IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre

Docket: AR17-30-08898	)	
BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	***J. S. Kliewer*** *and*
	)	***H. D. P. Crawley***
Appellant	)	*for the Appellant*
	)	
- and -	)	
	)	***S. G. Paler***
JADEN JOSHUA OMEASOO	)	*for the Respondent*
	)	*J. J. Omeasoo*
(Accused) Respondent	)	
	)	
- and -	)	***A. L. Sansregret***
	)	*for the Respondent*
Docket: AR17-30-08899	)	*B. J. White*
BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Appeals heard:*
	)	***September 7, 2018***
Appellant	)	
	)	
- and -	)	*Judgment delivered:*
	)	***April 12, 2019***
BENJAMIN JAMES WHITE	)	
	)	
(Accused) Respondent	)	

LEMAISTRE JA

[1] This case involves the powers of the police under section 495(1)(a) of the *Criminal Code* (the *Code*) to arrest individuals who are believed to have

been involved in a firearms incident based on a 911 call.

[2] At the conclusion of a *voir dire*, the trial judge found that the rights of Jaden Omeasoo (Omeasoo) and Benjamin White (White) (collectively, the accused) under sections 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) were breached, excluded the evidence seized by the police pursuant to section 24(2) and summarily dismissed the charges.

[3] The Crown appeals the decision of the trial judge and seeks a new trial. The basis of the Crown's appeals is that the trial judge erred when he found that the police did not have reasonable and probable grounds to arrest the accused, that the accused's *Charter* rights were violated by the arrest and the search incident to arrest and that the trial judge erred by excluding the evidence under section 24(2) of the *Charter*.

[4] For the reasons that follow, I would allow the appeals and order a new trial.

Background

The 911 Call

[5] Police received a 911 call regarding a road-rage incident involving firearms (the firearms incident) and the information received was relayed to Constables Millar and Campbell at 1:40 a.m. The information provided by the caller, who was not involved in the firearms incident, was that a red "Chevy" Silverado truck had cut off the driver of another vehicle after he drove up beside the truck and gestured at its driver. The truck followed the other vehicle on Archibald Street to the area where it turns into Watt Street

and pulled over. Two males exited the truck armed with handguns. There were no shots fired. The caller described the two males as white, one wearing a white hoodie and a baseball cap and the other wearing a black hoodie or sweater and a baseball cap.

The Initial Detention

[6] Constables Millar and Campbell were in a cruiser car near Fermor Avenue and Archibald Street when they received the information about the firearms incident. They immediately drove north on Archibald Street towards Watt Street to look for the red truck.

[7] The officers saw a red truck parked at the Tim Horton's restaurant near the intersection of Archibald Street and Marion Street. The vehicle was a Dodge Ram and was the only vehicle in the parking lot. The officers had seen no other vehicles on the road before spotting the truck.

[8] The truck had two male occupants. The officers watched the passenger, who was wearing blue jeans, a black shirt and a baseball cap, go into the Tim Horton's restaurant towards the washrooms. There is nothing other than the washrooms in this area of the Tim Horton's restaurant. Two to four minutes later, they saw him leave the washroom area, go to the cashier and return to the truck carrying a juice bottle. In addition to the cashier, they saw one, or possibly two, other people in the Tim Horton's restaurant at the time.

[9] Concerned about the safety of the people in the area, the officers went to speak to the occupants of the truck at 1:54 a.m., to investigate whether

they were involved in the firearms incident. They wanted to determine whether the occupants of the truck had a firearm.

[10] Constable Millar went to the driver's side of the truck. He noticed that it was running, the driver was not wearing a baseball cap and the passenger was Indigenous. Constable Campbell went to the passenger side of the truck. He used his flashlight to look into the truck, but did not see any firearms. The driver provided identification in the name of Benjamin White. The passenger did not provide identification, but said his name was Joseph Omeasoo. Constable Campbell went to the cruiser car to check the names provided by the males on his police computer to determine whether the males were the subject of any outstanding warrants or court orders. At 2:00 a.m., Cst. Campbell returned to the truck, advised there were "no wants or orders", and the officers told the accused that they were free to go.

The Arrest

[11] Immediately thereafter, Cst. Millar went to use the washroom inside the Tim Horton's restaurant. He found a .22 calibre bullet (the bullet) in the urinal. After showing the bullet to Cst. Campbell, the officers determined that they had reasonable grounds to believe that the accused had been involved in the firearms incident and that the passenger had left the bullet in the urinal. At 2:06 a.m., they went back to the truck to arrest the accused for a "firearms investigation." After arresting Omeasoo, Cst. Campbell established that his name was Jaden Omeasoo not Joseph Omeasoo and that he was breaching a probation order.

The Search

[12] After advising the accused of their *Charter* rights and placing them in separate cruiser cars, the officers searched the truck and found a "crack pipe" and crystal methamphetamine. When they searched Omeasoo at the police station, they found crack cocaine. During a subsequent search of the truck at the police station, the police found, among other things, a .22 calibre assault rifle, a prohibited clip for the rifle with ammunition and more than two kilograms of illegal drugs, including cocaine, marihuana, fentanyl, MDMA and methamphetamine. The accused were charged with possession of cocaine, methamphetamine and ecstasy for the purpose of trafficking (section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (the *CDSA*)), and firearms offences pursuant to sections 86(2), 88, 90(1), 91(1) and 94 of the *Code*. White was charged with additional weapons offences pursuant to sections 92(1)-(2) and 117.01(1).

The Trial

[13] The trial began with a *voir dire* to determine the admissibility of the items seized. During the *voir dire*, the Crown conceded that the officers' initial contact with the accused was an investigative detention (see *R v Mann*, 2004 SCC 52) and that the accused were entitled to be advised of their section 10 *Charter* rights. Because the officers did not tell the accused why they were being detained or provide them with their right to counsel, the Crown also conceded that the accused's section 10 *Charter* rights were infringed.

[14] During cross-examination, the officers were questioned about the differences between the information they had received about the firearms

incident from the 911 call and what they observed. In particular, defence counsel pointed out the following:

- the truck was a red Dodge Ram not a red Chevrolet Silverado;
- only one of the males was white (one of the males was Indigenous);
- only one of the males was wearing a baseball cap; and
- the passenger was wearing a black shirt, but neither of the males was wearing a hoodie or a sweater.

[15] When asked about these differences, Cst. Millar said that he could not differentiate between a Chevrolet Silverado and a Dodge Ram and that, in his 12 years of experience as a police officer, people very often get the make and model of a vehicle wrong. When it was suggested to Cst. Campbell that the passenger was Indigenous not white, he said, "It never crossed my mind." He also testified that, "based on [his] experience and the circumstances of various calls, people tend to get things right, but they also tend to get things wrong. Many times we're going north . . . when someone meant south as an example."

[16] Ultimately, the officers testified that they believed they had reasonable grounds to arrest the males because the truck was found in the area of the firearms incident, it matched the general description of the suspect vehicle, there were two male occupants and they found the bullet in the washroom where the passenger had just been.

[17] The trial judge concluded that, "White's Section 8, 9 and 10 rights were breached and Omeasoo's Section 9 and 10 rights were breached". He

also made the following findings on the *voir dire*:

- Omeasoo did not have standing to challenge the lawfulness of the search of the truck as the passenger;

- the accused were detained when the officers initially approached the truck, they were not advised of their section 10 rights and this constituted a breach of section 10 of the *Charter* (as conceded by the Crown);

- even though the accused were advised of their section 10 rights when they were arrested, "all that follow[ed]" was tainted by the initial section 10 breach;

- after finding the bullet, the officers had grounds to detain the accused for investigative purposes, but not to arrest them and therefore, the arrest breached their section 9 *Charter* right not to be arbitrarily detained or imprisoned;

- the search of the truck was unreasonable and breached White's section 8 *Charter* right to be secure against unreasonable search or seizure; and

- the search of Omeasoo was conducted after he was unlawfully detained and breached his section 8 *Charter* right.

[18] The trial judge excluded the evidence found in the truck and during the search of Omeasoo pursuant to section 24(2) of the *Charter*, and dismissed all of the charges.

Issues and Positions of the Parties

[19] The Crown relies on two grounds of appeal. First, it argues that the trial judge was wrong when he found that the accused's *Charter* rights were violated by the arrest and the search incident to arrest.

[20] Alternatively, it says that, if the officers had only a reasonable suspicion that the accused were involved in the firearms incident, the police had the common law authority to detain the accused and search for a firearm. It argues that the trial judge applied the law regarding exigent circumstances when he should have considered the law on police powers of detention and search pursuant to the *Waterfield/Dedman* test (see *R v Waterfield*, [1963] 3 All ER 659 (Ct Crim App); and *Dedman v The Queen*, [1985] 2 SCR 2).

[21] Second, the Crown asserts that, if the arrest was lawful, the analysis pursuant to section 24(2) would concern a section 10 breach only and would result in the admission of the evidence.

[22] Alternatively, it argues that, if the trial judge did not err in finding breaches of sections 8, 9 and 10, he erred by excluding the evidence under section 24(2) of the *Charter*. Specifically, it says that the trial judge misapplied *Charter* principles which caused him to inflate the seriousness of the police conduct; he failed to consider the impact of the breaches on the *Charter*-protected rights of the accused; and his decision to exclude reliable evidence essential to the prosecution of serious charges brought the administration of justice into disrepute.

[23] The accused argue that the trial judge's findings of fact are entitled to deference; he made no error of law in concluding that the search was

unreasonable or in applying the law to the facts; and he appropriately considered all three elements of the *Grant* test when he excluded the evidence pursuant to section 24(2) of the *Charter* (see *R v Grant*, 2009 SCC 32).

[24] Omeasoo also argues that the trial judge should have concluded that he had standing under section 8 to challenge the admissibility of the evidence found during the search of the truck, although he has not appealed this finding.

[25] Finally, the accused contend that, even if the trial judge erred in law, there must be a nexus between the legal error and the verdict before a new trial will be ordered.

Discussion

Standard of Review

[26] As these appeals were brought by the Crown under section 676(1)(a) of the *Code*, this Court's jurisdiction is limited to questions of law. As explained by Chartier JA (as he then was) in *R v Koczab (A)*, 2013 MBCA 43 (at para 4):

> [T]he Crown cannot appeal the trial judge's findings of fact or the conclusions on questions of mixed fact and law unless they rise to an error of law and fall within the following four categories, not to be taken as exhaustive, set out by Cromwell J. in *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197 (at paras. 24-32):
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> > 1) It is an error of law to make a finding of fact for which there is no supporting evidence. However, this principle does not, in general, apply to a decision to acquit based on a reasonable doubt because an acquittal is not a finding of fact, but instead a conclusion that the standard of reasonable doubt has not been met;

> 2) The legal effect of findings of fact or of undisputed facts raises a question of law;
>
> 3) An assessment of the evidence based on a wrong legal principle is an error of law. Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a "misapprehension of some legal principle" (at para. 29); and
>
> 4) The judge's failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law.

[27] While this Court must accept the trial judge's findings of fact, his conclusion that the facts do not, objectively, support a finding of reasonable grounds to arrest is a question of law reviewable on the standard of correctness (see *R v Shepherd*, 2009 SCC 35 at para 20; and *R v Chehil*, 2013 SCC 49 at para 60).

[28] Where a trial judge has considered the proper factors on a section 24(2) analysis and has not made any unreasonable findings, his or her determination is owed considerable deference on appellate review (see *R v Côté*, 2011 SCC 46 at para 44). See also *Grant* at para 86; and *R v Farrah (D)*, 2011 MBCA 49 at para 7.

The Police Power of Arrest

[29] Section 495(1)(a) of the *Code* provides the police with the power to arrest a person whom they believe, on reasonable grounds, has committed an indictable offence without the need to obtain a warrant. The requirement of reasonable grounds involves a subjective belief that is objectively grounded. In other words, a reasonable person, standing in the shoes of the officer would believe reasonable grounds to arrest exist. The police do not need to establish

a prima facie case for conviction before making the arrest (see *R v Storrey*, [1990] 1 SCR 241).

[30] When determining whether an officer's subjective belief of the existence of reasonable grounds is objectively reasonable, a court must not assess the various factors relied upon by the officer in isolation. The totality of the circumstances known to the officer at the time must be taken into account. The officer is entitled to rely on information received from third parties, reject information he or she believes is unreliable and draw inferences (see *R v Jacob (JA)*, 2013 MBCA 29 at paras 26-27, 32; and *R v Mitchell (R)*, 2013 MBCA 44 at para 35). As stated by the Court in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, "reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (at para 114).

[31] Establishing a reasonable belief is not a high or overly onerous standard to meet. As explained by Beard JA in *Jacob* (at para 34):

> While the officer needs to show more than a suspicion, the reasonable grounds standard is less than that of a *prima facie* case or proof on a balance of probabilities or proof beyond a reasonable doubt. (See *Censoni* [*R v Censoni*, 2001 CarswellOnt 4590 (Sup Ct J)] at paras. 43, 59.) It was explained by Steven Penney, Vincenzo Rondinelli and James Stribopoulos, in their text *Criminal Procedure in Canada* (Markham: LexisNexis Canada Inc., 2011) as follows (at paras. 2.161-2.162):
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> > The Supreme Court (of Canada) has elaborated on the meaning of the reasonable and probable grounds standard by placing it along a spectrum. According to the Court, it imports a standard of reasonable probability, which entails something less than proof beyond a reasonable doubt or a *prima facie* case but something more substantial than reasonable suspicion, and much further along the spectrum than mere possibility or

> suspicion. Based on this approach the standard is said to be met at "the point where credibly-based probability replaces suspicion."

The Trial Judge's Decision

[32] In this case, the arresting officers testified that they did not believe they had grounds to arrest the accused until Cst. Millar found the bullet in the urinal. However, the trial judge concluded that the connection of the bullet to the firearms incident was "tentative at best" and "the discovery of the bullet had not changed the facts materially under which the Officers were operating." He described the bullet as "close to being a red herring as it could possibly be, rather than significant new evidence" and found that the discovery of the bullet "was insufficient to provide the Officers with reasonable and probable cause to arrest."

[33] The trial judge summarised the arguments of the defence as follows:

> Defence counsel submitted that the arrest was an arbitrary detention. It was arbitrary because the Officers were aware now that Omeasoo was the only person wearing a baseball cap. White and Omeasoo were not wearing hooded sweatshirts. The vehicle was not a Chevrolet Silverado, but a Dodge Ram, and that Omeasoo was of Aboriginal origin and not Caucasian. And that [Millar] had used stereotypical Aboriginal information to come to conclusions that are not permitted and unreliable visual clues to support his suspicion.

[34] He considered the Crown's argument that the finding of the bullet elevated the officers' suspicion to reasonable grounds authorising the arrest. However, he rejected this argument and instead agreed with the position of

the defence, concluding that the bullet only provided the officers with new grounds to detain for investigative purposes.

[35] Because both officers testified that they believed that they had reasonable grounds to arrest the accused after finding the bullet, the issue to be determined by the trial judge was whether the officers' beliefs were objectively reasonable. In my view, the trial judge failed to assess the totality of the circumstances when considering the reasonableness of the officers' beliefs that there were grounds to arrest. He dealt with the evidence in a piecemeal fashion and failed to consider the cumulative effect of all of the facts and circumstances known to the officers at the time of the arrest on a holistic basis to determine whether, objectively, they had reasonable grounds to believe an offence had been committed.

[36] Moreover, the trial judge failed to consider the facts and circumstances from the perspective of the officers. As explained by Moldaver J in *R v MacKenzie*, 2013 SCC 50 (at para 62):

> Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. And because of that, "a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police" (*Yeh* [*R v Yeh*, 2009 SKCA 112], at para. 53).

[37] While the Court in *MacKenzie* was dealing with the standard of reasonable suspicion, in my view, these comments apply equally to a determination as to whether the standard of reasonable grounds to believe has been met (see also *R v Ha*, 2018 ABCA 233 at para 70).

[38] The officers testified that they believed that finding the bullet in the washroom minutes after Omeasoo had been there in the context of the firearms investigation, together with the other information that they had, provided the necessary grounds to arrest the accused. In other words, the bullet elevated their suspicion to a belief that the accused possessed a firearm that had just been pointed at a member of the public.

[39] In my view, the trial judge's characterisation of the discovery of the bullet as a "red herring" is a failure to recognise the connection between the bullet and the firearms incident under investigation. It is a failure, as a matter of law, to appreciate the significance of a fact in the context of the surrounding circumstances, which includes the nature of the investigation and the officers' experience and training (see *MacKenzie* at paras 60-61).

[40] The trial judge's finding that the connection between the accused and the firearms incident was lacking also contradicts his finding that the bullet provided the officers with "a new reasonable suspicion to detain [the accused] for further investigation." An investigative detention is lawful only when there are reasonable grounds to suspect a clear nexus between the individual detained and a recent or ongoing crime, and interference with the person's liberty is necessary to perform the officer's duty (see *Mann* at para 45). I fail to see how the bullet could provide new grounds to detain the accused if it was only tentatively connected to the firearms incident and did not materially change the facts known to the officers.

Did the Officers Have Reasonable Grounds to Arrest?

[41] The evidence established that, prior to arresting the accused, the officers had information that two males in a red truck on Archibald Street at

Watt Street were involved in a firearms incident. The males were described as white, one wearing a white hoodie and a baseball cap and the other wearing a black hoodie or sweater and a baseball cap. Within 14 minutes after the incident, the officers, who saw no other vehicles along the way, found a red truck with two male occupants. The truck was running and was parked in a Tim Horton's restaurant parking lot not far from the location of the incident. There were no other vehicles in the parking lot and, at most, three people (including the cashier) in the Tim Horton's restaurant. The truck's passenger, who was wearing a black shirt and a baseball cap, went into the Tim Horton's restaurant towards the washrooms. Minutes later, one of the officers found the bullet in the washroom.

[42] The only discrepancies between the information initially provided to the officers and what they discovered, were the make and model of the red truck; only one of the two males was wearing a baseball cap; one of the males was Indigenous not white; and, while one of the males was wearing a black shirt, neither of the males was wearing a hoodie.

[43] In my view, the officers' beliefs that the males in the truck had been involved in a firearms incident 26 minutes prior to their arrest was objectively reasonable in light of the constellation of factors known to them at the time of the arrest. This is so particularly in light of the evidence which established that Cst. Millar could not differentiate between a Chevrolet Silverado and a Dodge Ram; it did not occur to Cst. Campbell that the passenger was Indigenous; and, in both of the officers' experience, details provided by 911 callers can be wrong. In my view, the trial judge erred in finding that the arrests breached section 9 of the *Charter*.

Were the Searches of the Truck and Omeasoo Lawful?

[44] The police are permitted to conduct warrantless searches incident to arrest provided that the arrest is lawful, the search is conducted for a legitimate purpose related to the arrest and the search is reasonably conducted. As explained by this Court in *R v Laporte (PLR)*, 2016 MBCA 36 (at para 42):

> Searches incident to arrest are an established exception to the general rule that warrantless searches are prima facie unreasonable. They have an important law enforcement function that includes the collection and preservation of evidence. L'Heureux-Dubé J explained this in *Cloutier v Langlois*, [1990] 1 SCR 158 (at pp 180-83):
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> > (T)he police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him. The common thread in this line of authority is the objective of guaranteeing safety and applying the law effectively.
> >
> > . . .
> > (T)he process of arrest must ensure that evidence found on the accused and in his immediate surroundings is preserved. The effectiveness of the system depends in part on the ability of peace officers to collect evidence that can be used in establishing the guilt of a suspect beyond a reasonable doubt. The legitimacy of the justice system would be but a mere illusion if the person arrested were allowed to destroy evidence in his possession at the time of the arrest.

[45] In light of my conclusion that the officers had reasonable grounds to arrest the accused for the firearms incident, the searches of the truck and Omeasoo were well within the scope of the police common law power to search incident to arrest. The searches were connected to the offence and

conducted in order to protect the police and the public and to discover and preserve evidence. There is no suggestion that the manner in which the searches were conducted was improper (see *R v Caslake*, [1998] 1 SCR 51 at paras 10-25). Thus, in my view, the trial judge erred in finding that the warrantless searches breached section 8 of the *Charter*.

[46] Since I have found that the arrest and the subsequent search of the truck were lawful, it is unnecessary for me to deal with the trial judge's reasons regarding the lawfulness of the search of the truck pursuant to investigative detention. However, I believe it is necessary to make some *obiter* comment on this issue.

[47] The trial judge's use of *R v Paterson*, 2017 SCC 15 is not appropriate in this case. *Paterson* addressed different issues because it involved a warrantless entry to a residence pursuant to section 11(7) of the *CDSA* and whether there were exigent circumstances, rather than the warrantless search of a vehicle pursuant to a firearms investigation under the *Code*. The question of whether the search of the truck was lawful required analysis pursuant to the *Waterfield/Dedman* test and not *Paterson*.

The Section 24(2) Charter Analysis

[48] In light of my conclusion that the trial judge erred in finding breaches of sections 8 and 9 of the *Charter*, all that remains is the section 10 breach conceded by the Crown. While I may not necessarily agree with the Crown's view that the nature of the initial detention engaged section 10 of the *Charter*, I accept that the concession was made. Rather than focussing on the flaws in the trial judge's analysis, including whether he considered the impact of the breaches on the accused's *Charter* rights in this case and his reference

to a statement that was not the subject of the *voir dire*, I will consider whether the section 10 breach warrants exclusion of the evidence under section 24(2).

[49] Section 10 of the *Charter* provides the right to be informed of the reason for arrest or detention and the right to counsel. The Crown conceded that, when the officers initially approached the truck and spoke to the accused, they were detained for investigative purposes and should have been advised of their section 10 *Charter* rights. The trial judge found that, even though the accused were advised of their section 10 rights when they were arrested, all that followed was tainted by the initial section 10 breach.

[50] I disagree. Nothing with any significant evidential value was found during the initial detention. All of the evidence excluded by the trial judge was found after the accused were arrested and properly advised of their section 10 rights. Even if the evidence had been obtained in a manner that infringed the accused's rights under section 10 of the *Charter*, in my view, its admission would not bring the administration of justice into disrepute.

[51] As explained by Hamilton JA in *R v Molnar*, 2018 MBCA 61 (at paras 39-40):

> Under section 24(2), evidence shall be excluded if, having regard to all of the circumstances, its admission will bring the administration of justice into disrepute. This inquiry requires the courts to balance individual and societal rights and requires a consideration of "all the circumstances" (*R v Grant*, 2009 SCC 32 at para 85), as "(n)o overarching rule governs how the balance is to be struck" (*Grant* at para 86).
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> The well-known considerations are:
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> 1. The seriousness of the *Charter*-infringing state conduct;

2. The impact of the breach on the *Charter*-protected interests of the accused; and

3. Society's interest in an adjudication of the case on the merits.

See *Grant*; *R v Harrison*, 2009 SCC 34; and *R v Paterson*, 2017 SCC 15.

[52] The interaction between the officers and the accused during the initial contact was brief, minimally invasive and relatively innocuous. The officers approached the vehicle to investigate whether the occupants had a firearm and to ensure the safety of people in the area. When they found nothing to connect the accused to the firearms incident, the officers released them. The officers proceeded cautiously and acted reasonably and in good faith in the context of a firearms investigation. In my view, the seriousness of the *Charter*-infringing state conduct does not favour exclusion of the evidence.

[53] The initial detention lasted only six minutes; led to no incriminatory statements or evidence; had almost no impact on the decision to arrest the accused and search them and the truck; and the *Charter* breach was remedied when the accused were advised of their section 10 rights upon arrest (see *R v Spence*, 2017 MBCA 26 at paras 27-29). Any impact of the section 10 breach on the *Charter*-protected interests of the accused would not warrant exclusion of the evidence.

[54] The officers were investigating a firearms incident in response to a 911 call. The charges the accused faced were serious. The evidence discovered during the search of the truck and Omeasoo was reliable and

essential to the Crown's case. Society has a strong interest in the adjudication of this case on its merits.

[55] On balance, I am not satisfied the admission of the evidence would bring the administration of justice into disrepute.

Relief Sought

[56] The accused argue that, even if the trial judge erred in law, it would be speculative to conclude that they would be convicted if a new trial were to be granted and, therefore, the appeals ought to be dismissed rather than a new trial ordered.

[57] While the Crown is not required to establish that the verdict would necessarily have been different if the evidence had been admitted in order to obtain a new trial, it must establish that "the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (*R v Graveline*, 2006 SCC 16 at para 14).

[58] In *R v O'Kane*; *R v Zebrun*, 2012 MBCA 82, Hamilton JA considered the Crown's burden to satisfy the Court that a new trial is warranted on an appeal from a directed verdict of acquittal. She stated (at para 71):

> To conclude, the Crown does have the burden to demonstrate that the legal error may have impacted the verdict of acquittal. However, it will be only in exceptional circumstances that the Crown will not be able to demonstrate the verdict may be different after a new trial. Appellate courts cannot speculate as to what might have occurred if the trial had proceeded. Therefore, it will be rare that an appellate court will not order a new trial after

> determining that a directed verdict of acquittal was an error of law, particularly when the trial was with a jury.
>
> [emphasis added]

[59] Clearly, admitting the items seized by the police into evidence at the trial would change the outcome as the charges would not be summarily dismissed as a result of the exclusion of the evidence following the *voir dire*. Therefore, in my view, the verdict may be different after a new trial.

Conclusion

[60] In my view, the trial judge erred in law when he concluded that the accused's rights pursuant to sections 8 and 9 of the *Charter* were breached and that the arrest and searches incident to arrest were unlawful. Further, in my view, the section 10 breach during the initial detention does not warrant exclusion of the evidence under section 24(2), and the verdict may be different after a new trial.

[61] In the result, I would grant the appeals and order a new trial.

leMaistre JA

I agree: Steel JA

I agree: Beard JA