C.A. № A-304-17

COURT OF APPEAL FOR ONTARIO

BETWEEN:

RYAN NANOKEESIC

(Appellant)

- and -

HER MAJESTY THE QUEEN

(Respondent)

APPELLANT'S FACTUM

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PART I:

INTRODUCTION

1. This case is about whether various *Charter*-protected rights of Ryan Nanokeesic were violated in his interactions with police on June 31, 2016. Specifically, there is concern that his section 9, 10(a), 10(b), and 8 rights were violated, and thus there is a question as to whether evidence obtained against Mr. Nanokeesic on that evening should be excluded. The evidence obtained was a loaded handgun in his backpack. If the evidence was admitted, a conviction would have been entered on the weapons charges, and if the evidence was excluded, an acquittal would have been entered on the weapons charges. At trial, it was determined that several of Mr. Nanokeesic's rights were violated. However, a section 24 analysis conducted by the learned trial judge led to the conclusion that the evidence should be included regardless of the violations. The appellant respectfully submits that:

a) Contrary to the original ruling, Mr. Nanokeesic was in fact detained arbitrarily in his original interaction with police, in violation of his section 9 rights.

b) Consistent with the original ruling, Mr. Nanokeesic was detained arbitrarily in the course of his interaction with police, and was not informed of his right to counsel, in violation of his section 9, 10(a), and 10(b) rights.

c) Consistent with the original ruling, the search of Mr. Nanokeesic's backpack was conducted in violation of his section 8 rights.

d) Contrary to the original ruling, the evidence obtained in the course of these unconstitutional interactions with police should be excluded, as per section 24(2).

PART II:
SUMMARY OF THE FACTS

2. On the evening of June 31, 2016, P.C. Bannon and P.C. Spicer were on a bicycle patrol of a community housing complex. This task is mandated under Community Officers Proactive Policing (C.O.P.P.), an initiative of which the said officers were members.

3. During the patrol the officers spotted a group of young Aboriginal men walking out of an alleyway. None of the men was known to the officers or engaged in a suspicious activity at the time. It was accepted by the trial judge on the evidence that the officers approached the group of young men with the aim of identifying and questioning them.

4. Upon the officers' approach the Appellant, Mr. Nanokeesic, separated from the group and started walking back into the alleyway. Mr. Nanokeesic was wearing dark, baggy clothes, a baseball hat and carried a small backpack. The officers, having judged that Mr. Nanokeesic was trying to avoid them, followed Mr. Nanokeesic into the alleyway.

5. Soon after starting to follow Mr Nanokeesic P.C. Bannon called out to him, without requesting him to stop. The trial judge accepted on the evidence that at this stage the officers wanted to identify Mr. Nanokeesic and have him fill in a "C.C.C." or a Community Contact Card. The officers denied that they wanted to

identify Mr. Nanokeesic on the basis of his being a young Aboriginal man.

6. The officers caught up with Mr Nanokeesic and requested to speak with him. Mr. Nanokeesic stopped and asked whether he had done something wrong. The officers replied that he did not, that they just wanted to talk. They asked him for his name, and dismounted, one of them standing in front of Mr. Nanokeesic and the other standing to his side. Mr. Nanokeesic hesitantly provided them with his name. P.C. Spicer incorrectly suspected that the name given was false, but because the surname "Nanokeesic" matched that of suspects in another criminal matter, asked Mr. Nanokeesic for identification. Mr. Nanokeesic replied that he did not think he had identification on his person.

7. At this point P.C. Bannon approached Mr. Nanokeesic and assumed a protective stance. P.C. Spicer asked Mr. Nanokeesic for his identification again and, upon being told that it was in the backpack, instructed Mr. Nanokeesic to get it. Mr. Nanokeesic began to take off his backpack and then hesitated. Upon being asked whether he had something which he was not supposed to have Mr. Nanokeesic replied, "That depends". P.C. Bannon said that she would have a look herself and reached for the backpack. At this point Mr. Nanokeesic started running away from the officers.

8. The officers gave chase, caught up with Mr. Nanokeesic, detained and arrested him for obstructing police on grounds that he had provided a false name. This charge was later withdrawn. The trial judge accepted as a fact not disputed by Mr. Nanokeesic that during the chase he discarded his backpack, in which the officers discovered both his wallet containing photo identification and a loaded handgun, after the arrest.

9. It was not disputed that Mr. Nanokeesic was in possession of a loaded firearm. The defence proceeded on the basis of an application under Section 24(2) of the *Canadian Charter of Rights and Freedoms* to exclude the firearm from evidence. The application was denied and Mr. Nanokeesic was convicted of all charges related to possession of a firearm. He was remanded into custody without bail until a date to be set for sentencing.

10. Mr. Nanokeesic has appealed this decision and is challenging it on the issue of the inclusion of the loaded gun in evidence. The Crown is challenging Singh J.'s finding that the officers' conduct infringed Mr. Nanokeesic's rights under ss. 8, 9 and 10 (a) and (b).

<u>TRIAL DECISION</u>

11. At trial, Singh J. determined that at the first instance of Mr. Nanokeesic's interaction with police, there was no detention:

> While I have little doubt Mr. Nanokeesic likely felt like he had to stop and speak with the police, the problem with the position advanced by the defence is that it would mean that anytime a police officer wanted to engage with and speak to an individual, that person would be considered detained. This cannot be the law. The police must be allowed some latitude to speak with and engage citizens… In this case, the defendant has failed to show he was detained for the purpose of completing a C.C.C. at the initial point of contact with the police.

Reasons for Decision, paras. 29-30

12. At trial, Singh J. determined that, as the interaction with police progressed, Mr. Nanokeesic was detained, and further, that it was arbitrary:

> … I disagree with the Crown that he was never detained during his encounter with the police. Rather, what started out as a lawful engagement by a police officer transformed into a detention as the encounter developed.

Reasons for Decision, para. 31

> The Crown urges me to find that if Mr. Nanokeesic was detained at this point, the police had grounds and it was a lawful detention. I do not accept this submission.

Reasons for Decision, para. 33

13. Consequently, it was also determined that Mr. Nanokeesic should have been informed of his right to counsel, but was not:

> There is little issue that the police failed to comply with their obligations under Sections 10(a) and (b) of the *Charter*… when the police detained Mr. Nanokeesic, they were required to inform him of the reasons for his detention and his right to retain and consult counsel.

Reasons for Decision, paras. 34-35

14. At trial, Singh J. determined that the search of Mr. Nanokeesic's backpack following his arrest was in violation of his section 8 rights:

> I find that the subsequent search of the backpack was the direct result of this earlier unlawful detention and the attempted search of the backpack. In other words, Mr. Nanokeesic was well within his rights to run away from an unlawful detention and to resist the unlawful search of his private backpack. I see the act of throwing away the backpack as further

confirmation of Mr. Nanokeesic's expectation of privacy, not an act of abandonment. The subsequent search was unlawful and the police violated Mr. Nanokeesic's rights under Section 8 of the Charter.

Reasons for Decision, para. 42

15. At trial, Singh J. decided, based on an analysis of the relevant precedent on section 24(2), to allow the evidence obtained via the illicit search to be included:

> I find that this is essential evidence in a very serious crime. While the police clearly did not act in accordance with the law, I find that they did not act maliciously or in bad faith. If the police conduct in this case had been egregious, it may have tilted the balance in favour of exclusion. However, this is not a charge like the possession of illegal drugs. In fact, I can say with confidence that had there been drugs in that backpack instead of a loaded handgun, I would have no difficulty in excluding the evidence. The exclusion of the evidence in this case would be more harmful than its admission.

Reasons for Decision, para. 49

PART III

GROUNDS OF APPEAL

ISSUE ONE: WAS MR. NANOKEESIC DETAINED IN VIOLATION OF HIS RIGHTS UNDER SECTION 9 OF THE CHARTER WHEN THE POLICE ORIGINALLY STOPPED HIM FOR THE PURPOSE OF COMPLETING A C.C.C.?

16. Section 9 of the *Charter of Rights and Freedoms* states:

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

Canadian Charter of Rights and Freedoms, *Schedule*

B, *Constitution Act*, 1982, s. 9. (the "*Charter*")

17. Detention is not explicitly defined here, but has since been defined by the Supreme Court of Canada, in *R v Grant*, as follows:

> Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 44

18. The appellant believes that Singh J. has erred in not defining the police's original act of stopping Mr. Nanokeesic as a detention.

19. Without the legal obligation in this case, the second part of the above definition, the question of what a reasonable person would do in such a circumstance, must be considered. In order to determine whether a conclusion that one is being detained is reasonable, the Supreme Court of Canada, in *Grant, supra,* provided the following framework:

> a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of

others; and the duration of the encounter.

c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 44

20. How those factors apply to Mr. Nanokeesic is fundamentally important in determining whether he was detained when the original interaction with police took place.

21. It is the opinion of the appellant that Mr. Nanokeesic was psychologically detained when the police first caught up with Mr. Nanokeesic for the purpose of completing the Community Contact Card.

The circumstances giving rise to the encounter

22. The police officers were patrolling a low-income neighbourhood with a high crime rate. Their job was to engage with and speak to individuals they encounter while on patrol, as part of a community policing initiative.

Reasons for Decision, para. 3

23. Constables Bannon and Spicer biked past a group of young, Aboriginal men who are said to not have been doing anything suspicious. In Justice Singh's estimation, the job of the police officers was to "identify and question the young men".

Reasons for Decision, para. 4

24. The officers found it suspicious that, upon circling back past the group, Nanokeesic began to separate from the group. As such, they decided to follow Mr. Nanokeesic. Being behind him, they beckoned Mr. Nanokeesic with words which have not been precisely determined. P.C. Bannon acknowledges that Mr. Nanokeesic was under no legal obligation to talk to them. The facts are that Mr. Nanokeesic did in fact exercise this right and began to walk away.

Reasons for Decision, paras. 5-6

25. As the police officers called Mr. Nanokeesic's name, the latter's pace quickened. As such, the police officers "sped up on their bikes and caught up with Mr. Nanokeesic." When both officers stopped on either side of Mr. Nanokeesic, Mr. Nanokeesic stopped.

Reasons for Decision, para. 13

26. It seems difficult to justify this encounter as being a general enquiry. The police's purpose appears to have been focussed investigation. The police officers stated that, in walking away from them, Mr. Nanokeesic seemed avoidant. They therefore wanted to speak with him. Immediately, this specific intent of engaging with Mr. Nanokeesic appears to be beyond the scope of a general inquiry.

The nature of the police conduct

27. The nature of the police conduct must also be discussed. It is reasonable to presume that the pursuit of Mr. Nanokeesic on bicycle would cause him to believe that he is being detained. Regardless of why, Mr. Nanokeesic was moving away from police. It is acknowledged that this was within his rights. However, the officers are said to have

increased their speed on their bikes. This indicates a specific pursuit of Mr. Nanokeesic, and to him, it would appear as though he had no choice but to comply, lest he should continue to be pursued by the police.

28. It is also said that when the officers caught up with Mr. Nanokeesic, they stopped beside him. P.C. Bannon states something to the effect of just wanting to talk. Mr. Nanokeesic had stopped at this point.

Reasons for Decision, para. 13

29. It was the position of Singh J. that the encounter began to morph into a detention after P.C. Spicer grew suspicious and did not believe Mr. Nanokeesic's response to the query about his name. This was relatively early in the encounter, and as such there was not much time in between the initial interaction and what the learned trial judge deemed to be a detention.

30. However, there is one other key event which must be considered. After the officers pull up beside Mr. Nanokeesic and declare their interest in speaking to him, P.C. Spicer states that he and P.C. Bannon dismount from their bikes, and that he stands in front of Mr. Nanokeesic.

Reasons for Decision, para. 14

31. This action of standing in front of Mr. Nanokeesic can reasonably be seen as a form of detention.

<u>The particular characteristics or circumstances of the individual</u>

32. Finally, Mr. Nanokeesic's characteristics must be considered, per *Grant*, *supra*.

33. Mr. Nanokeesic is a young, Aboriginal male. He lives in a low-income neighbourhood with a high crime rate. As a young man, his level of sophistication is rather low, especially in relation to experienced police officers. Given the clear power imbalance, it is not unreasonable to believe that Mr. Nanokeesic felt compelled to speak with police as a youth.

34. There are several points to be considered in relation to Mr. Nanokeesic's minority status. Firstly, Aboriginal youth may be fearful of police due to previous incidents of discrimination. Additionally, they may be hesitant to cooperate with police due to controversy surrounding police and Aboriginal relations. The perception of discrimination on the part of Aboriginal people can cause great fear and can be likened to coercion.

35. With all of the factors laid out in *Grant*, *supra*, examined in relation to this case, it is again submitted, respectfully, that Singh J. erred in not considering the initial encounter to be a detention.

36. Of course, the police are well within their rights to detain someone, so long as it is not arbitrary. What constitutes arbitrariness must therefore be considered.

37. It was deemed in the trial that there was no reason for P.C. Bannon and P.C. Spicer to suspect Mr. Nanokeesic. He was simply exercising his rights in walking away. The courts may choose to allow leniency in terms of the discretion of the officer, however, per *R v Hufsky*, "[a] discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."

R. v. Hufsky, [1988] 1 S.C.R 621 at para. 13

38. An additional consideration is racial profiling. The officers deny any racial profiling, but as Singh J. notes in the decision, there is some sense that the "carding" program may disproportionately target certain individuals.

Reasons for Decision, para. 8

39. It is understood that Mr. Nanokeesic was part of a group which consisted of young, Aboriginal men. Mr. Nanokeesic walked away, and the police followed. Caution should be exerted before making an accusation of racial profiling, but it seems hard to imagine that it was not a factor in this case. Without any other reason to target Mr. Nanokeesic, it is plausible that his characteristics made him a prime target for the police, even if they were not aware of this consciously.

40. Even if *Hufsky*, *supra*, does not establish the arbitrariness of the detention in this case, then the judgement in *R v Storrey* should be noted. While they determined that the arrest was lawful in that case, the court did note the following:

> That is to say, there is no indication that the arrest was made because a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested. These factors, if established, might have the effect of rendering invalid an otherwise lawful arrest.

R. v. Storrey, [1990] 1 S.C.R. 241, n.p.

41. Therefore, even though it was not established in that case, it is perfectly reasonable to apply that principle to this case. While section 1 of the *Charter* may allow for community based programs such as the one in this case, it certainly would not cover racial profiling in any sense.

42. For the reasons stated above, it is the appellant's respectful submission that Mr. Nanokeesic's section 9 rights were violated after his first contact with police.

Issue Two: If not, was Mr. Nanokeesic detained at some point thereafter and, in particular, before he was asked about whether he had anything in his backpack in violation of his section 9, 10(a) and (b) rights?

43. For convenience, section 9 of the *Charter* states:

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

Canadian Charter of Rights and Freedoms, *Schedule B*,
Constitution Act, 1982, s. 9. (the "*Charter*")

44. Sections 10(A) and 10(B) of the *Charter* state:

> Everyone has the right on arrest or detention:
>
> (A) to be informed promptly of the reasons therefore;
>
> (B) to retain and instruct counsel without delay and to be informed of that right;

Canadian Charter of Rights and Freedoms, *Schedule B*,
Constitution Act, 1982, s. 10(A), 10(B). (the "*Charter*")

45. To recall, in order to determine whether a conclusion that one is being detained is reasonable, the Supreme Court of Canada, in *Grant, supra,* provided the following framework:

> a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 44

46. It was the position of Singh J. that Mr. Nanokeesic was detained at some point prior to being asked about the contents of his backpack, and that this detention was arbitrary. The appellant is in agreement with Singh J. on this matter.

47. In particular, the appellant would like to note several key points which the trial emphasised and which support this interpretation.

<u>The circumstances giving rise to the encounter</u>

48. The circumstances are essentially the same as discussed previously given that it is the same encounter. The appellant would again like to emphasise that Mr.

Nanokeesic exercised his rights in avoiding police, and the police made a significant effort in catching up to him in order to speak with him.

49. Additionally, if the encounter is taken to mean in the context of this discussion the point at which Singh J. deemed there to be a detention, then there are some important circumstances to be discussed

50. P.C. Spicer asked for Mr. Nanokeesic's name, and then asked for identification after becoming suspicious at Mr. Nanokeesic's response. While it is not important for these purposes to establish that these actions were illicit, it does go to suggest an interrogative nature to Mr. Nanokeesic's discussion with police.

51. It is essentially after those basic questions and the suspicions that followed where Singh J. deemed there to be a detention.

<u>The nature of the police conduct</u>

52. That determination was in no small part due to the actions of police.

53. As Singh J. points out, there was a certain aggression and a demanding nature to the interaction with police. Firstly, it is said that P.C. Bannon took an aggressive posture of crossing the arms in a downward motion.

Reasons for Decision, para. 32

54. When P.C. Spicer became suspicious that Mr. Nanokeesic had provided a false name, he wanted to see Mr. Nanokeesic's identification. After some dialogue, P.C. Spicer did not just ask for it, but rather he demanded that Mr. Nanokeesic "just get it".

Reasons for Decision, para. 32

55. When the police make a demand, it seems reasonable to follow it. Indeed, a reasonable person would probably believe that he had no choice but to follow it.

<u>The particular characteristics or circumstances of the individual</u>

56. While some of these points have been made already, some are worthy of repetition for emphasis.

57. Rightly or wrongly, there is a perceived power imbalance between minority communities and police. This is due a general feeling that they are unfairly targeted and often suspected of wrongdoing without any cause. This can cause great nervousness and distress, which in part explains that of Mr. Nanokeesic in his interactions with police, but also explains why someone like Mr. Nanokeesic would be more apt to obeying the commands of police even when no legitimate obligation actually exists.

58. It is also important to remember that Mr. Nanokeesic is a young male who may not have the level of sophistication in order to understand his own rights.

59. Based on the consideration of these factors, there appears to be ample support behind the conclusion of the learned trial judge that there was a detention as the encounter with police progressed.

60. As for arbitrariness, Singh J. states the following:

> The Crown urges me to find that if Mr. Nanokeesic was detained at this

> point, the police had grounds and it was a lawful detention. I do not accept this submission. The police had no such grounds. Mr. Nanokeesic was never cautioned about providing a false name. The police had no actual grounds to believe Mr. Nanokeesic was providing a false name; at most, they had a hunch or a suspicion.

Reasons for Decision, para. 33

61. Indeed, as was pointed out in *Storrey*, *supra*:

> … personal enmity between a police officer directed towards the person arrested … if established, might have the effect of rendering invalid an otherwise lawful arrest.

R. v. Storrey, [1990] 1 S.C.R. 241, n.p.

62. It would therefore appear that, on these grounds, the detention was arbitrary. There has not been any convincing explanation as to a legitimate and tangible suspicion that the police could have had.

63. The second constitutional issue pertaining to this point in the encounter is s. 10.

64. Assuming that he was detained at this point (the finding of Singh J.), the police must have provided Mr. Nanokeesic with the reasons for the detention and his right to counsel (along with the common law right to remain silent). Indeed, Singh J. did find that the police were in violation of these rights.

Reasons for Decision, paras. 35-36

65. The Supreme Court, in *R v Manninen*, found that:

> First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay.
>
> Further, s. 10(*b*) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel.

R. v. Manninen, [1987] 1 S.C.R. 1233 at paras. 21, 23

66. In a further clarification, the Supreme Court indicated in *R v Suberu* that:

> In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately".

R. v. Suberu, 2009 SCC 33, [2009] 2 S.C.R. 460 at para. 41

67. The case law therefore clearly indicates that this was required of the police in this case, and the facts show that these requirements were not met.

68. This violation of rights was by no means trivial. Mr. Nanokeesic made a seemingly incriminating statement in his encounter with police without having been informed of his rights. This seemed to be the intention of police in asking him whether he had anything in bag which could be illicit.

69. The appellant agrees with the decision by the learned trial judge on this issue.

ISSUE THREE: WAS THE SEARCH OF MR. NANOKEESIC'S BACKPACK UNREASONABLE AND IN VIOLATION OF HIS RIGHTS UNDER SECTION 8 OF THE CHARTER?

70. Section 8 of the *Charter* states:

> Everyone has the right to be secure against unreasonable search or seizure.
>
> *Canadian Charter of Rights and Freedoms*, *Schedule B*, *Constitution Act*, 1982, s. 8. (the "*Charter*")

71. The search at issue here is the search of the backpack which Mr. Nanokeesic discarded prior to his arrest. It should be noted that the search occurred after the arrest of Mr. Nanokeesic. When the police searched the backpack, they found a loaded gun.

72. There are two potential justifications for the search of Mr. Nanokeesic's bag: firstly, that it is within the powers of police to search for material relating to the arrest, and secondly, that the bag had been abandoned, and therefore Mr. Nanokeesic had no privacy interest on the bag.

73. On the first argument, Singh J. stated:

> The police have a common law power to search incidental to a lawful arrest, provided there is some purpose for the search related to the arrest like the discovery of evidence or the protection of officer safety: see *R v Caslake*, 1998 CanLII 838 (SCC). The problem with this submission is that I have already found Mr. Nanokeesic's detention to be unlawful and that the police did not have grounds to suspect that Mr. Nanokeesic had provided a false name to them. The fact that Mr. Nanokeesic ran from the police does not make that detention somehow lawful or provide the police with grounds to arrest him. The arrest in this case was not lawful and

therefore no search incidental to that arrest can be upheld.

Reasons for Decision, para. 39

74. In *R v Blake*, Doherty J.A. stated:

> … the graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct. That disassociation is achieved by excluding the evidentiary fruits of the state misconduct.

R. v. Blake, 2010 ONCA 1 at para. 23

75. This follows a similar logic to the "fruit of the poisonous tree" doctrine used in the United States. To be clear, there is no principle in Canadian law that unlawful conduct *automatically* disqualifies any evidence discovered thereof, unlike in the United States. However, there is a lesson to be learned from that doctrine. In any other case, if a man was arrested, their person could be searched without warrant, a standard power. The police did that in this case, but it was also found by Singh J. that the arrest was unlawful. If that is indeed true, then the logic behind this doctrine dictates that the search was not lawful because the arrest was not lawful. In this case, the "evidentiary fruits of the state misconduct" is the gun which was found after the arrest. While there is still a chance that the evidence could be included, it still must be said that the search was dependent on the unlawful detainment, and that, had there not been an unlawful detainment, the search would likely not have occurred.

76. An analysis on whether the backpack was abandoned and the subsequent privacy interest that may be held in it must now be undertaken, given that the normal police power to search following an arrest does not seem to apply.

77. As a general legal principle, someone who has abandoned his property no longer has an expectation of privacy, and thus the police can search that property without a warrant. While there are several important cases which highlight this general rule, there are unique circumstances in this case which require discussion.

78. In the landmark case *R v Patrick*, the Supreme Court determined that, if one placed garbage at the edge of his property, there was no expectation of privacy.

R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579

79. The circumstances of that case are quite different from this one. However, in that case, the Supreme Court used a test which may be helpful in this case in determining whether Mr. Nanokeesic had a privacy interest in the bag.

80. The test in *Patrick*, *supra*, reads (facts altered slightly for this case):

(1) <u>Did the Appellant Have a Reasonable Expectation of Privacy?</u>

1. What was the nature or subject matter of the evidence gathered by the police?

2. Did the appellant have a direct interest in the contents?

3. Did the appellant have a *subjective* expectation of privacy in the informational content [of the backpack]?

4. If so, was the expectation *objectively* reasonable? In this respect, regard must be had to:

    a. the place where the alleged "search" occurred; in particular, did the police trespass on the appellant's property and, if so,

what is the impact of such a finding on the privacy analysis?

b. whether the informational content of the subject matter was in public view;

c. whether the informational content of the subject matter had been abandoned;

d. whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?

e. whether the police technique was intrusive in relation to the privacy interest;

f. whether the use of this evidence gathering technique was itself objectively unreasonable;

g. whether the informational content exposed any intimate details of the appellant's lifestyle, or information of a biographic nature.

(2) If There Was a Reasonable Expectation of Privacy in This Case, Was It Violated by the Police Conduct?

The second question is only reached if the first question is answered in the affirmative.

R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579 at paras. 26-28

81. This test is important so that the "totality of the circumstances" are considered, which is required in determining if a reasonable expectation of privacy existed.

R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579 at para. 26

<u>What was the nature or subject matter of the evidence gathered by the police?</u>

82. It was Mr. Nanokeesic's backpack that was searched, and in it was a loaded gun. In it was also Mr. Nanokeesic's wallet, including his driver's license.

Reasons for Decision, para. 18

83. Clearly, a wallet can contain material which is important and personal to the owner, such as a photo of a loved one, documentation, etc. Therefore, it would appear as though Mr. Nanokeesic, to borrow the words in *Patrick*, had "a direct interest not only in the [backpack] itself but, in particular, its informational content."

R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579 at para. 31

<u>Did the appellant have a direct interest in the contents?</u>

84. In the *Patrick* case, the Court addressed the issue of attempting to conceal illegal contents, and stated:

> The majority in the Alberta Court of Appeal seems to state, in para. 35, that because the items of interest located by the police revealed involvement in criminal activity they cannot "constitute intimate details of lifestyle or core biographical details to which privacy protection ought to be extended". I would have thought, with respect, that the criminal "lifestyle" of the appellant was at the epicentre of what the police wanted to know and what the appellant wished to conceal… A warrantless search of a private place cannot be justified by the after-the-fact discovery of evidence of a crime.

R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579 at para. 32

85. The Court here has determined that even illegal contents constitute a legitimate, direct interest, and as such it would appear as though this factor is in Mr. Nanokeesic's favour.

Did the appellant have a *subjective* expectation of privacy in the informational content [of the backpack]?

86. The answer to this question appears to be yes. Mr. Nanokeesic was concealing a loaded handgun in the backpack and did not want it to be found. His bag was closed and he removed it from his person while being pursued, likely in an attempt to hide it from police.

If so, was the expectation *objectively* reasonable?

87. In considering this, there are numerous criteria that must be considered.

a) The place where the alleged "search" occurred; in particular, did the police trespass on the appellant's property and, if so, what is the impact of such a finding on the privacy analysis?

88. The bag was dropped behind a private shopping complex and beside a dumpster. This is evidently not Mr. Nanokeesic's property and so there is no trespass in that regard.

b) Whether the informational content of the subject matter was in public view

89. On this matter, the Supreme Court in *Patrick*, *supra*, stated:

> Of course the garbage bags were in plain view but the appellant asserts no privacy interest in the outside surface of the bags. His concern, as was the concern of the police, was with the concealed contents of the bags, which were clearly not in public view.
>
> *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579 at para. 53

90. The same logic can be applied to the backpack in this case, and therefore, the "informational content of the subject matter" was not in public view.

c) Whether the informational content of the subject matter had been abandoned

91. This is a factor which is extremely important in determining the privacy interest, given that, if someone abandons his property, it contradicts the notion that he expected that property to remain private.

92. The *Patrick* case found that the garbage was abandoned, but the precedent cited in that case was related to garbage bags and the like, which is not quite relevant in this case. Indeed, Mr. Nanokeesic placed the backpack beside the dumpster, not in it, suggesting that there was not an intent to dispose of the backpack, and perhaps even an intent to retrieve it.

93. There is some precedent to suggest that, in similar circumstances, a backpack is abandoned.

94. In *R v Nesbeth* (cited by the learned trial judge), a man also threw his backpack to the ground as he was being pursued by police.

R. v. Nesbeth, 2008 ONCA 579 at para. 6

95. Prior to that case, in *R v L.B.*, two youth had an interaction with police:

> Officer Reimer then asked L.B. for his name and date of birth. He intended to do a check on L.B. through the Canadian Police Information Centre ("CPIC"). L.B. complied. Meanwhile, Officer Purches, who had been speaking with F, obtained F's name and date of birth and passed that information along to Officer Reimer.
>
> As Officer Reimer waited for the CPIC results, Officer Purches noticed that L.B. was not carrying the black bag that he had been holding at the top of the walkway. Accordingly, Officer Purches walked up the stairs to the area where L.B. had been seated and started to look around.
>
> At the top of the stairs, Officer Purches quickly located the black bag. He found it "on the grass with some litter". As he did so, he called down to L.B. and F, who were "at the bottom with Detective Constable Reimer", and asked "whose bag is this". F did not respond; L.B. replied "I don't know". In view of L.B.'s response and the fact that he had distanced himself physically from the bag, Officer Purches treated the bag as abandoned property and he opened it. Inside, he located school work with L.B.'s name on it; he also discovered a loaded .22 calibre handgun. At that point he shouted "gun, gun, gun" and he and his partner arrested L.B. and F at gunpoint.

R. v. L.B., 2007 ONCA 596 at paras. 20, 23, 25

96. It was found in this case that the statement from L.B. denying ownership of the bag removed any privacy interest that was had. Thus, the search of the bag was considered legal.

R. v. L.B., 2007 ONCA 596 at para. 71

97. This case was decided prior to *Patrick*, *supra*. However, prior to that case, the Supreme Court laid out a not too dissimilar criteria in *R v Edwards*:

I. presence at the time of the search;
II. possession or control of the property or place searched;
III. ownership of the property or place;
IV. historical use of the property or item;
V. the ability to regulate access, including the right to admit or exclude others from the place;
VI. the existence of a subjective expectation of privacy; and
VII. the objective reasonableness of the expectation.

R. v. Edwards, [1996] 1 S.C.R. 128 at para. 45

98. These criteria were not considered in this case, and thus it seems unlikely that the "totality of the circumstances" could have been considered.

99. In *Nesbeth*, *supra*, Rosenberg J.A. stated the following in relation to *R v L.B.*:

> One of the officers retrieved the bag and asked the accused, "whose bag is this". The accused responded that he did not know. The court held, at para. 71, that by this answer the accused had "disclaimed any privacy interest in the bag" and thus "effectively precluded himself from relying on s. 8 of the *Charter*". The same may be said here. By his conduct in intentionally throwing away the knapsack, the respondent had precluded himself from relying on the s. 8 protection.

R. v. Nesbeth, 2008 ONCA 579 at para. 23

100. *Nesbeth*, *supra*, was also decided prior to *Patrick*, but Rosenberg J.A. also had the benefit of the criteria laid out in *Edwards*, and, unlike in *R v L.B.*, did conduct an analysis:

> Not all factors will be applicable in any particular case and some will be more important than others. Three factors stand out in this case to demonstrate that there was no reasonable expectation of privacy in the knapsack. Far from having possession or control of the knapsack, the respondent attempted to divest himself of possession and control. He gave up the ability to regulate access to the property when he threw it away. Finally, he offered no evidence of any subjective expectation of privacy; to the contrary, the trial judge accepted that the respondent intentionally threw the knapsack away, which suggests that he was no longer interested in exercising any privacy interest in the knapsack.

R. v. Nesbeth, 2008 ONCA 579 at para. 22

101. Singh J. distinguishes *Nesbeth* from this case by discussing the police conduct and what in his view amounted to an unlawful detention. This, in the learned trial judge's estimation, differentiated the two cases. Police conduct is one of the considerations in *Patrick* and will be discussed later.

102. However, the above analysis in *Nesbeth* is still worthy of a brief discussion in relation to this case. Firstly, it could be said that Mr. Nanokeesic was attempting to "divest himself of possession and control", but only insofar as he wished to prevent the police from discovering it. If the bag was on his person, it would be discovered. Mr. Nanokeesic, it is true, did give up immediate physical access to the backpack by throwing it on the ground. However, on the last point, there is quite a distinction to be made. It should not be taken as a given that Mr. Nanokeesic was "no longer interested in exercising any privacy interest in the knapsack."

103. If Mr. Nanokeesic was truly interested in disposing of the backpack, then it is likely that he would have actually placed the bag in the dumpster or in other garbage disposal container. It is easier to access the backpack if it is beside the dumpster rather than in it, suggesting the intention to retrieve it.

104. Finally, in *Nesbeth*, *supra*, the bag contained "cocaine (680 grams), two digital scales and three cell phones." A significant amount of cash was also found on the person.

R. v. Nesbeth, 2008 ONCA 579 at para. 6

105. Conversely, in this case, Mr. Nanokeesic's bag contained his wallet and his driver's license. While it would seem reasonable that the suspect in *Nesbeth* would not mind disposing of his backpack, given that his main asset, his cash, was on his person, the same should not be said of Mr. Nanokeesic. It seems unlikely that Mr. Nanokeesic would have wished to permanently part ways with that property.

106. To conclude the discussion on the abandonment factor in *Patrick*, while previous cases with similar circumstances suggest that Mr. Nanokeesic abandoned his backpack, analysing his intent shows that in fact his intent was not to abandon the backpack, but to keep it private from police.

d) Whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?

107. The backpack was left on private property, but was not subject to any obligation of confidentiality. This factor is not especially relevant to this case.

e) Whether the police technique was intrusive in relation to the privacy interest:

108. It was found by Singh J. that Mr. Nanokeesic was detained at some point during the interaction with police, perhaps most obviously during their conversation about the bag. Mr. Nanokeesic was told to get the identification from his bag. Given that the police were interested in his identification, they were thus interested in his bag:

> … it is clear the police officers had already formed the intention to search his backpack during the unlawful detention.

Reasons for Decision, para. 41

109. The detention was unlawful, and there was a pursuit of Mr. Nanokeesic when he tried to run away. It is evident that the police were interested in searching the bag based on their suspicion of Mr. Nanokeesic. Singh J. already noted that any such suspicion was unfounded.

Reasons for Decision, para. 33

110. Given that these police actions were unjustified, it is fair to say that the police technique was intrusive "in relation to the privacy interest."

f) Whether the use of this evidence gathering technique was itself objectively unreasonable;

111. If these police tactics were to become commonplace, it would be gravely concerning and would come at a detriment to the values that a free society holds dear. As Singh J. notes:

> There is nothing more sacred to a free and democratic society than the right of its citizens to walk freely or spend time doing whatever one wants, wherever one chooses (provided of course the acts are lawful). It is no answer for the Crown to say now, with the benefit of hindsight obtained by an unlawful detention and search, that Mr. Nanokeesic was breaking the law.

Reasons for Decision, para. 46

112. There cannot be a precedent that the police can stop people in the streets in the hopes of being eventually able to search them in the hopes of finding evidence of criminality. In this case, the police's unlawful detainment of Mr. Nanokeesic cannot be considered objectively reasonable.

g) Whether the informational content exposed any intimate details of the appellant's lifestyle, or information of a biographic nature.

113. Per the Court in *Patrick*:

> Lifestyle and biographical information was exposed, but the effective cause of the exposure was the act of abandonment by the appellant, not an intrusion by the police into a subsisting privacy interest.

R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579 at para. 71

114. To reiterate, the court has ruled that even criminal evidence is considered a detail of one's life. Given that the appellant here believes that there was not an act of abandonment, and indeed, that there was an intrusion by police, this factor applies in favour of Mr. Nanokeesic.

115. Based on these factors, there appears to be convincing reason to believe that there was a reasonable expectation of privacy. While the courts have emphasised the importance of considering all of the circumstances, they have generally put great weight on the issue of abandonment.

116. It is the appellant's contention that there was no abandonment. However, whether Mr. Nanokeesic did in fact abandon his bag is less relevant in light of the violations by police (one of the other factors). If Mr. Nanokeesic is considered to have abandoned his bag, then it only came about as the result of malpractice and intrusive behaviour on the part of the police. Therefore, it is the appellant's respectful contention that there was an expectation of privacy, consistent with the findings of the learned trial judge.

(2) If There Was a Reasonable Expectation of Privacy in This Case, Was It Violated by the Police Conduct?

117. The only way it would appear that the expectation of privacy could not be invalidated is if it was found that the police had the power to conduct a search after an arrest. As stated previously, the facts of this case appear to suggest that they did not have that power, and as such, the expectation of privacy was violated in this case.

118. With the factors laid out in *Patrick*, *supra*, considered, it is thus the appellant's submission that Mr. Nanokeesic's section 8 rights were violated.

ISSUE FOUR: IF THE SEARCH WAS UNREASONABLE, SHOULD THE LOADED HANDGUN BE EXCLUDED FROM EVIDENCE PURSUANT TO SECTION 24(2) OF THE CHARTER?

119. Section 24(2) of the *Charter* states:

> 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.

Canadian Charter of Rights and Freedoms, *Schedule B*,
Constitution Act, 1982, s. 24(2). (the "*Charter*")

120. The appellant respectfully disagrees with Singh J. on the decision to allow the handgun into evidence based on this section of the *Charter*.

121. The case *R v Grant*, *supra*, also provides a test pertaining to this issue:

> … a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits.

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 71

122. The appellant believes that this test should result in the exclusion of the loaded handgun from evidence.

The seriousness of the *Charter*-infringing state conduct

123. Firstly, it was the finding of Singh J. that the violation of Mr. Nanokeesic's rights was serious:

> I find that this case involved a serious breach that impacted a very significant Charter-protected interest. I must comment that I am appalled by the attitude of the Crown towards the conduct at issue in these kinds of cases. It has become almost a matter of course to characterize such intrusions as simple, well-meaning mistakes that do not seriously impact the individual. I do not accept that the police unlawfully detaining a Canadian citizen can simply be dismissed as a "good faith" mistake.

Reasons for Decision, para. 46

124. In this case, the learned trial judge found that there were three *Charter*-related violations. This is certainly not a matter to be taken lightly. The right to move freely, the right to counsel, and the right to privacy are absolutely fundamental, and the police violations that were found in this case cannot be considered minor.

<u>The impact of the breach on the *Charter*-protected interests of the accused</u>

125. Singh J. also found that there was a significant impact on Mr. Nanokeesic. Singh J. noted that:

> There is nothing more sacred to a free and democratic society than the right of its citizens to walk freely or spend time doing whatever one wants, wherever one chooses (provided of course the acts are lawful).

Reasons for Decision, para. 46

126. With the benefit of hindsight, it could be said that the detention of Mr. Nanokeesic was justified because he was in fact in possession of an illegal weapon. Yet, this is a frame of thinking which is contradictory to the principles of the Canadian justice system.

127. The police cannot arrest people on the basis of a hunch and hope to find incriminating evidence after the fact. There must be some valid grounds for detention. Detaining citizens without cause is not a matter to be taken lightly, and the damage of this action is not mitigated merely by finding evidence afterwards. To allow such a system would act as an incentive for police to detain people more often on the basis of little to no evidence in the hopes of uncovering a crime later.

128. What is clear is that there was a significant impact on the *Charter* rights of Mr. Nanokeesic: he was arbitrarily detained by police, made incriminatory statements without adequate knowledge of his rights, and had his private property searched.

<u>Society's interest in the adjudication of the case on its merits</u>

129. Despite Singh J. finding in favour of Mr. Nanokeesic on the first two criteria, the evidence was admitted on the basis of the third criterion in *Grant*, *supra*. Section 24(2) makes it clear that Canada does not practice a rule of absolute exclusion: evidence can be included despite being obtained illegally based upon the administration of justice, a phrase clarified in *Grant*, *supra*. Ultimately, Singh J. found that the adjudication of this case on its merits was more important than the upholding of Mr. Nanokeesic's rights.

130. Respectfully, it is submitted that this interpretation could have significant and harmful effects on the administration of justice in the long term.

131. In *R v McGuffie*, the court noted the following:

> In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence… If the first and second inquiries make a strong case for

> exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility…
>
> *R. v. McGuffie*, 2016 ONCA 365 at para. 63

132. There is significant support for this point of view. In *R v Grant*, the Court stated:

> It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.
>
> *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 84

133. This principle has seen some application. In *R v Wong*:

> The evidence seized included a semi-automatic handgun with ammunition, 11 kilograms of MDMA, significant quantities of marijuana and cocaine and documents evidencing credit card fraud. The evidence

> was plainly reliable and essential to the Crown's case – factors that favour the admission of the evidence.

R. v. Wong, 2015 ONCA 657 at para. 86

134. However, the evidence was excluded on appeal:

> The police conduct in this case, while not deliberate, was unacceptable. To admit the evidence would be to condone ignorance of *Charter* standards and a casual approach to the protection of *Charter* values.

R. v. Wong, 2015 ONCA 657 at para. 88

135. The circumstances in that case were not too dissimilar, noteworthily. There was an aggressive questioning by a police officer which was deemed to be a detainment, and so the defendant's section 10(b) rights were deemed to have been violated.

R. v. Wong, 2015 ONCA 657 at paras. 48, 50

136. This is significant as Singh J. identifies the possession of drugs in *McGuffie*, *supra*, as being less severe than the possession of the gun in this case, and thus being less apt to be excluded. Of course, *Wong*, *supra*, shows that this may not be the right approach.

Reasons for Decision, para. 49

137. The above examples show that the general position of the courts is to prevent what the alternative position would entail. If the police are made to believe that they can

violate rights in the hopes of finding even the most serious evidence, it only incentivises such behaviour. The test in *Grant*, *supra*, is a test whose factors must all be considered, and given that two of them are in Mr. Nanokeesic's favour, exclusion seems like the right course.

138. Singh J. notes the problem with allowing a serious crime to go unpunished and the perception that would give to the public. Respectfully, this is a short-term consideration.

139. If such an approach is taken in future cases, the accompanying change in police conduct will have a far more significant effect on the administration of justice. Confidence among minorities in the police is already extremely low. There is mistrust and a lack of cooperation. This only stands to get worse, and this could have serious implications.

140. It is very likely that people of colour will refuse to cooperate with police or provide them with any information. This could make their job more difficult, whether it be in continuing the Community Contact Card program or investigating serious crimes. While this is not strictly a legal consideration, neither was the judgement in the original case. The test in *Grant, supra*, and the phrase "the administration of justice", require a certain consideration of outside factors.

141. Singh J. notes that Thunder Bay is a high crime city. It is questionable if, in the long-term, convicting Mr. Nanokeesic will help or hurt the cause to make it safer. The aforementioned concerns will likely make the situation worse.

142. However, that is not to say that the only concern is race. Singh J. stated that he must "weigh the public perception of allowing a serious crime to go unpunished against

the public perception that police target their fellow Canadians on the basis of their ethnicity."

Reasons for Decision, para. 48

143. Yet, this case goes far beyond that single issue. Race may have been a factor in the initial suspicion and desire to speak with Mr. Nanokeesic, but the conduct of police is suggestive of a more general problem.

144. The learned trial judge found that Mr. Nanokeesic was detained without having been informed of his rights, and was made to make incriminating statements as a result. Additionally, Singh J. deemed the search of Mr. Nanokeesic's backpack to be illicit.

145. These are violations of fundamental *Charter* rights which could affect anyone in any circumstance. Respectfully, by taking an overly narrow view, the wider implications of the condoning of such behaviour was not considered.

146. In summary, the appellant respectfully submits that the learned trial judge erred in his decision to include the evidence of the loaded handgun.

APPLICATION TO THIS CASE

147. An application of the current legal thought on the various constitutional issues presented here suggests that there were significant constitutional violations, and there is justification to exclude the evidence. By applying the *Grant* tests on detention and the exclusion of evidence, and the *Patrick* test on the expectation to privacy, there is good reason to find in favour of the appellant.

PART IV

ORDER REQUESTED

148. It is respectfully requested that the appeal be granted and the conviction of Mr. Nanokeesic be overturned. It is hoped that it is found that his section 8, 9, and 10(a) and 10(b) rights were violated at various points during the encounter, and that therefore the evidence of a loaded handgun should be excluded, thereby almost certainly acquitting Mr. Nanokeesic of the charges against him.

ALL OF WHICH is respectfully submitted by

____
Daniel St-Amant
Of Counsel for the Appellant

DATED AT ST. FRANCIS XAVIER CATHOLIC HIGH SCHOOL this **1st**

Day of **May, 2017**

APPENDIX A

AUTHORITIES TO BE CITED

LEGISLATION

Canadian Charter of Rights and Freedoms, *Schedule B*, *Constitution Act*, 1982. (the "*Charter*")

JURISPRUDENCE

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MISCELLANEOUS

Reasons for Decision, Spring 2017 OJEN Charter Challenge