acquittal.

Two judges of the Supreme Court disagreed with the majority's decision that to admit the evidence would bring the administration of justice into disrepute (i.e. harm the reputation of the justice system). The minority believed that the correct test to apply is the articulable cause test rather than the "reasonable grounds" test used in *Waterfield*. Police officers are required to show reasonable grounds when justifying a detention of a suspect upon arrest. The minority held that the standard used to justify a search and ought to be different from that used to justify a detention.

On the issue of whether police officers have a right to conduct a search incidental to arrest, the minority agreed with the majority of the Court, but only on the condition that the detention itself is lawful. The minority said that the search must be reasonably

necessary to secure evidence of a crime, to protect the police or the public, or to discover anything that could endanger the police or facilitate escape. The minority concluded that the officer's search of the pocket was a minor violation of Mann's rights, particularly in light of the fact that since he was in an area with a high rate of crime, he should have had a lower expectation of privacy. The minority argued that since possession for the purposes of trafficking is a serious crime, it would bring the justice system into disrepute if the evidence were not allowed and the conviction did not stand.