Date: 20150819
Docket: CR 14-01-33516
Indexed as: R. v. Okemow
Cited as: 2015 MBQB 140
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,	)	Appearances:
	)	
	)	W. Rustyn Ullrich,
- and -	)	Danielle Y. Simard and
	)	Allison Kindle Pejovic
	)	for the Crown
MICHAEL FRANK OKEMOW,	)	
accused.	)	Bruce F. Bonney and
	)	Andrew J. McKelvey-Gunson
	)	for the accused
	)	
	)	JUDGMENT DELIVERED:
	)	August 19, 2015

Restriction on publication: No information regarding any portion of this *voir dire* shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

Ruling on *Voir Dire* re Admissibility of Evidence

BOND J.

INTRODUCTION

[1] On September 29, 2012, officers of the Winnipeg Police Service entered a residence at 650 Furby Street and located a firearm later determined to have been used in a fatal shooting the previous night. The accused Okemow is

charged with murder in relation to that shooting. He has made an application to exclude the evidence of the seizure of the firearm from his trial.

[2] Briefly, the facts can be summarized as follows: Police officers responded to a "gun seen" call in the area of 650 Furby Street. One officer observed the accused, who he believed matched the description of the man seen with a gun, outside the residence acting suspiciously and then entering the residence. Police knocked on the door and the accused let them in. The accused was detained and was not advised of his rights to counsel. The police "cleared" the residence – looking for persons who might be injured or who might present a danger to others. In the process, police observed two firearms and ammunition in the basement of the residence. The accused was arrested.

[3] The accused alleges that the police conduct was in a violation of s. 8 and s. 10(b) of the ***Charter***, and seeks exclusion of the evidence. The Crown argues that the accused has not established that he has standing to seek a remedy under the ***Charter***. The Crown further claims that the police did not infringe s. 8 of the ***Charter*** as the warrantless search was justified pursuant to the police duty to keep the peace and preserve life. The Crown concedes a technical s. 10(b) breach but argues that the evidence should nevertheless be admitted.

ISSUES

[4] The issues to be addressed are:

1. Does the accused have standing to seek exclusion of the evidence under s. 24(2) of the ***Charter***?

2. Was there an infringement of s. 8 of the ***Charter***?

3. Should the evidence be excluded pursuant to s. 24(2) of the ***Charter***?

STANDING

The facts relevant to standing

[5] The residence located at 650 Furby Street was owned by a numbered company, which was in turn owned by Harbinder Bhandl and managed by her husband, Sukhjit Singh Bhandl. Mr. Bhandl rented the property to Curtis Meeches who entered into a lease agreement on July 11, 2012. On the lease agreement were listed three other individuals who were identified by Mr. Meeches as staying in the residence. This list did not include the accused. Mr. Bhandl did not know the accused, had never met the accused, he had not given a key to the residence to the accused and did not receive any rent money from the accused. Mr. Meeches paid the rent for July, August and September 2012 and then stopped paying the rent.

[6] Documents seized from the residence included:

- a Manitoba Hydro bill dated September 14, 2012 and two MTS (telephone/internet service) bills dated August 17, 2012 and September 18, 2012, respectively, all addressed to 650 Furby Street, and in the name of Lee Franklin or L. Franklin;

- a Nissan Canada Liability Statement regarding a leased vehicle dated August 22, 2012, addressed to 650 Furby Street, in the name of Maria Meneses; and
- an Indian Status card issued on September 1, 2012 in the name of Gregory Myerion.

[7] Gregory Myerion is one of the names listed on the lease agreement. No documents or identification of the accused were found in the residence.

[8] The accused was present in the residence at the time of the search. When police knocked on the door he answered and let them in. There were six other people present in the living room of the residence, apparently watching television and drinking beer. None of them lived at 650 Furby Street. The accused told police that he stayed there but that he did not know who owned the house.

[9] After the arrest of the accused, as well as other individuals who were present in the residence, the police contacted Mr. Bhandl and asked him to secure the residence. Mr. Bhandl did secure the residence. Mr. Meeches did not pay any further rent and did not contact Mr. Bhandl to obtain the $600 damage deposit.

[10] The accused did not testify on the *voir dire*.

The positions of the parties

[11] Defence counsel argued that the accused's presence in the residence at the time of the search, the fact that he opened the door to let the police in, and

his statement to police that he stayed there, taken together, establish that he had a reasonable expectation of privacy in the residence. He acknowledged that the evidence suggests that a number of people may have had access to the house, but argued that this does not undermine the accused's expectation of privacy.

[12] The Crown argued that the accused has not established that he had a reasonable expectation of privacy. The Crown pointed to the absence of any formal connection between the accused and the residence – he was not the owner, he was not on the lease – as well as the absence of any evidence that the accused had a subjective expectation of privacy. The Crown also noted that the evidence suggests that a number of people may have had access to the premises and argued that there is no evidence that the accused had any authority to regulate access to the premises.

Analysis

[13] It is well established that the onus rests on the accused to establish that he has standing to seek a remedy under s. 24(2) of the ***Charter***: ***R. v. Edwards***, [1996] 1 S.C.R. 128, at para. 43.

[14] To do so, the accused must demonstrate that he had a reasonable expectation of privacy in relation to the place searched or the thing seized: ***Edwards***, at para. 30.

[15] Whether the accused had a reasonable expectation of privacy is generally to be determined without reference to the conduct of the police during the search: ***Edwards***, at para. 33.

[16] The law is helpfully summarised by Cory J., in ***Edwards***, as follows:

> **45** ... 1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed. See *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619.
>
> 2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places. See *Hunter*, *supra*.
>
> 3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See *Pugliese*, *supra*.
>
> 4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably. See *Rawlings*, *supra*.
>
> 5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso*, *supra*, at p. 54, and *Wong*, *supra*, at p. 62.
>
> 6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
>
> (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.
>
> See *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 256.

> 7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

[17] In applying the factors articulated in ***Edwards***, I begin in this case with the absence of evidence. There is no evidence from the accused regarding his subjective expectation of privacy. There is no evidence of the accused's historical use of the premises. There is no evidence of the accused's historical use of the firearm seized. There is no evidence of the accused's control over the residence, or ability to regulate access to it, except that he opened the door for the police on this one occasion.

[18] The ability to regulate access to the premises is a factor that is given considerable weight in the ***Edwards*** case. In that case, the apartment searched was that of the accused's girlfriend, and the evidence showed that the accused stayed at the apartment on occasion, kept a few possessions there and had a key to it. However, the authority to admit anyone to or exclude anyone from the apartment rested with Mr. Edwards' girlfriend.

[19] In the case before this court, the applicant argued that the evidence of the accused's right to admit or exclude others can be found in the fact that he opened the door when the police knocked. In my view, little can be inferred from this bare fact in the absence of other evidence regarding his connection to the residence, and in the face of the evidence regarding others' occupancy of the residence. Less than three months prior to the search, the house had been rented to Curtis Meeches who had listed three other people whom he expected

would occupy the residence. They were authorized by the lease to occupy the premises. One of them was Gregory Myerion. An Indian Status card in his name found in a bedroom suggests that he may have been living or staying at the house. There is no evidence of the relationship between the accused and Curtis Meeches, or between the accused and any of the other persons authorized to occupy the residence. Utility bills for the premises were apparently directed to another individual. While there is no direct evidence of who was living there, what this evidence suggests is that a number of people may have had access to the premises. It does not support the inference that the accused had the authority to regulate access to it.

[20] The only other evidence of the accused's connection to the residence is the accused's comments in response to questions from the police. None of the officers involved made verbatim notes of what the accused said to police. Det. Comte testified that in response to the question, "Who lives here?" the accused said, "I stay here." Later, Det. Comte testified that when the group of individuals at the house was asked collectively, "Who stays here?" the accused was "the only one that ... piped up and said: Yes, I live here." Det. Comte testified that the accused said he did not know who owned the house. Then Police Chief McCaskill (who was partnered with Comte that evening) testified that he heard that exchange and had noted that the accused said he was "staying there" and that he does not know who owns the house. Det. Motuz testified that he subsequently spoke to the accused and asked him, "Do you live here?" and

his response was "that he stays at the residence but doesn't live there, and he says he doesn't know whose place it was." Cst. Johnson testified that he heard the accused tell Det. Motuz "that he stays there but he doesn't know who, who owns the house or who rents it, or who the ... actual owner or renter is."

[21] Having heard the evidence, I find that the evidence of Det. Motuz best reflects the accused's comments. In his evidence and in his notes, he had turned his mind to the distinction between the accused "staying" at the residence, which suggests a temporary situation, versus the accused "living" at the residence which suggests some permanence. Det. Comte did not make that distinction in his evidence, and appeared to use the terms "lives" and "stays" interchangeably. I find that the evidence of all of the officers is generally consistent. The evidence of Det. Motuz on this issue, however, is more precise.

[22] There is no question that the law in the context of the ***Charter*** recognizes a very high expectation of privacy in a person's dwelling house: ***R. v. Silveira***, [1995] 2 S.C.R. 297; ***R. v. Feeney***, [1997] 2 S.C.R. 13.

[23] However, that expectation of privacy does not extend to all persons who are present in a house when a search is conducted or all persons who may have access to the house. I find the comments of Freedman J.A. of the Manitoba Court of Appeal in ***R. v. Guiboche***, 2004 MBCA 16, 180 Man.R. (2d) 276, helpful in this regard. That case involved a challenge to a police officer's entry into the residence of the accused's father for the purpose of arresting the accused. There was evidence that the accused lived elsewhere. Freedman J.A. referred to

the Supreme Court's decision in ***Feeney*** regarding police authority to enter a person's dwelling house for the purpose of effecting an arrest and to the Supreme Court's decision in ***Silveira*** where the high level of protection afforded to a person's dwelling house was reaffirmed. Freedman J.A. said:

> **78** ... For all persons, their dwelling-house is, at law, their castle, but it is not necessarily anyone else's castle. The rationale of the common law's enshrinement of the dwelling-house as a special place can be succinctly explained by reference to the notion, central to an interpretation of s. 8 of the *Charter*, of "reasonable expectation of privacy," and the comments of Cory J. in *Silveira* (para. 70 above) make clear that this concept is at the heart of the law's respect for a dwelling-house.
>
> **79** A dwelling-house is a special place for the person who lives there, recognized as such by the common law, and sanctified to a considerable extent by judicial commentary. Absent circumstances such as were outlined by Cory J. in *Edwards* creating a reasonable expectation of privacy by one person in another's dwelling-house, such dwelling-house should not provide any greater degree of security or privacy than, for example, another person's car (see *R. v. Belnavis*, [1997] 3 S.C.R. 341), or any other place where there is a limited or no reasonable expectation of privacy. The question always is, does the person asserting a s. 8 violation have a reasonable expectation of privacy in the site in question? See *R. v. Buhay*, [2003] 1 S.C.R. 631.

[24] It should be noted that in both ***Edwards*** and ***Guiboche***, there was evidence that the accused lived at a residence other than that which was the subject of the impugned search. In the case before me there is no such evidence. However, I find that this feature of the evidence, which could distinguish this case from ***Edwards*** and ***Guiboche***, is not determinative. The accused bears the burden of demonstrating that he has a reasonable expectation of privacy in 650 Furby Street. It is for him to demonstrate that the circumstances support that conclusion. He called no evidence on the *voir dire*. The court is asked to come to that conclusion based on what occurred, and what

was said, on the occasion of the impugned search. While this may be sufficient evidence in some cases, I find that it is not in this case. Here, there is evidence that another person rented the house, having recently signed a lease and paid the rent, and that others had authorization to live there pursuant to the lease. In addition, there is some evidence that suggests that other persons may have had access to the house. The accused's presence on one occasion, and his assertion to the police that he stays at the house, considered against this background, is insufficient to satisfy me that he lived there or had a reasonable expectation of privacy in the residence.

[25] Defence counsel in oral argument urged the court to consider that 650 Furby Street may have been a "non-traditional" dwelling house to be distinguished, for example, from a single family dwelling occupied by a homeowner and his or her family. He asked the court to infer from the evidence that the residence was a "flop house" where a number of people may be staying, that the residents' occupancy of the house is transient in nature, and that at any given time any one of them may be in control of the premises such that he or she has a reasonable expectation of privacy.

[26] It goes without saying that a reasonable expectation of privacy could arise in a wide variety of circumstances in relation to a potentially infinite range of possible living situations. Indeed, a person may be staying in a room in someone else's house in return for rent, or in return for services, or as a guest. A person may stay at a house, in the absence of the owner or the rent-paying

tenant, but with his or her consent, for any number of purposes, such as to protect it from intrusion by others or to protect its contents, or simply as a benefit of family relationship, friendship, employment, gang association, generosity or charity. Whether or not any of these situations would give rise to a reasonable expectation of privacy would depend on all of the circumstances. The difficulty for the applicant in making his argument in this case, is that there is a paucity of evidence about the nature of the connection between the accused and the residence. I find that the inference he asks the court to draw cannot be drawn from the evidence before me.

[27] Considering all of the circumstances, I conclude that the accused has not demonstrated a reasonable expectation of privacy in 650 Furby Street, and his application must fail.

SECTION 8

[28] In the event I am in error regarding the issue of standing, I will go on to consider whether there was a breach of s. 8 of the ***Charter***.

The facts relevant to the s. 8 claim

[29] Det. Comte was the Acting Patrol Sergeant on September 29, 2012. He was operating a marked police cruiser and was partnered with then Chief of Police McCaskill. Chief McCaskill has since retired from the force, and in September 2012 he was soon to be retired and had decided to work a shift on patrol with some of his officers as a last opportunity to observe them working in the field. Det. Comte was driving the car, and although it would usually be his

partner's responsibility to access and monitor the in-vehicle computer, that night he was doing that too. Communications between police dispatch and the officers was effected in part by radio and in part by way of the computer.

[30] At approximately 7:10 p.m., Det. Comte heard a report of a disturbance, with seven males and two females in front of 645 Sherbrook Street. At approximately 7:26 p.m., Det. Comte heard a report of a call indicating that the caller saw a group of males in front of 645 Sherbrook Street and that one of the males had a gun in his back pocket. The description of this person was that he was an aboriginal male with tattoos on his arms and wearing a red ball cap. These males had been seen walking towards Maryland Street cutting through 624 Sherbrook Street. At that time, Det. Comte and Chief McCaskill were assigned to respond to the call. They began driving around the area, looking for the man with a gun.

[31] At 7:42 p.m. Det. Comte heard about another call, with the caller indicating that a man had gone into a green one-ton dump truck parked behind 645 Sherbrook Street and was hiding from police there. This time the description given was of a black male between 17 and 20 years of age, slender, wearing a green hat, with a black handgun in the front waistband of his pants. Det. Comte and Chief McCaskill responded to the call, arriving at the rear of 645 Sherbrook Street at 7:45 p.m. They found the green dump truck, searched it for the man, and found no one. They had their firearms drawn and held them in front of them at their waist pointed at the ground.

[32] After they searched the truck, Det. Comte noticed the accused at the rear of the house across the alley. This was the rear of 650 Furby Street. Det. Comte saw the accused behaving suspiciously. He described the accused looking shocked to see them, with eyes and mouth opened wide. The accused was on a small landing outside the back door. Det. Comte described how the accused kept his back to the rear of the house, and shuffled sideways to the door. The accused awkwardly opened the door while maintaining this position and never once turned his back to the police. Det. Comte testified it appeared that the accused was attempting to hide something.

[33] Det. Comte testified that in his mind, the accused matched the suspect's description – an aboriginal male. He was cross-examined on the fact that the second gun call included a fairly detailed description of the suspect as a black male, a description that the accused clearly did not fit. Det. Comte's evidence was that he had simply missed that description in the information that was being broadcast to him and he had no explanation for that. Chief McCaskill also testified that he had missed that description, and had in his mind that they were looking for an aboriginal male. Indeed, Chief McCaskill understood the information that they received as indicating that the second call was in relation to the same male who had been seen earlier with a gun. In his mind, it was the same individual who was hiding in the truck. Similarly, Cst. MacArthur, who had also responded to the call, missed the "black male" description, and understood

that the call indicated that one of the people causing a disturbance in front of 645 Sherbrook Street was hiding in the dump truck.

[34] Det. Comte and Chief McCaskill went to the back door of 650 Furby Street. Det. Comte looked through a window in the door and observed people inside the residence, including the accused. He knocked on the door and the accused answered. Det. Comte told the accused that they were investigating a gun incident in the area, and asked if they could come in to talk to him. The accused said, "Sure. Come in," and they entered. The two officers spoke to the accused, who identified himself as Bret Michaels, which Det. Comte knew to be the name of the lead singer of a rock band called Poison. The officers also spoke to the other people in the house, all of whom told police that they were just visiting there. No one present was able to say who owned the house. The accused told police that he stayed there, but did not know who owned the house.

[35] While Det. Comte and Chief McCaskill were talking to the occupants, other officers attended to provide assistance. Det. Comte directed them to search the house for any other people, and directed the accused to go outside with Det. Motuz to confirm his identity. As Det. Comte was himself walking out of the house, he noticed a door opened to stairs leading to the basement of the house. The basement light was on. He looked down the stairs and noticed a live .22 calibre bullet on the steps. Det. Comte then alerted the other officers, and proceeded down the stairs accompanied by Cst. MacArthur. In the process of

searching the basement for people, Cst. MacArthur found an open duffel bag containing two illegal firearms. He seized the firearms. One of them was later identified as having been used in a shooting that resulted in a man's death.

The positions of the parties

[36] The applicant argued that the s. 8 breach began when Det. Comte attended at the door of the house and looked through the window, and that it continued when the officers entered the residence. He argued that the accused's apparent willingness to allow the officers to enter cannot be construed as consent to the entry as the apparent consent was not valid because it did not satisfy the requirements of the law established in ***R. v. Wills*** (1992), 7 O.R. (3d) 337 (C.A.). The applicant argued that Det. Comte had formed the intent to detain the accused and search the house before he approached the back door. He argued that Det. Comte did not have sufficient grounds to do either of those things at that time.

[37] The Crown takes the position that the actions of the officers and the search of the residence were justified as ancillary to common law police powers and duties to keep the peace and preserve life under the ***Waterfield/Dedman*** principles: ***R. v. Waterfield***, [1963] 3 All E.R. 659 (C.C.A.); ***Dedman v. The Queen***, [1985] 2 S.C.R. 2. The Crown argued that the police officers had sufficient grounds to justify their actions, and failure to act as they did would have been a dereliction of duty.

Analysis

[38] I begin with the applicant's claim that his s. 8 ***Charter*** right was breached when Det. Comte approached the door of 650 Furby Street, knocked on it and looked through the window in the door. The applicant relied on the principles enunciated in ***R. v. Kokesch***, [1990] 3 S.C.R. 3. In ***Kokesch***, a police officer conducted a "perimeter search" of a residence because he suspected there was a grow operation there but he did not have sufficient grounds to obtain a warrant. He went to the property, which was at the end of a 75 – 100 yard driveway, and searched the area immediately surrounding the house, noticing window coverings, a vent installed in the wall, the smell of marihuana, and the sounds of electrical humming. His purpose in entering onto the property was to gather evidence. The Court found that the perimeter search was conducted without any statutory or common law authority and was therefore a breach of s. 8.

[39] In my view, ***Kokesch*** has no application to this case. Here, Det. Comte attended the residence to speak to the accused and address a public safety concern. It was reasonable for him to approach the door and to knock on it. This action does not constitute a search. The Supreme Court recently stated in ***R. v. MacDonald***, 2014 SCC 3, [2014] 1 S.C.R. 37:

> **26** There is no question that individuals have a reasonable, indeed a strong, expectation of privacy in their homes (*R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 19; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Silveira*, [1995] 2 S.C.R. 297), as well as in the approaches to their homes (*Evans*, at para. 21). However, *Evans* also established that the police have an implied licence to approach the door of a residence and knock. Doing so will not be considered an invasion of privacy constituting a search if the purpose of the police is to communicate with the occupant. But "[w]here the conduct of the police . . . goes beyond that which is permitted by the

> implied licence to knock, the implied 'conditions' of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder" (*Evans*, at para. 15). In such circumstances, the police action constitutes a "search".

[40] In ***MacDonald***, the police attended at the door in response to a noise complaint. The accused opened the door a few inches, and seeing what appeared to be a weapon, the police officer pushed the door open further. The Court found that the act of pushing the door open further was a search that attracted ***Charter*** scrutiny (although it was ultimately found to be justified).

[41] In my view, when Det. Comte looked through the window in the door he did not go beyond the implied licence. It did not involve an invasion of privacy constituting a search. The window was accessible to anyone who attended at the door. Anyone knocking at the door could look through it.

[42] After responding to the knock on the door, the accused allowed the officers in. The applicant argued that the accused's consent to the officers' entry was not valid because it did not satisfy the requirements set out in ***R. v. Wills***, *supra.* ***Wills*** was a case where the Crown sought to rely on the consent of the accused for the admission into evidence of breath samples in an impaired driving case. The court found that to succeed, the Crown had to show that the accused had waived his ***Charter*** right. The court concluded, at pp. 353-4:

> In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:
>
> (i) there was a consent, express or implied;

(ii) the giver of the consent had the authority to give the consent in question;

(iii) the consent was voluntary in the sense that that word is used in *Goldman*, *supra*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;

(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(vi) the giver of the consent was aware of the potential consequences of giving the consent.

[43] These criteria, however, were established in ***Wills*** in the context of the accused's purported consent to the police obtaining evidence from him. Similarly, the case of ***R. v. Borden***, [1994] 3 S.C.R. 145, where the Supreme Court cites ***Wills*** with approval, deals with the consent of an accused to provide a blood sample for the purposes of a sexual assault investigation.

[44] Do these requirements apply in a case such as this one, where the police wish to speak to a person inside a residence in relation to an investigation and public safety concern?

[45] In ***R. v. Petri,*** 2003 MBCA 1, 170 Man.R. (2d) 238, officers responded to a complaint of a possible impaired driver. The caller gave a detailed description of the vehicle, which was quite distinctive. The officers found the vehicle parked at the address of the registered owner which was close to the location where it had been observed by the caller. The officers knocked on the door and the accused opened it and allowed the officers in. As they spoke to him, they noted

signs of impairment and asked him if he had been driving the vehicle. He said he had and they arrested him. The Court found that the officers entered the residence with "implicit consent from the accused as he backed away from the open door and talked to them" (at para. 22).

[46] The Court in ***Petri*** made no reference to the requirements of ***Wills*** and instead stated:

> **23** It is true that any implied invitation may be negated where the police enter the residence without the express or reasonably assumed consent of the occupant. However, there is nothing to nullify consent in the evidence that was before the court in this case. If the police are present for the lawful purpose of conducting an investigation by communicating with the occupant, they can continue the communication unless and until the occupant makes known that his cooperation has been withdrawn.

[47] The Court in ***Petri*** emphasized that the officers were engaged in an "open-ended investigation" and had no grounds to arrest the accused until after they observed and spoke to the accused. The implied consent was for the police to enter the residence in the course of their investigation and not for the purpose of making an arrest (at para. 26).

[48] In the case before me, Det. Comte told the accused that they were investigating a gun incident in the area and asked him if they could come in and talk to him. His response was, "Sure. Come in." The accused gave explicit consent to the officers to enter to conduct their investigation. I find that this consent was valid. The requirements set out in ***Wills*** for a valid consent to search for or seize evidence are not applicable to this case.

[49] Det. Comte was pressed in cross-examination to agree with the suggestion that he had intended to detain the accused and search the house prior to attending to the door. Det. Comte testified that he could not say with certainty at what point he formed the intent to detain the accused or search the house. There was, he said, no "ah-ha moment." He described the situation as fluid. He was processing information as he took steps to respond to the call. He acknowledged a heightened level of stress occasioned by the presence of the Chief of Police. He testified that his concern was the safety of the public and of police officers.

[50] I find that Det. Comte was a credible witness and was genuinely attempting to explain his decision-making process in a high-stress situation. I find that his actions were driven by a genuine concern for the safety of the public and police. He had just seen a man who he believed may be armed with a gun enter a house. His response was to attempt to speak to the man, he knocked on the door, and was granted entry.

[51] Det. Comte was cross-examined as well about what he would have done had the accused not invited him in when he knocked. The evidence he gave in a series of questions and answers is best summarized at the end of the exchange as follows:

> Q. So are you saying now that had he said no you, you wouldn't have gone in?
>
> A. I'm saying if you asked me that right at that time, if that would have happened, I don't know what I would have done because it didn't happen like that. Now, looking back on it I'd like to think that I would

have reacted, yes, I would have went [sic] into the house.

[Transcript of Proceedings, held on May 20, 2015, pp. 97-98]

[52] In my view, the hypothetical "what would you have done if" question is of limited value. The court must make its decision based on what actually occurred and on what the officers actually did. I note the comments of Abella J. in ***R. v. Clayton***, 2007 SCC 32, [2007] 2 S.C.R. 725. In that case, the accused were detained and searched by police as they left a nightclub parking lot where it had been reported that there had been a number of men in possession of handguns. The issue was whether the search of the accused and their vehicle was a violation of s. 8. Abella J. wrote:

> **48** The officers' safety concerns also justified the searches incidental to the detention. The trial judge based his finding that Farmer's and Clayton's s. 8 rights were violated on his conclusion that the decision to search them was made before the officer had the objective grounds to do so. This, it seems to me, ignores the fact that the relevant time is the time of the actual search and seizure. By that time, the officers had the requisite subjective and objective grounds. Intention alone does not attract a finding of unconstitutionality. It is not until that subjective intent is accompanied by actual conduct that it becomes relevant. We would otherwise have the Orwellian result that *Charter* breaches are determined on the basis of what police officers intend to do, or think they can do, not on what they actually do. The *Charter* protects us from conduct, not imagination, and even a benign motive may not justify objectively unreasonable police conduct.

[53] Det. Comte and Chief McCaskill entered the residence to investigate a "gun seen" call after being allowed in by the accused. None of the occupants could say who owned the house. None of them lived there. The accused said that he stayed there and gave what appeared to be a false name. The accused was detained when he was directed to go to the police vehicle with Det. Motuz and Cst. Johnson for the purpose of identifying him. Although Det. Comte may

have intended to detain the accused prior to that moment, he took no steps to do so and did not conduct himself in a way that suggested the accused was detained. The accused was not directed to show his hands, for instance. See ***R. v. Grant***, 2009 SCC 32, [2009] 2 S.C.R. 353.

[54] In my view, the case before me is akin to the case of ***R. v. Farrah***, 2011 MBCA 49, 268 Man.R. (2d) 112, and ought to be resolved based on the principles enunciated in that case.

[55] In ***Farrah***, police responded to a location where a robbery had just occurred. They were told a gun had been discharged, and two men were seen running away. They used a tracking dog to follow the suspects. The dog showed interest in two suites in an apartment building nearby. Officers entered and searched the suites without a warrant. They arrested the accused in one of the suites. The Court found that there was no s. 8 violation and set out the following principles.

[56] A warrantless search is presumptively unreasonable, and the onus rests on the Crown to show on a balance of probabilities that the search was reasonable: ***Farrah***, at para. 28.

[57] If a reasonable expectation of privacy is established, the Court must consider whether the search is authorized by law either pursuant to statute or common law: ***Farrah***, at para. 28.

[58] There is no suggestion that the entry and search in this case was authorized by statute. If it is to be justified, it must be pursuant to common law.

[59] In ***Farrah***, the Court summarizes the possible sources of common law authority to conduct warrantless searches as follows:

> **31** ... The common law will typically provide the legal basis for warrantless searches when:
>
> a) there is consent to the search;
>
> b) the police come upon evidence in the course of their duties or unexpectedly and that evidence is in plain view (under the "plain view doctrine");
>
> c) the search is incident to arrest;
>
> d) the search is incident to detention; or
>
> e) the search is ancillary to the common law police powers and duties to keep the peace and preserve life pursuant to the *Waterfield/Dedman* test (*R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.); *Dedman v. The Queen et al.*, [1985] 2 S.C.R. 2).

[60] The court went on to explain (e) above as follows:

> **33** To determine whether the entry and search amounted to a lawful exercise of their common law powers (and was therefore authorized by law), the two-pronged *Waterfield/Dedman* test, as was recently restated in *Gomboc*, has to be met (at para. 144):
>
> > The Crown attempts to show common law authorization by relying upon the ancillary police powers doctrine articulated in R. v. Waterfield, [1963] 3 All E.R. 659 (C.C.A.). To succeed, the Crown must show that (1) the search "fell within the general scope of the duties of a police officer under statute or common law", and (2) the "interference with liberty [was] necessary for the carrying out of the particular police duty and [was] reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference": Dedman v. The Queen, [1985] 2 S.C.R. 2, at p. 35.

[61] There is no doubt that the common law police duties include protection of life and property, as well as the investigation and prevention of crime: ***MacDonald*** at para. 31; ***Clayton,*** at para. 23. In my view, the officers in the case before me were acting in the course of their common law duties by

responding to and investigating the report of a person in possession of an unsecured gun.

[62] On all of the evidence, I find that the officers were performing their common law duties when they entered the premises to speak to the accused, and searched it for the homeowner or for injured or dangerous persons.

[63] The real question is whether their actions were necessary and reasonable in the circumstances. Was the interference with liberty and privacy justifiable in this case?

[64] Whether the warrantless entry and search was justified requires a consideration of all of the circumstances. As the Supreme Court stated in ***R. v. Godoy***, [1999] 1 S.C.R. 311, as cited in ***R. v. Clayton***, *supra*:

> **25** In *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 18, this Court accepted the following test developed by Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), at p. 499, for assessing whether police interference with individual liberties was justified:
>
> > [T]he justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

[65] In this case, the police were responding to a "gun seen" call, which was actually two calls. In his evidence, Det. Comte acknowledged that the police sometimes receive unfounded calls of this nature but in his mind when there is a second call with the same claim, this gives the complaint greater credibility. The information that the officers first received was that the person with the gun was near 645 Sherbrook Street and was aboriginal with tattoos, wearing a red ball

cap. The second call said that the man with the gun was hiding in a dump truck behind 645 Sherbrook Street, and that he was a black male. A description of his height, build, and clothing was given. That information was received at 7:42 p.m. By 7:45 p.m., the officers were searching the truck. They found no one, but immediately following, Det. Comte's attention was drawn to an individual who fit the first description of the suspect acting suspiciously, as if hiding something on his person, within 40 feet of the truck. I find that it is reasonable that the officers would investigate further and attempt to speak to this person.

[66] The applicant argued that the failure to note the difference between the two descriptions given in the first and second calls amounted to negligence on the part of the officers, in particular Det. Comte who was directing the investigation. I do not find that the failure to note this description was negligent. I am not prepared to speculate as to why the description was missed, but it is noteworthy that all three officers missed this description, suggesting that there may be some reason common to all three of them. Regardless, even if the officers had considered the second description, it would be reasonable for them to make efforts to speak to the man who fit the first description of a man with a gun and who was located within 40 feet of the location where a man with a gun was said to be hiding from police. It should be noted as well that the accused was observed at this location within three minutes of the second call being broadcast, and within 20 minutes of the first call.

[67] Det. Comte was challenged on his evidence regarding the accused's behaviour at the back door of 650 Furby Street. It was suggested that Det. Comte's evidence in the *voir dire* was inconsistent with the evidence he gave at the preliminary hearing and that he embellished his evidence by testifying that the accused "displayed characteristics of an armed person", words he did not use at the preliminary hearing. While it may be that Det. Comte did not describe his interpretation of the accused's movements with those words at the preliminary hearing, there was no suggestion that Det. Comte was inconsistent about what he observed. He observed the accused looking shocked to see the officers and to step sideways with his back to the house, keeping the front of his body turned towards the officers. He awkwardly reached backwards and opened the storm door and the inside door of the house with his left hand still maintaining his position, and entered the house without turning his back to the officers. It is reasonable for the officer to interpret this conduct as suspicious and indicative of someone hiding something, such as a gun.

[68] The applicant also argued that Det. Comte's reference to the area where this investigation was being conducted as a "hot spot" or "high crime area" should be given no consideration pursuant to comments made by the Court in ***R. v. Mann***, 2004 SCC 52, [2004] 3 S.C.R. 59. With respect, I do not read ***Mann*** as prohibiting reliance on this factor as part of Det. Comte's assessment of the situation in this case. Both Det. Comte and Chief McCaskill referred to recent criminal activity in the area, and in particular, to the fatal shooting that had

occurred on the previous day in that area. This contributed to their concern for public safety. In ***Mann***, the Court is concerned with grounds for detention and states: "The presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals" (at para. 47). In this case, the police had specific information about a crime being committed (possession of an unsecured handgun in a public place) in an area where a man had been shot and killed less than 24 hours before. They were entitled to consider the recent shooting when considering how to address the public and police safety concerns occasioned by such an offence.

[69] Taking all of the circumstances together, in my view, the officers were acting in response to a real public safety concern. They were not merely speculating or acting on a hunch. There was information about an aboriginal male with a gun in the area of 645 Sherbrook Street, which is just across the back laneway from 650 Furby Street. There was further information about a black male in that precise area hiding in a green dump truck with a gun. The information was confirmed to the extent that the truck was located where the caller said it would be. There had been a shooting in that area just the day before. The officers had reasonable grounds for their concern about public safety: ***Farrah***, *supra*, at para. 42.

[70] Within minutes of this information being received by the officers, the accused, fitting the first description given of a man in possession of a handgun,

was observed to be acting in a manner that suggested he was trying to hide a something on his person, and entering a residence. The officers did not use force to enter the house. They entered with the accused's consent. Upon doing so, the accused gave what appeared to be a false name, and the owner or lawful occupant of the home could not be identified. It was reasonable for the officers to search the residence for other persons. Like the officers in the ***Farrah*** case, the police were dealing with an unknown, unpredictable, and potentially dangerous situation. In my view, the following comments in ***Farrah*** apply equally to the case before the court:

> **45** In my view, and in the particular circumstances of this case, the forced entry into the suite amounted to a justifiable use of police powers to address public and officer safety concerns. The following passage, recently cited by Cromwell J. in *Cornell*, is well suited to the case at bar (at para. 20):
>
> > .... I respectfully agree with Slatter J.A. when he said in the present case that "[s]ection 8 of the *Charter* does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present": para. 24.
>
> **46** Furthermore, this court has previously concluded, where extraordinary circumstances exist (such as a legitimate cause for concern with respect to the safety of those at the scene or of the public generally), that the police are permitted to enter the dwelling without a warrant to conduct a "sweep search" for other persons (see *Tereck* at paras. 3, 12). As was stated by Monnin J.A. in *Tereck*, to do otherwise "would have been a dereliction of their duty" (at para. 12). In *Tereck*, as in this case, the principal reason for entry into the dwelling was not to effect an arrest (although one did ultimately occur), it was to address a real and urgent concern surrounding public and police safety.
>
> **47** A legal warrantless entry into a dwelling will often arise in an emergency setting, where it would be impractical to obtain a warrant because of the fluidity and potential volatility of the situation (in response to 911 calls) or the dangerousness of the conditions (as in this case, where a shot had been fired and the police were in pursuit of the suspect). To be clear, because of the "high value" placed on the security and privacy of the home (see *R. v. Feeney*, [1997] 2 S.C.R. 13 at para.

> 43), situations calling for a warrantless non-consensual entry in a dwelling will be the exception.
>
> **48** In the case at hand, the judge referred to *Feeney* a number of times in her detailed reasons and appeared to be preoccupied with the effect of that decision upon the fact situation before her. The judge noted that the police entered suite 16 for a dual purpose: to address safety concerns and to apprehend suspects, if any were found. With *Feeney* in mind, she was concerned that, because the police did not have the "subjective belief that there were grounds for arrest" (at para. 71) when they entered the suite, their conduct was not justifiable. This exact preoccupation with the impact of *Feeney* was addressed in *Godoy*, where the Supreme Court of Canada concluded that the reasoning in *Feeney* did not apply in that case because the entry was driven not to make an arrest, but by the 911 call concerns. Although the police did, in fact, arrest the husband in the home after they entered the dwelling in the *Godoy* case, their principal preoccupation was to respond to the 911 call. Any ensuing arrest was ancillary.

[71] The applicant argues that there was simply insufficient information to connect the accused and the residence at 650 Furby Street to the "gun seen" calls they were responding to. There is ample precedent, however, to support the "justifiability" of the type of search that was conducted in this case where the information about the presence of a gun is limited. In ***Farrah***, the Court cites ***R. v. Cornell***, 2010 SCC 31, at para. 123, [2010] 2 S.C.R. 142, where the Supreme Court agreed with Slatter J.A. of the Alberta Court of Appeal in the same case when he said, "[s]ection 8 of the *Charter* does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present" (***Farrah***, at para. 45). In ***R. v. Tereck***, 2008 MBCA 90, 228 Man.R. (2d) 260, the warrantless search of the accused's residence for weapons was justified where the accused had written a letter to his psychiatrist saying that he intended to kill himself with a gun, without any evidence that the accused possessed a gun at his residence.

[72] In ***Clayton***, *supra*, the police received a 911 call indicating that there were several men in a night club parking lot in possession of handguns. The police were found to be justified in stopping every vehicle that left the parking lot. There was little, if any, direct connection between the vehicle stopped or its occupants and the "gun seen" call to which the police were responding. The 911 caller had provided descriptions of four cars and descriptions of the clothing that the men in possession of guns were wearing. However, the Court found that the fact that the accused's car and clothing did not match the caller's description did not render the stop and subsequent search unlawful: ***Clayton*** at paras. 37-40.

[73] I find that there was sufficient connection between the "gun seen" calls, the accused and the residence at 650 Furby Street to justify the sweep search conducted. I conclude that Det. Comte's entry into 650 Furby Street and the search conducted by himself and his fellow officers was justified. Even if the applicant had standing, his rights were not violated.

SECTION 24(2)

The law regarding the application of s. 24(2)

[74] The Crown has conceded a technical breach of s. 10(b). It says, however, that the evidence should not be excluded. I agree. My analysis of this aspect of the case is founded first on my finding that the accused had no standing to seek a remedy for a s. 8 breach in relation to the search of the residence, or in the alternative, on my finding that there was no s. 8 breach. It is based on the s. 10(b) breach that was conceded.

[75] The accused was detained for the purposes of ascertaining his identity after he gave what the police believed to be a false name. He was asked to escort officers to a police car equipped with a computer for that purpose. He was not advised of his right to counsel at that time.

[76] There is no doubt that the accused had the right to be informed of his right to counsel when he was detained: ***R. v. Suberu***, 2009 SCC 33, [2009] 2 S.C.R. 460. This right was breached. The question is whether the evidence of the guns seized ought to be excluded as a result of this breach.

[77] First, I have considered whether the evidence the accused seeks to exclude was "obtained in a manner" that infringed his rights in the context of a s. 10(b) breach alone. The court in answering this question must consider what temporal, contextual or causal connection there may be between the breach and the discovery of the evidence. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct." See ***R. v. Mack***, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38.

[78] In this case, the accused was detained in the context of the firearms investigation and was present at the residence when it was searched. Police were searching the house at the same time that the accused was being escorted out to the police car. In my view, although the guns were not found as a result of the s. 10(b) breach, there is sufficient temporal and contextual connection to engage s. 24(2).

[79] The test to be applied is clearly set out in ***Grant***, *supra*, at para. 71:

> **71** ... When faced with an application for exclusion under s. 24(2), 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. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

[80] I find that the breach of s. 10(b) in this case was not of a serious nature. The accused was detained only briefly for the purpose of establishing his identity. The accused was directed to attend to the police car with Det. Motuz and Cst. Johnson by Det. Comte sometime after he had arrived on the scene, which was at 7:45 p.m. Det. Motuz and Cst. Johnson escorted the accused out of the house and they arrived at the car and began conducting computer checks at 7:53 p.m. When the accused was arrested in relation to possession of the firearm and related offences at 8:00 p.m., he was informed of his right to counsel. There was no ulterior motive on the part of the officers. There was no attempt to obtain incriminating evidence from the accused. He was treated respectfully by the officers.

[81] The impact of the breach on the accused was minimal. The right to counsel is an important right protecting the accused's right to obtain legal advice, particularly in relation to his or her right to choose whether to cooperate with a police investigation. However, in this context, the accused was detained

to ascertain his identity. Unlike in ***Grant***, the police were not seeking to obtain evidence from the accused that would provide grounds for a search. In addition, the accused made no incriminating comments while detained. It was a matter of minutes before the accused was arrested and advised of his right to counsel.

[82] Society's interest in adjudication of this matter on its merits is significant. The firearm seized and later associated to the homicide with which the accused is charged is a significant piece of physical evidence. The Crown concedes that its case does not depend entirely on this evidence. However, corroboration of its witnesses is important to the Crown's case.

[83] Considering all of these factors in relation to the s. 10(b) breach alone, I conclude that admission of the evidence would not bring the administration of justice into disrepute.

[84] Turning to the alleged breach of s. 8, if I am wrong in finding that there was no breach, I would nonetheless admit the evidence.

[85] Regarding the seriousness of the breach, I find that the s. 8 breach was not serious in the circumstances. The officers in this case were acting in good faith. They were responding to a potentially dangerous situation. They obtained the consent of the accused to enter the residence for the purpose of addressing a significant public safety concern. When they searched the house, police were looking for persons, not evidence. The search was very brief. There is no suggestion that the officers used the search for persons as a pretext for a more thorough search.

[86] Regarding the impact on the accused's ***Charter***-protected interests, I find that the impact on the accused's privacy interests was not significant. Although the place searched was a dwelling house, which is afforded a high level of protection, here the accused's expectation of privacy was diminished. Even if my finding that the accused has no standing to seek ***Charter*** relief is in error, the facts surrounding his expectation of privacy in the residence are relevant. The accused did not own the residence, was not listed as an occupant on the lease, and did not pay rent. There is evidence that other persons had the right to occupy the residence pursuant to the lease and the authority to control access to the premises. The resulting reduced expectation of privacy reduces the impact of the breach on the accused's privacy interests. See ***R. v. Belnavis***, [1997] 3 S.C.R. 341, at para. 40.

[87] Finally, as stated above, society's interest in adjudication of this matter on its merits is significant, and militates in favour of admission.

DISPOSITION

[88] Based on these reasons I conclude as follows:

1. The accused does not have standing to seek a remedy under s. 24(2) of the ***Charter*** for the alleged breach of s. 8 of the ***Charter***.
2. The breach of s. 10(b) of the ***Charter*** conceded by the Crown should not result in the exclusion of the evidence.

3. In the event I am in error in relation to the issue of standing, I conclude that there was no breach of s. 8 of the ***Charter***.

4. In the event that I am in error in relation to the breach of s. 8 of the ***Charter***, I conclude that the breach of s. 8 should not result in the exclusion of the evidence.

_____

J.