Unreasonable Search and Seizure

Earlier this month, in *R. v. N.O.*, the Alberta Court of Appeal considered what could constitute unreasonable search and seizure, and what could be considered arbitrary detainment under sections 8 and 9 of the *Charter of Rights and Freedoms*.[1]

The case before the court was an appeal from a trial decision that held that the appellant's *Charter* rights had not been violated. In the case at hand, a police officer in an unmarked car had been patrolling a neighbourhood and had observed what he deemed to be suspicious activity where one male exited his car, entered an apartment lobby, shook hands with another male and then returned to his car without engaging in conversation.[2] The officer then approached the suspect as he returned to his car and advised him that he was being detained for a drug investigation.[3] The officer then proceeded to handcuff the individual and conduct a search of the suspect. As a result of the detainment and subsequent search, the officer discovered 14 pieces of crack cocaine for which the suspect was subsequently tried and convicted of possession.[4]

The trial judge had found that no *Charter* rights had been infringed because "the events observed by the officer gave him cause to detain the respondent for investigative purposes, and he did so properly."[5] The trial judge also held that the officer was justified in placing the suspect in handcuffs as the officer had reason to be concerned for his safety.[6]

The Alberta Court of Appeal then considered the alleged *Charter* rights violations made by the appellant; that he had been unreasonably detained and searched, and found that the appellant's section 9 *Charter* rights had been breached.[7] The court cited the Supreme Court of Canada's ruling in *R. v. Mann* on section 9 where the Court stated the need to balance "fundamental issues on the right of individuals to walk the streets free from state interference, but in recognition of the necessary role of the police in criminal investigation."[8]The Court of Appeal then decided that the officer's detainment of the appellant was arbitrary.[9] As opposed to the trial judge, the justices on the appeal court held that neither the high crime rate of a neighbourhood, nor the late time of day were objectively reasonable to justify detention.[10] Once the detainment was found to be unreasonable, the subsequent search and arrest were also unreasonable and in violation of the appellants section 8 *Charter* rights.

After finding that sections 8 and 9 of the *Charter* had been violated, the Court of Appeal had to consider section 24(2) of the *Charter* which provides for the exclusion of evidence where *Charter* rights have been violated. The test for

whether the evidence should be excluded depends on "trial fairness, the seriousness of the breach and the effect that its admission would have on the administration of justice," as outlined in *R. v. Stillman*.[11] In this case, because the officer failed to take the proper investigative steps before detaining and searching the suspect, the submission of the subsequent evidence would bring the administration of justice into disrepute, and the appeal court judges therefore held that the evidence must be disallowed under the *Charter*, and an acquittal ordered.[12]

The balancing of sections 8, 9, and 24 of the *Charter* is both important and challenging. Had the Alberta Court of Appeal upheld the trial judge's ruling, it would have provided police officers with greater powers to detain and search suspected individuals merely based upon the time of day or the neighbourhood they happened to be passing through. Conversely, citizens have a strong interest in removing drug dealers and other criminals from their streets. Although the appellant in this case was a drug dealer, the philosophy that underlies the common law tradition is that it is better to let one guilty person free than to punish society at large. Perhaps that would have been the result had the courts not restrained the police in *R v. N.O.*, and by extension the state's right to intrude upon the private domain of the citizenry.

The relevant sections of the *Charter*:
8. Everyone has the right to be secure against unreasonable search or seizure.
9. Everyone has the right not to be arbitrarily detained or imprisoned.
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the*Canada Act 1982* (U.K.), 1982, c. 11 (CanLII).
[2] *R. v. N.O.*, 2009 ABCA 75, at paras. 3 and 4 (CanLii).
[3] *Ibid*. at para 4.
[4] *Ibid*. at paras. 4 and 16.
[5] *Ibid*. at paras. 7 and 10.
[6] *Ibid*. at para. 10.

[7] *Ibid*. at para. 45.
[8] *Ibid*. at para. 29.
[9] *Ibid*. at paras. 37-41.
[10] *Ibid*. at paras. 38, 40.
[11] *Ibid*. at para. 47.
[12] *Ibid*. at para. 52.