

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Aucoin, 2012 SCC 66, [2012] 3 S.C.R. 408 | **Date:** 20121130  **Docket:** 34349 |

**Between:**

**Brendan David Aucoin**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Ontario**

Intervener

**Coram:** LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 53)  **Dissenting Reasons:**  (paras. 54 to 107) | Moldaver J. (Deschamps, Abella, Rothstein and Karakatsanis JJ. concurring)  LeBel J. (Fish J. concurring) |

R. *v.* Aucoin, 2012 SCC 66, [2012] 3 S.C.R. 408

Brendan David Aucoin Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Ontario Intervener

**Indexed as: R. *v.* Aucoin**

2012 SCC 66

File No.: 34349.

2012:  May 16; 2012:  November 30.

Present: LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for nova scotia

*Constitutional law — Charter of Rights —* *Search and seizure — Accused stopped for minor motor vehicle regulatory offence — Police officer conducting pat‑down search of accused as a prelude to detention in police vehicle — Police officer discovering drugs in accused’s pockets as a consequence of pat‑down search — Whether detention of accused was unlawful — Whether pat‑down search was unreasonable — Whether admission of evidence would bring administration of justice into disrepute — Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).*

Late one night, A was stopped by a police officer because the licence plate on the vehicle he was driving was registered to a different vehicle. A failed a roadside screening test and the officer decided to impound his vehicle and issue him a ticket pursuant to the *Motor Vehicle Act*. Fearing that A might disappear into the nearby crowd, the officer decided to secure A in the rear of his police cruiser while completing the paper work. The officer first conducted a pat‑down search, after asking for and receiving A’s permission. The officer felt something soft in A’s pocket and, when asked what it was, A said that it was ecstasy. A was arrested and searched further. The officer found cocaine and pills in his pocket. The trial judge held that the search did not violate s. 8 of the *Charter* and the seized evidence was admissible. A was convicted for possession of cocaine for the purpose of trafficking. His appeal was dismissed by a majority of the Court of Appeal.

*Held* (LeBel and Fish JJ. dissenting): The appeal should be dismissed.

*Per* Deschamps, Abella, Rothstein, Moldaver and Karakatsanis JJ.: A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. Because the pat‑down search was a prelude to securing A in the cruiser, the question that arises is whether detaining A in this manner was reasonably necessary in the totality of the circumstances. The question is not whether the officer had the authority to detain the appellant in the rear of the cruiser, but whether he was justified in exercising it as he did in the circumstances of this case. The problem here arises from the shift in the nature and extent of A’s detention that flowed from the police officer’s decision to secure A in the rear of his cruiser while he wrote up the ticket for the motor vehicle infractions. Those factors altered the nature and extent of A’s detention in a fairly dramatic way, especially when one considers that the infractions for which he was being detained consisted of two minor motor vehicle infractions. The question is whether there were other reasonable means by which the officer could have addressed his concern about A disappearing into the crowd. The officer’s actions, though carried out in good faith, were not reasonably necessary. Because A’s detention in the back of the cruiser would have been unlawful, it cannot constitute the requisite basis in law to authorize the warrantless pat‑down search.

Nonetheless, the cocaine found on A was admissible into evidence under s. 24(2) of the *Charter*. There were unusual circumstances that prompted the police officer’s conduct in this case and he acted in good faith. He attempted throughout to respect A’s rights. He was not searching for evidence. The search was for reasons of officer safety and A’s safety. These factors attenuate the seriousness of the breach. Moreover, the law surrounding police policies in the detention context is still evolving. Where the police act in good faith and without deliberate disregard for or ignorance of *Charter* rights, as was the case here, the seriousness of the breach may be attenuated.

*Per* LeBel and Fish JJ. (dissenting): The police did not have the authority to detain A in the police car in the circumstances. The detention was unlawful and therefore arbitrary. The test, as in the case of any common law power, is whether the detention was reasonably necessary on an objective view of the totality of the circumstances. A court must consider the importance of the duty being performed, the nature of the liberty being interfered with and the extent of the interference, and must seek to strike a proper balance between the competing interests. This necessarily entails a consideration of whether a less intrusive means of fulfilling the duty existed. In this case, less intrusive alternatives existed. In these circumstances, it was not reasonably necessary to detain A in the rear seat of the police car.

The pat‑down search was incident to the detention and therefore also unlawful and unreasonable. Warrantless searches are presumed to be unreasonable unless the Crown can demonstrate on a balance of probabilities that the search was authorized by a reasonable law and carried out in a reasonable manner. Although the trial judge found that the officer was searching for weapons, she failed to consider whether there were reasonable grounds for the search or whether the search was appropriately confined in scope. There is no evidence of a reasonable subjective belief that officer safety or the safety of others was at risk.

The conduct at issue in this case was serious. The officer acted in ignorance of, or with wilful disregard for, well‑established *Charter* standards for police conduct. A reasonably had a high expectation of privacy in respect of the contents of his pockets. The search had a significant impact on his privacy interest and, because the evidence would not have been discovered but for the illegal search, it is considerably intrusive. The detention was arbitrary and therefore also impacted A’s liberty interest. Nor was he informed of his right to counsel, therefore the search had an impact upon his right to be protected against self‑incrimination. Although there is no doubt that, in this case, truth‑seeking would be better served by the admission of the evidence, on balance, admitting the evidence would bring the administration of justice into disrepute.

**Cases Cited**

By Moldaver J.

**Applied:** *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; **referred to:**  *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34.

By LeBel J. (dissenting)

*R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Waterfield*, [1963] 3 All E.R. 659; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Kang‑Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Loewen*, 2011 SCC 21, [2011] 2 S.C.R. 167; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 8, 9, 10(*b*), 24(2).

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 5(2).

*Criminal Code*, R.S.C. 1985, c. C-46, s. 691(1)(*a*).

*Motor Vehicle Act*, R.S.N.S. 1989, c. 293, s. 100A(1).

APPEAL from a judgment of the Nova Scotia Court of Appeal (Hamilton, Fichaud and Beveridge JJ.A.), 2011 NSCA 64, 306 N.S.R. (2d) 20, 968 A.P.R. 20, 86 C.R. (6th) 310, 239 C.R.R. (2d) 41, 273 C.C.C. (3d) 172, 15 M.V.R. (6th) 1, [2011] N.S.J. No. 380 (QL), 2011 CarswellNS 482, affirming the accused’s conviction for possession of cocaine for the purpose of trafficking. Appeal dismissed, LeBel and Fish JJ. dissenting.

*Brian Vardigans* and *Roger A. Burrill*, for the appellant.

*David W. Schermbrucker* and *James C. Martin*, for the respondent.

*Jennifer M. Woollcombe* and *Emile Carrington*, for the intervener.

The judgment of Deschamps, Abella, Rothstein, Moldaver and Karakatsanis was delivered by

Moldaver J. —

I. Introduction

1. This appeal concerns a police officer’s authority to detain a motorist in the rear of his police cruiser in the course of a roadside stop for a regulatory offence. The appellant, Brendan David Aucoin, was convicted of possession of cocaine for the purpose of trafficking after a pat-down search during the course of the roadside detention. His appeal to the Nova Scotia Court of Appeal was dismissed by a majority of the court. Mr. Aucoin appeals to this Court as of right. He seeks to have his conviction set aside and a verdict of acquittal entered on the basis that the search was unconstitutional.

II. Background Facts

1. At around midnight on May 31, 2008, Constable Burke, of the Kentville, Nova Scotia police service, stopped a car upon discovering that its licence plate was registered to a different vehicle. The appellant was the driver of the car and its sole occupant.
2. While speaking to the appellant, Constable Burke noted a smell of alcohol on his breath. As a newly licensed driver, the appellant was prohibited under s. 100A(1) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 (“*MVA*”), from having any alcohol in his system while driving. Constable Burke administered a roadside screening test which revealed 20 mg of alcohol per 100 mL of blood in the appellant’s system. Accordingly, Constable Burke decided to impound the appellant’s vehicle and issue him a ticket for contravening s. 100A(1) of the *MVA*.
3. Because it was dark outside and the lighting was poor, Constable Burke chose to sit in the front seat of his cruiser to write out the ticket. There were a lot of people milling around and Constable Burke was concerned that the appellant might walk away and disappear if he were allowed to remain outside of the police vehicle.[[1]](#footnote-1) Accordingly, Constable Burke decided to secure the appellant in the rear of his cruiser while completing the paper work.
4. As a prelude to placing the appellant in the rear of his cruiser, Constable Burke sought and received permission from the appellant to do a pat-down search for safety reasons.
5. In the course of the pat-down search, Constable Burke felt something square and hard in the left front pocket of the appellant’s pants. He asked the appellant what it was and the appellant said it was his wallet. Constable Burke accepted that answer. Constable Burke then felt something soft in the appellant’s right front pocket. He again asked what it was and the appellant replied that it was ecstasy.
6. That response prompted the appellant’s immediate arrest. A search of his right front pocket, incidental thereto, revealed eight bags containing cocaine and two bags containing 100 green pills. On testing, the pills turned out not to be ecstasy, nor did they contain any other illicit substance under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
7. As Constable Burke was seizing the drugs from the appellant, two other police officers arrived on the scene in a separate police vehicle. No further drugs were found in the appellant’s vehicle. A search of his wallet revealed $250 in cash: 12 twenty-dollar bills and one ten-dollar bill. A further $45 in cash was also found.
8. The appellant was tried for possession of cocaine for the purpose of trafficking and possession for the purpose of trafficking in a drug held out to be ecstasy. He was acquitted on the latter charge and convicted on the former. His appeal to the Nova Scotia Court of Appeal was dismissed by a majority of the court (2011 NSCA 64, 306 N.S.R. (2d) 20).
9. The appellant now appeals to this Court from his conviction on the cocaine charge. He submits that Constable Burke had no right in the circumstances to perform a pat-down search on him. That search, he claims, was unlawful and in violation of his right to be free from unreasonable search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*. He further argues that the s. 8 breach was serious and that the cocaine found in consequence should have been excluded under s. 24(2) of the *Charter*.
10. For the reasons that follow, I am satisfied that the pat-down search was unreasonable in the circumstances and that it constituted a breach of the appellant’s s. 8 *Charter* rights. That said, in view of the trial judge’s findings of fact, I am satisfied that the breach was not sufficiently egregious to warrant the exclusion of the cocaine from evidence. Accordingly, I would dismiss the appeal.

III. *Voir Dire* Ruling at Trial

1. The appellant was tried by Judge C. MacDonald of the Nova Scotia Provincial Court. At the outset of the proceedings, the appellant moved to have the cocaine excluded from evidence under s. 24(2) of the *Charter*. He claimed that Constable Burke had violated his s. 8 rights when, without lawful authority, he performed a pat-down search on him. The trial judge conducted a *voir dire* to determine the issue and, after hearing evidence from Constable Burke, as well as other police officers and the appellant, she concluded that the impugned search was reasonable in the “very unusual circumstances at play” on the night in question (A.R., vol. I, at p. 14). Hence, she rejected the appellant’s argument that his s. 8 rights had been breached and she dismissed his motion.
2. In arriving at her findings of fact on the *voir dire*, the trial judge accepted Constable Burke’s evidence over that of the appellant. No issue is taken with the trial judge’s findings of fact. The debate centres on whether she applied the correct legal principles to those findings in determining that the appellant’s s. 8 rights had not been violated.
3. In her ruling on the *voir dire*, the trial judge expressed reservations about the authority of the police to secure an offender in the rear of a police cruiser — and to perform a pat-down search for safety reasons as a prelude to doing so — in the context of a routine motor vehicle infraction. She stated:

. . . I share the concerns that were raised by [counsel for the appellant] in his argument . . . . And he talked in terms of . . . people who, for example, are driving their motor vehicles and they’re being stopped for whatever under the *Motor Vehicle Act*, he expressed the concern that these individuals could be requested to be seated in the back seat of a police car and then, before being placed in that police car, that they’re going to be subjected to a search for weapons as a result of . . . failing to signal or something such as that. . . . I can understand those concerns. [A.R., vol. I, at p. 14]

1. Mindful of those concerns, the trial judge was nevertheless satisfied that in the “very unusual circumstances at play” that night, Constable Burke’s actions were reasonable and did not infringe the appellant’s s. 8 rights.
2. First, the trial judge noted that it was late at night when Constable Burke encountered the appellant. There was no natural lighting in the area and the only place where Constable Burke could write out the ticket was in his police car where he could see what he was doing.
3. Second, the appellant was being ticketed for having alcohol in his system as a newly licensed driver and his car was going to be impounded. Hence, Constable Burke could not allow the appellant to “return to his own vehicle to await delivery of the ticket”. It would have been “inappropriate” and “arguably a continuation of the offence under Section 100 of the *Motor Vehicle Act*” (A.R., vol. I, at p. 15).
4. Third, Kentville was celebrating the annual Apple Blossom Festival and there were many people around that night. Constable Burke was concerned that in the circumstances, had the appellant been left alone on the street, he “just could have walked off before getting the ticket” (A.R., vol. I, at p. 15).
5. According to the trial judge, in light of these “unusual factors”:

. . . it was reasonable for Constable Burke to request Mr. Aucoin to be seated in his police car while he was writing out the ticket. And it was also reasonable in all of the circumstances for Constable Burke to do the very quick pat-down search that he did, and the short conversation that he had with Mr. Aucoin before Mr. Aucoin was placed in the back seat of that vehicle. Office[r] safety is a legitimate concern in this particular fact-situation. [A.R., vol. I, at p. 16]

1. With respect to officer safety, Constable Burke testified that when he administered the roadside breath test to the appellant, the appellant was seated in the rear of his cruiser with the door open. His legs and feet were outside of the cruiser. In that situation, Constable Burke stated that officer safety was not a concern because he was facing the appellant and could monitor his movements. Placing the appellant in the rear of his cruiser, while he sat in the front seat to write up the ticket, was another matter. His back would have been exposed to the appellant, making it impossible for him to monitor the appellant’s movements. According to Constable Burke, this became “an officer-safety issue” because he had “no idea what an individual could have in his possession that could harm himself or harm me while my back is turned to him” (A.R., vol. II, at p. 18).
2. Finally, Constable Burke testified — and the trial judge accepted his evidence — that in patting down the appellant, he was not looking for evidence (A.R., vol. I, at p. 9). He was solely concerned about his safety and the safety of the appellant.

IV. Nova Scotia Court of Appeal, 2011 NSCA 64, 306 N.S.R. (2d) 20

A. *Majority Opinion*

1. Writing for herself and Fichaud J.A., Hamilton J.A. reviewed the record and determined that the trial judge had made no errors in her findings of fact. She further concluded that the trial judge applied the correct legal principles to those findings. In the result, she saw no reason to interfere with the trial judge’s conclusion that the pat-down search was reasonable in the circumstances and that it did not infringe the appellant’s s. 8 rights.
2. In her reasons, Hamilton J.A. noted a disturbing comment made by Constable Burke in his testimony — something the trial judge had not specifically mentioned. In his testimony, Constable Burke stated that it was his usual practice to place persons involved in “alcohol-related” offences in the rear of his cruiser. It was “convenient” to do so. He could watch the person to ensure that “he doesn’t walk away [or] re-enter his vehicle” (A.R., vol. II, at p. 48).
3. While the trial judge did not find that Constable Burke was following his usual practice on the night in question, Hamilton J.A. noted that if he had been, the pat-down search of the appellant may have amounted to “a breach of s. 8 of the *Charter*” (para. 28). In this case however, Constable Burke’s actions were to be viewed “in light of the particular circumstances he faced, not in the context of other fact situations that may arise” (para. 28).

B. *Dissenting Opinion*

1. Justice Beveridge, dissenting, concluded that Constable Burke had violated the appellant’s s. 8 rights. In his view, there was no objective basis for Constable Burke’s subjective belief that the appellant might walk away; nor was Constable Burke justified in securing the appellant in the back seat of his cruiser. His doing so amounted to a *de facto* arrest of the appellant, for which he had no authority. Nor was Constable Burke empowered to conduct a pat-down search. He had no reason to believe that the appellant presented a safety risk.
2. Even though the s. 8 breach was the only *Charter* issue argued at trial, Beveridge J.A. found that the appellant’s rights under s. 9 (unlawful detention) and s. 10(*b*) (right to counsel) had also been breached. Having found a violation of all three sections, he then conducted a s. 24(2) analysis.
3. In Justice Beveridge’s opinion, the s. 8 breach was serious, especially when considered alongside the s. 9 and s. 10(*b*) breaches that accompanied it. In his view, the actions of Constable Burke, while not abusive, were deliberate and arbitrary. Thus, it could not be said that he was acting in good faith.
4. Turning to the *Charter*-protected interests of the appellant, Beveridge J.A. found that the impact on the appellant’s rights to liberty and privacy was significant, although not egregious. Weighing those factors against society’s interest in having the case tried on its merits, Beveridge J.A. found that in the long term, the admission of the cocaine into evidence would bring the administration of justice into disrepute. Accordingly, he found that the evidence should have been excluded.
5. In the result, Beveridge J.A. would have allowed the appeal, set aside the conviction and entered a verdict of acquittal.

V. Analysis

A. *Section 8*

1. In *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278, a majority of the Court held that “[a] search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.” In this case, the Crown seeks to justify the pat-down search of the appellant as incidental to Constable Burke’s decision to place the appellant in the back of the police cruiser. The question that arises, as I will explain, is whether securing the appellant in the cruiser — which would have fundamentally altered the nature of his ongoing detention — was reasonably necessary in the totality of the circumstances.
2. At the outset, I wish to clarify that this is not a case about investigative detention. The trial judge used that term and was guided by this Court’s decision in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, as to the limited powers of search the police have available to them in such circumstances.
3. In this case, to the extent that the appellant was detained, the reason for his detention was not investigatory. He was detained initially because the licence plate on his car was registered to a different vehicle. He was further detained when it became apparent that he had alcohol in his system in contravention of the “newly licensed driver” provision of the *MVA*.
4. The appellant’s detention for those infractions was perfectly lawful — and he does not suggest otherwise. But again, the basis for his detention was not investigatory, as that term is used in *Mann*. It was grounded in Constable Burke’s belief that the appellant had violated two provisions of the *MVA*.
5. The problem in this case arises from the shift in the nature and extent of the appellant’s detention — and the asserted need to do a pat-down search as a prelude to it — that flowed from Constable Burke’s decision to secure the appellant in the rear of his cruiser while he wrote up the ticket for the motor vehicle infractions. That decision carried with it increased restrictions on the appellant’s liberty interests, and the added feature of an intrusion into his privacy interests. Those factors, in my view, altered the nature and extent of the appellant’s detention in a fairly dramatic way — especially when one considers that the infractions for which he was being detained consisted of two relatively minor motor vehicle infractions.
6. To be clear, I do not see this case as turning on whether Constable Burke had the *authority* to detain the appellant in the rear of his police cruiser, having lawfully stopped him for a regulatoryinfraction. Rather, the question is whether he was justified in *exercising it* as he did in the circumstances of this case.
7. The existence of a general common law power to detain where it is reasonably necessary in the totality of the circumstances was settled in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725. That case moved our jurisprudence from debating the existence of such a power to considering whether its exercise was reasonably necessary in the circumstances of a particular case. As Abella J., for the majority, observed:

The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk. [Emphasis added; para. 31.]

1. That brings me to what I consider to be the flaw in the trial judge’s analysis in this case. Given the adverse impact that the decision to secure the appellant in the rear of the cruiser would have on his liberty and privacy interests, I am of the view that a more stringent test than the one applied by the trial judge was required to support her determination that Constable Burke’s actions were lawful in the circumstances.
2. Constable Burke knew that as a prelude to securing the appellant in the rear of his cruiser, he was going to do a pat-down search on him for reasons of officer safety and the appellant’s safety. His reason for wanting to secure the appellant was to prevent the appellant from walking away and disappearing into the crowd. The trial judge accepted the officer’s evidence in that regard. It was late at night, the street was crowded with people, and the appellant’s vehicle was off-limits to him.
3. Accepting, as the trial judge did, that Constable Burke was concerned about the appellant walking away, I am nonetheless of the view that in the context of this case, in order to justify securing the appellant in the back seat — knowing that this would also entail a pat-down search — detaining the appellant in that manner had to be reasonably necessary.[[2]](#footnote-2) In other words, the question to be asked is whether there were other reasonable means by which Constable Burke could have addressed his concern about the appellant disappearing into the crowd, short of doing what he did. If there were other reasonable means to ensure the appellant would not flee the scene, then detaining him in the police cruiser could not be said to be reasonably necessary and would thus have constituted an unlawful detention within the meaning of s. 9 of the *Charter*: *Clayton*, at para. 20.
4. Without wishing to second-guess the actions of the police and recognizing, as I do, that the police are often required to make split-second decisions in fluid and potentially dangerous situations, I am nonetheless of the view that Constable Burke’s actions, though carried out in good faith, were not reasonably necessary.
5. In fairness to the trial judge, she was not asked to consider the matter from that perspective. I believe, however, that had the trial judge applied the proper test, she would have found that the “necessity” component of it had not been met in the circumstances.
6. In this regard, while there may be other examples, I note that two police officers arrived at the scene while the appellant was being searched by Constable Burke. That leads me to conclude that backup was close at hand, something Constable Burke could readily have ascertained. Had he done so, he could have waited an extra minute or two to do the paper work, without impinging on the appellant’s right to be released from detention as soon as reasonably practicable.
7. I caution, however, that a different factual matrix may well have supported a finding of reasonable necessity. And where such a finding is made, I respectfully disagree with the minority view that “the balance will generally not favour” securing a detainee in the back of a police cruiser (para. 86). In the context of a straightforward motor vehicle infraction, I recognize that it will be the rare case in which it will be reasonably necessary to secure a motorist in the rear of a police cruiser. But where reasonable necessity exists, no further balancing is required.
8. As it is, Constable Burke chose to secure the appellant in the rear of the cruiser and pat him down as a prelude to doing so. But for that decision, there would have been no pat-down search.[[3]](#footnote-3) Because detaining the appellant in the back of the cruiser would have been an unlawful detention — given there were other reasonable means by which Constable Burke could have addressed his concern that the appellant might flee — it cannot constitute the requisite basis in law to support a warrantless search: *Collins*, at p. 278. Therefore, the pat-down search was unreasonable within the meaning of s. 8 and constituted a breach of the appellant’s *Charter* right against unreasonable search and seizure. With respect, the trial judge and the majority of the Court of Appeal erred in concluding otherwise.

B. *Section 24(2)*

1. In light of the s. 8 breach, I turn to s. 24(2) to determine whether the cocaine found on the appellant should have been admitted into evidence. Having regard to the trial judge’s findings of fact, which are not challenged on appeal, I am satisfied that the cocaine was properly admissible. Importantly, the trial judge believed Constable Burke and her findings implicitly reject the notion that Constable Burke was simply following his usual practice in alcohol-related offences of securing the offender in the rear of his cruiser as a matter of convenience.
2. Manifestly, Constable Burke was mistaken about his authority to place the appellant in the rear of his cruiser. But in proceeding as he did, he was not acting in flagrant disregard of the appellant’s *Charter* rights. On the contrary, the trial judge’s findings make it clear that Constable Burke was attempting to respect those rights throughout. When conducting the roadside test, Constable Burke did not secure the appellant in the rear of the cruiser. Rather, he left the rear door open and allowed the appellant to sit with his feet and legs outside of the cruiser. Prior to conducting the pat-down search, Constable Burke asked for and received the appellant’s permission. While the appellant’s consent did not amount to a waiver, Constable Burke was not asked what he would have done had the appellant refused. When Constable Burke felt something firm in the appellant’s left front pocket, he accepted the appellant’s response that the object was a wallet. He did not place his hand inside the pocket to verify the response. As for the right pocket, Constable Burke testified that if the appellant had told him it was his medication, he would have accepted that response.
3. Significantly, the trial judge found as a fact that Constable Burke was not searching for evidence when he conducted the pat-down search (A.R., vol. I, at p. 9). In other words, his request that the appellant be seated in the rear of the cruiser was not a ruse to search for incriminating evidence. On the contrary, the search was performed for reasons of officer safety and the appellant’s safety.
4. Nor was Constable Burke simply following his usual practice for alcohol-related offenders. The trial judge assessed his conduct against the “very unusual circumstances at play” on the night in question (A.R., vol. I, at pp. 14-15). Had the trial judge found otherwise, the breach would have been much more serious and may well have warranted exclusion under s. 24(2).
5. In the end, having regard to the trial judge’s findings of fact, I am satisfied that Constable Burke was acting in good faith. His error was in not appreciating that the pat-down search would only be reasonable in the circumstances if it could be shown that it was reasonably necessary — in the sense that there were no other reasonable means available — to secure the appellant in the rear of the cruiser to address his concern that the appellant might walk away. But there was no intention on his part to misuse his powers; nor did he choose to ignore the appellant’s *Charter* rights. These factors serve to attenuate the seriousness of the breach.
6. Moreover, as the decisions of the trial judge and the majority of the Court of Appeal reveal, the law surrounding police powers in the detention context is still evolving. For that reason, in cases where the police act in good faith and without deliberate disregard for or ignorance of *Charter* rights — as was the case here — the seriousness of a breach may be attenuated. See *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 86.
7. As for the impact of the search on the appellant’s privacy rights, I accept that the impact was significant — but no more so than society’s interest in having this case tried on the merits.
8. Balancing the three factors identified by this Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, I am satisfied that the scales tip in favour of admission of the cocaine.

VI. Conclusion

1. The cocaine found on the appellant was properly admitted into evidence. Accordingly, I would dismiss the appeal.

The reasons of LeBel and Fish JJ. were delivered by

LeBel J. (dissenting) —

I. Overview

1. In this appeal, the Court must once again consider the nature and scope of police powers. The appellant, Mr. Aucoin, was detained and searched after being pulled over for a motor vehicle infraction. As I will show in these reasons, the police did not have the authority to detain and search him in the circumstances. The question, therefore, is whether the evidence obtained as a result of the serious breach of Mr. Aucoin’s constitutional rights, which occurred in the context of a very common regulatory offence, should be excluded. In my view, it should. I would therefore allow the appeal, exclude the evidence, and enter a verdict of acquittal.

II. Facts

1. On May 31, 2008, Constable Christopher Michael Burke was on patrol with Cadet Tyler Gerrard Lynk in Kentville, Nova Scotia. Around midnight, they stopped a black Chevrolet vehicle after noting a discrepancy concerning its licence plate. The driver of the vehicle was 19-year-old Brendan David Aucoin.
2. Cst. Burke approached the vehicle and asked Mr. Aucoin for his licence, registration and insurance certificate. Cst. Burke testified that he could smell alcohol and that he accordingly asked Mr. Aucoin to get out of the vehicle and go to the police car to provide a breath sample. Mr. Aucoin sat in the rear seat of the police car with his feet outside the vehicle while Cst. Burke administered the breath test. The results showed 20 mg of alcohol in 100 mL of blood — well below the legal limit but in breach of the provincial zero-tolerance policy for newly licensed drivers (*Motor Vehicle Act*, R.S.N.S. 1989, c. 293, s. 100A(1)).
3. It was dark, and Cst. Burke needed the police car’s interior light to write out the ticket for the motor vehicle infraction. He decided to place Mr. Aucoin in the car’s locked rear seat while he wrote out the ticket in the front seat. Before placing him in the rear seat, Cst. Burke performed a pat-down search for weapons.
4. Cst. Burke felt a hard object in Mr. Aucoin’s left front pocket and asked him what it was. Mr. Aucoin replied that it was his wallet. Cst. Burke continued the search and felt a soft object in Mr. Aucoin’s right front pocket. He asked Mr. Aucoin what it was, and Mr. Aucoin replied that it was ecstasy. Cst. Burke placed Mr. Aucoin under arrest and retrieved two baggies containing pills and eight baggies containing a white powdered substance from Mr. Aucoin’s pocket.
5. The white powdered substance was later analyzed and determined to be cocaine. The pills were analyzed and determined to be a substance that was not listed in any schedule of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Mr. Aucoin was charged under s. 5(2) of that Act with one count of possession of cocaine for the purpose of trafficking and one count of possession of a substance held out to be ecstasy for the purpose of trafficking.
6. Mr. Aucoin filed a notice alleging that the pat-down search had violated his right, guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*, to be secure against unreasonable search and seizure. He asked that the drugs seized as a result of that search be excluded from evidence pursuant to s. 24(2) of the *Charter*. On December 8, 2009, Judge MacDonald of the Nova Scotia Provincial Court held that the search had not violated Mr. Aucoin’s *Charter* rights. The evidence was admitted at trial, and on June 24, 2010, Mr. Aucoin was convicted on the first count, that of possession of cocaine for the purpose of trafficking. He was acquitted on the second count. On August 11, 2010, Mr. Aucoin was sentenced to two years’ imprisonment. He appealed both his conviction and his sentence to the Nova Scotia Court of Appeal. The majority of the Court of Appeal dismissed the appeal, but Beveridge J.A. dissented (2011 NSCA 64, 306 N.S.R. (2d) 20). Mr. Aucoin now appeals to this Court as of right.

III. Judicial History

A. *Nova Scotia Provincial Court*

1. Before the trial, Judge MacDonald held a *voir dire* to determine whether the evidence seized during the pat-down search was admissible. She began by reviewing the relevant legal principles, stating that a warrantless search is presumed to be unreasonable unless the Crown can demonstrate on a balance of probabilities that the search was authorized by a reasonable law and carried out in a reasonable manner (*R. v. Collins*, [1987] 1 S.C.R. 265). The present case concerns the common law police power to search incident to a lawful detention. A protective pat-down search will be authorized in the context of a lawful detention if an officer has reasonable grounds to believe that his or her safety, or the safety of others, is at risk (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59).
2. Judge MacDonald was mindful of the fact that Mr. Aucoin was being detained not for a criminal matter, but for a violation of provincial motor vehicle legislation (A.R., vol. I, at pp. 13-14). Despite concerns about the context of the detention and search, she was convinced that there were “some very unusual circumstances at play”: it was late at night, Cst. Burke needed the police car’s light to write out the ticket, and Mr. Aucoin could not return to his own vehicle, because it was being removed. It was also a busy time during the Apple Blossom Festival, so Cst. Burke was concerned that Mr. Aucoin could simply walk away and disappear into the crowd (A.R., vol. I, at pp. 14-15).
3. Given these “unusual circumstances”, Judge MacDonald concluded:

. . . it was reasonable for Constable Burke to request Mr. Aucoin to be seated in his police car while he was writing out the ticket. And it was also reasonable in all of the circumstances for Constable Burke to do the very quick pat-down search that he did, and the short conversation that he had with Mr. Aucoin before Mr. Aucoin was placed in the back seat of that vehicle. Office[r] safety is a legitimate concern in this particular fact-situation. [A.R., vol. I, at p. 16]

Judge MacDonald held that there had therefore been no breach of Mr. Aucoin’s *Charter* rights. The evidence was subsequently admitted at trial. Mr. Aucoin was convicted of possession of cocaine for the purpose of trafficking and sentenced to two years’ imprisonment.

B. *Nova Scotia Court of Appeal, 2011 NSCA 64, 306 N.S.R. (2d) 20*

1. Mr. Aucoin appealed both his conviction and his sentence to the Nova Scotia Court of Appeal. He raised four grounds of appeal: (1) that the trial judge had erred in finding that the pat-down search did not violate s. 8 of the *Charter*; (2) that the trial judge had erred in giving too much weight to an expert’s opinion that the possession was for the purpose of trafficking; (3) that the verdict was unreasonable; and (4) that the trial judge had failed to consider and properly apply the principles of sentencing.
2. Hamilton J.A. wrote for herself and Fichaud J.A. On the *Charter* issue, she held that the trial judge had considered the correct legal principles and had properly applied them to the facts of the case. Hamilton J.A. reviewed the unusual circumstances identified by the trial judge and confirmed that it was reasonable to detain Mr. Aucoin in the back seat of the police car and that, once the officer had decided to do so, it was reasonable to do a pat-down search for weapons (paras. 26-27). Hamilton J.A. therefore rejected this ground of appeal. She went on to reject the other three grounds of appeal and to uphold both the conviction and the sentence of two years’ imprisonment.
3. Beveridge J.A. dissented on the *Charter* issue. In his view, the trial judge had failed to identify any source of lawful authority for searching Mr. Aucoin:

As clearly articulated by the Supreme Court of Canada in *R. v. Collins*, [1987] 1 S.C.R. 265 . . . , and recently affirmed in *R. v. Mann*, a warrantless search is presumed to be unreasonable unless it is authorized by law, the law is reasonable and the manner in which the search is carried out is reasonable. Although the trial judge referred to these basic principles, she failed to identify what lawful authority she was relying on to find the search to be in conformity with s. 8 of the *Charter*. It appears to be implicit in her reasons that she found the appellant to be tangled up in an investigative detention and because she considered the officer’s decision to place Mr. Aucoin in the rear of the police car [to] be reasonable, this justified a protective search. The majority reasons of my colleagues agree with this approach. With respect, I cannot. [para. 71]

1. First, Beveridge J.A. found that there was no lawful authority for the detention. The trial judge had concluded that it was reasonable for Cst. Burke to ask Mr. Aucoin to be seated in the back of the police car:

With all due respect to the trial judge, whether it was reasonable to request the appellant to be seated in the rear of the police vehicle is not the test that imbues the police with power to interfere with the liberty of a person. Of course, if the police have a power to do something, it must be exercised reasonably, but merely finding police conduct to be reasonable is, in my opinion, insufficient. [para. 65]

An officer must have reasonable grounds to detain someone in the back seat. Cst. Burke had indicated that he had a subjective fear that Mr. Aucoin might walk away before receiving his ticket; however, the Crown had conceded that there were no objective grounds for this fear (paras. 67-69).

1. Second, there was no lawful authority for the search. An officer must have reasonable grounds to believe that his safety or that of others is at risk before conducting a protective pat-down search (*Mann*). Not only did Cst. Burke arbitrarily create the officer safety issue, he could not identify any grounds, reasonable or otherwise, to trigger the need to carry out the search (paras. 78-79). Furthermore, Beveridge J.A. stated, the search went beyond one reasonably limited to locating weapons. It is impossible to leap from feeling something soft in a pocket to a legitimate concern for officer safety justifying a targeted inquiry into what the object was (para. 80).
2. The dissenting judge therefore concluded that the trial judge had erred in law in failing to identify any source of lawful authority for the search. He went on to consider whether the admission of the evidence would bring the administration of justice into disrepute, having regard to the three lines of inquiry identified in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.
3. First, he found that the state conduct was serious: Cst. Burke had acted arbitrarily in deciding to impose greater restrictions on Mr. Aucoin’s liberty without having reasonable grounds to do so and had failed to base the decision to search on specific inferences drawn from known facts. His search had gone beyond what was reasonably necessary in order to locate weapons. In addition, Cst. Burke’s conduct appeared to be part of his normal approach to dealing with detained motorists. These facts favoured exclusion of the evidence (paras. 88-92). Second, the impact of the breach on Mr. Aucoin’s *Charter*-protected interests was significant: Mr. Aucoin had a high expectation of privacy in respect of the contents of his pockets, and the evidence could not have been discovered without the unauthorized search and coercive questioning (paras. 93-94). Third, without the evidence, the Crown would have no means of prosecuting the case. Exclusion would therefore gut the truth-seeking function of the trial. This favoured admission of the evidence (para. 95).
4. Balancing all these factors, Beveridge J.A. concluded that in the long term, admitting the cocaine into evidence would bring the administration of justice into disrepute. There was no uncertainty in the law. Cst. Burke acted without reasonable grounds, and doing so was part of his routine (para. 98). Beveridge J.A. would therefore have allowed the appeal, excluded the evidence, and ordered an acquittal. Given this conclusion, it was not necessary for him to consider the other grounds of appeal.

IV. Issues

1. Mr. Aucoin appeals to this Court as of right pursuant to s. 691(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. The appeal is limited to the question of law on which Beveridge J.A. dissented, that is, whether the search violated Mr. Aucoin’s *Charter* right to be secure against unreasonable search and seizure. This Court must answer the following questions:

(1) Was the detention lawful?

(2) Was the search lawful? and

(3) Should the evidence be excluded?

V. Analysis

1. This appeal raises yet again the issue of the nature and scope of common law police powers, this time in the context of a regulatory offence. For the purpose of determining whether the police have a common law power to engage in particular conduct that interferes with an individual’s liberty, this Court has adopted the two-stage test first set out by the English Court of Appeal in *R. v. Waterfield*, [1963] 3 All E.R. 659, at pp. 660-61.
2. At the first stage, the Court must determine whether the conduct falls within the general scope of any duty imposed on the police by statute or at common law. Common law police duties include the preservation of the peace, the prevention of crime, and the protection of life and property (*Dedman v. The Queen*, [1985] 2 S.C.R. 2).
3. At the second stage, the Court must consider whether the conduct, albeit within the general scope of a police duty, involved an unjustifiable use of powers associated with that duty. To be justified, “[t]he interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference” (*Dedman*, at p. 35).
4. The *Waterfield* test has consistently been applied by this Court to determine the scope of common law police powers. For example, in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, the Court recognized a common law power to search incident to a lawful arrest; in *Mann*, the Court recognized a common law power of investigative detention and a power to search incident to that detention; and in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, a majority of the Court recognized a common law power to conduct sniffer-dog searches.
5. Under the law as recognized and developed in the foregoing cases, the police have a power to engage, in furtherance of their duties, in conduct that is reasonably necessary in light of the totality of the circumstances. A court must consider the importance of the duty being performed, the nature of the liberty being interfered with and the extent of the interference, and must seek to strike a proper balance between the competing interests. This necessarily entails a consideration of whether a less intrusive means of fulfilling the duty existed.
6. In the instant case, the trial judge asked not whether the detention and search were reasonably necessary, but simply whether they were reasonable (A.R., vol. I, at p. 16). As Beveridge J.A. pointed out in his dissent, reasonableness is not the test that imbues the police with power to interfere with the liberty of a person (para. 65). The trial judge therefore erred in law by applying the wrong legal standard for recognizing police powers. It falls to this Court to apply the proper legal standard to the facts as found by the trial judge.
7. As I will explain, it was not reasonably necessary for Cst. Burke to detain Mr. Aucoin in the rear seat of a locked police car in order to write out the summary offence ticket. Less intrusive alternatives existed. Furthermore, even if the detention had constituted a lawful exercise of police powers, it was not reasonably necessary to perform the protective pat-down search. Cst. Burke did not have reasonable grounds to believe that his safety, or the safety of others, was at risk. The evidence found as a result of the search was therefore obtained in violation of Mr. Aucoin’s *Charter* rights. In the circumstances of this case, admitting the evidence would bring the administration of justice into disrepute. I would accordingly exclude the evidence and enter a verdict of acquittal.

A. *The Detention*

1. Mr. Aucoin was initially detained when Cst. Burke pulled his vehicle over to investigate the discrepancy with his licence plate. When Cst. Burke smelled alcohol, Mr. Aucoin was further detained to investigate a possible offence under either the *Motor Vehicle Act* or the *Criminal Code*. Upon obtaining the breath test results, the investigation was complete, but the detention continued so as to enable Cst. Burke to write out the summary offence ticket. It is only this final stage of the detention that is in issue. It was at this time that Cst. Burke decided to place Mr. Aucoin in the police car’s locked rear seat and, as a prelude to this detention, to perform the pat-down search. If the detention was unlawful, then the pat-down search incident to that detention must also be unlawful (see *R. v. Loewen*, 2011 SCC 21, [2011] 2 S.C.R. 167).
2. The courts below seem to have proceeded on the assumption that in the circumstances of this case, the detention was an investigative detention. I am not sure that this is the most apt characterization. An investigative detention is one that occurs in the course of investigation of a crime. The test for investigative detention therefore focuses on a nexus between the individual to be detained and a recent or ongoing criminal offence. The goal of the detention must be to ascertain whether the particular individual is implicated in the criminal activity under investigation (*Mann*, at para. 34).
3. In contrast, in the present case, the investigation into the motor vehicle infraction was complete by the time Cst. Burke made the decision to detain Mr. Aucoin in the rear seat of the police vehicle. The duty Cst. Burke was discharging at this time was the issuance of a ticket for the infraction. There was no question that it was Mr. Aucoin who was implicated. The detention in this case therefore fits somewhat awkwardly into the definition of an investigative detention.
4. Nevertheless, what is at issue here is the common law power to detain an individual. The test, as in the case of any common law power, is whether the detention was reasonably necessary on an objective view of the totality of the circumstances (*Mann*, at para. 34). In my view, it was not.
5. At the *voir dire*, Cst. Burke was asked in direct examination why he decided to place Mr. Aucoin in the back of the police car. He replied:

His car was being removed so he couldn’t go back to his vehicle. And it’s Apple Blossom weekend. It was busy. And I felt if he was on the side of the road, possibly he could walk away. As I’m writing the ticket, he could disappear. [A.R., vol. II, at pp. 18-19]

1. The trial judge concluded that, in light of the fact that Mr. Aucoin’s vehicle was being removed and of Cst. Burke’s subjective fear that Mr. Aucoin might walk away, it was reasonable to detain him in the back of the police car. She erred in two respects. First, as I have already explained, reasonableness is not the standard for recognizing a common law police power. The detention must be *reasonably necessary*. Second, there were no reasonable grounds to support Cst. Burke’s subjective fear that Mr. Aucoin might walk away. The Crown conceded as much. The evidence indicated that Mr. Aucoin was cooperative throughout the encounter. He did not say or do anything that would indicate a desire to flee. In addition, there was a second uniformed officer present to supervise him. The fact that Cadet Lynk was in training and was not carrying a firearm did not inhibit his ability to stand and watch Mr. Aucoin. There was therefore a less intrusive alternative: Mr. Aucoin could have stood on the sidewalk to await his ticket. In these circumstances, it cannot be said that it was reasonably necessary to detain Mr. Aucoin in the rear seat of the police car.
2. Generally speaking, detaining an individual in the locked rear seat of a police car in order to write out a ticket for a motor vehicle infraction will rarely strike an appropriate balance between the public’s interest in effective law enforcement and its interest in upholding the right of individuals to be free from state interference. Had there been reasonable grounds to believe that Mr. Aucoin might flee, with the result that the detention could be said to be necessary, the overall reasonableness of the decision to detain would then need to be assessed in light of the totality of the circumstances (*Mann*, at para. 34), including the nature and extent of the interference with liberty and the importance of the public purpose served by that interference (see *Dedman*, at pp. 35-36). The seriousness of the offence is therefore a relevant consideration (see *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 31). In my view, where the public purpose served by the interference is the enforcement of a regulatory offence and the interference involves the police assuming complete control over an individual’s movements, the balance will generally not favour recognizing a police power.
3. For the foregoing reasons, I find that it was not reasonably necessary to detain Mr. Aucoin in the rear seat of the police car. There was no authority for the detention. The detention was unlawful, and therefore arbitrary.

B. *The Search*

1. The protective pat-down search was an incident to the detention. Given my conclusion that the detention was unlawful, the search must also be unlawful and therefore unreasonable. However, even if it had been reasonably necessary to detain Mr. Aucoin in the rear seat of the police car, I would have concluded that the search was unreasonable.
2. A search incident to a lawful detention is a warrantless search. Warrantless searches are presumed to be unreasonable unless the Crown can demonstrate on a balance of probabilities that the search was authorized by a reasonable law and carried out in a reasonable manner (*Collins*). In addition, such a search will be authorized by the common law if it falls within the framework established in *Mann*.
3. In *Mann*, this Court recognized a common law power to search incident to a lawful detention. The decision dealt specifically with searches incident to an investigative detention, but the principles also apply to any lawful detention. The power is defined narrowly:

The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. [para. 40]

In addition, a search incident to a lawful detention must be confined in scope to one that is reasonably designed to locate weapons (*Mann*, at para. 41).

1. The trial judge found as a fact that Cst. Burke was searching for weapons, not for evidence (A.R., vol. I, at p. 9). However, she failed to consider whether there were reasonable grounds for the search or whether the search was confined in scope to one that was reasonably designed to locate weapons.
2. It should be borne in mind that warrantless searches are presumed to be unreasonable. The onus is therefore on the Crown to lead evidence of the officer’s subjective belief that his safety or the safety of others was at risk, and of the reasonable grounds for that belief (*Collins*). Such evidence is entirely lacking from the record in this case.
3. In direct examination, Cst. Burke testified that it was his standard practice to conduct a pat-down search whenever someone was going to be placed in the back seat of the police car (A.R., vol. II, at p. 19). In his view:

. . . it’s an officer-safety issue because I have no idea what an individual could have in his possession that could harm himself or harm me while my back is turned to him and he’s in the rear of the patrol car. [A.R., vol. II, at p. 18]

This is simply not a sufficient basis for authorization of a search. The power to search does not arise as a matter of course from the fact of detention. Nor can it be justified on the basis of a vague concern for safety. Rather, the police are “required to act on reasonable and specific inferences drawn from the known facts of the situation” (*Mann*, at para. 41). In cross-examination, Cst. Burke conceded that he had *no* *reason to suspect* that Mr. Aucoin had any weapons in his possession (A.R., vol. II, at p. 39). This belies any suggestion that there were reasonable grounds for the search.

1. At the hearing of this appeal, the Crown suggested that “the absence of information, in fact, informed the officer’s concern that his safety could well be at risk” (transcript, at p. 38). To accept that the absence of information could ever give rise to reasonable grounds would be to confer on the police a wholesale search power heretofore unknown to the law. I would respectfully decline to make such a monumental change to the common law.
2. In addition to the lack of reasonable grounds, the search went beyond the scope of one that was reasonably designed to locate weapons. Cst. Burke felt something soft in Mr. Aucoin’s right front pocket and asked him what it was. It is clear that this questioning constituted a search (see *R. v. Mellenthin*, [1992] 3 S.C.R. 615). I share Beveridge J.A.’s view that “[i]t is impossible in these circumstances to leap from feeling something soft to a legitimate concern for officer safety justifying a targeted inquiry of the appellant as to what the object was” (para. 80). In cross-examination, Cst. Burke could not identify any inference, reasonable or otherwise, to justify a concern for officer safety and the questioning that followed. Instead, he simply stated: “I didn’t know what it was. That’s why I asked the question” (A.R., vol. II, at p. 42).
3. Additional support for this conclusion is found in *Mann* itself, in which this Court upheld the trial judge’s finding that, when the officer felt something soft in Mr. Mann’s pocket, there was nothing from which he could infer that it was reasonable to proceed beyond the basic pat-down search (para. 49). In that case, the officer reached into the pocket of the person being searched, whereas here Cst. Burke asked Mr. Aucoin what was in his pocket. Given the reasonable inference that Mr. Aucoin would have felt compelled to answer (see *Mellenthin*), the situations are essentially identical. I find no merit in the argument that Mr. Aucoin could have simply lied. The common law should not be developed in such a way as to encourage citizens to deceive the police.
4. The evidence discloses no reasonable grounds for Cst. Burke to believe that his safety or the safety of others was at risk. In addition, the search went beyond the scope of one that was reasonably designed to locate weapons. The Crown has therefore failed to discharge its burden of demonstrating that the search was reasonable. The evidence seized as a result of the search was accordingly obtained in violation of Mr. Aucoin’s *Charter* right to be secure against unreasonable search and seizure.
5. I am mindful of the position, urged upon us by the Attorney General of Ontario, that this Court should approach the appeal “with a genuine appreciation of the fact that, day in and day out, police officers are expected to execute their important duties in dynamic, challenging, and dangerous circumstances” (factum, at para. 1). The fact remains, however, that the Crown could point to *no grounds, reasonable or otherwise*, to justify the search. While the police may at times be entitled to some leeway in their assessment of the totality of the circumstances, given their experience and the dynamics of a situation, courts are nonetheless entitled to insist upon an evidentiary record that discloses some grounds to support the authority to perform a search.

C. *Excluding the Evidence*

1. When evidence is obtained in a manner that infringes a *Charter* right, the court must exclude that evidence if admitting it would bring the administration of justice into disrepute. To determine whether the evidence should be excluded, 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; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society’s interest in the adjudication of the case on its merits (*Grant*, at para. 71).
2. The first line of inquiry focuses on the gravity of the *Charter*-infringing state conduct. The more serious the conduct, “the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law” (*Grant*, at para. 72). In my view, the conduct at issue in this case was serious. Cst. Burke knew or ought to have known that he needed reasonable grounds to conduct a pat-down search. Thus, he acted either in ignorance of, or with wilful disregard for, well-established *Charter* standards for police conduct. This favours exclusion (*Grant*, at paras. 74-75; see also *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494).
3. The seriousness of the conduct is further aggravated by Cst. Burke’s testimony that it was his standard practice to put detained motorists in the locked rear seat of his police car, and to perform a pat-down search before doing so (A.R., vol. II, at pp. 19 and 38). This is evidence of a pattern of abuse:

It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion. [*Grant*, at para. 75]

1. I would therefore agree with Beveridge J.A.’s conclusion that the *Charter*-infringing conduct was serious and that it “shows a lack of respect for one of the basic tenets of our law — absent some statutory exception, the police can only interfere with liberty or privacy interests on reasonable and probable grounds” (para. 98). To admit the evidence would be to condone a situation in which a police officer can insist, without any grounds, that a person be detained in the locked rear seat of a police car and, also without any grounds, that the person be searched. The effect would be to significantly erode public confidence in the rule of law.
2. The second line of inquiry focuses on the impact of the offending conduct on the *Charter*-protected interests of the accused. An unreasonable search impacts upon an accused person’s privacy interest. Mr. Aucoin reasonably had a high expectation of privacy in respect of the contents of his pockets. The search therefore had a significant impact on his privacy interest (*Grant*, at para. 78; see also *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215). In addition, because the evidence would not have been discovered but for the illegal search, it is “considerably more intrusive” (*Côté*, at para. 72; see also *Mellenthin*).
3. Privacy was not the only *Charter*-protected interest affected by the state conduct in this case. The detention was arbitrary and therefore had an impact upon Mr. Aucoin’s liberty interest. In addition, asking Mr. Aucoin what was in his pockets, in a context in which he had not been informed of his right to counsel and believed he had no choice but to answer, had an impact upon his right to be protected against self-incrimination. This questioning expanded the search beyond the scope of one that was reasonably designed to locate weapons. And it was Mr. Aucoin’s response to this questioning that actually led to the discovery of the cocaine. The cocaine can therefore properly be considered derivative evidence (*Grant*, at para. 132). Given the multiple *Charter* interests engaged, and given Mr. Aucoin’s high expectation of privacy, the impact of the *Charter*-infringing conduct was significant.
4. In the third and final line of inquiry, the court “asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (*Grant*, at para. 79). There is no doubt that, in this case, truth-seeking would be better served by the admission of the evidence. The evidence is both relevant and reliable. In addition, excluding it would “effectively gu[t] the prosecution” (*Grant*, at para. 83). Therefore, this line of inquiry does not favour exclusion.
5. Having considered all the circumstances, I find that admitting the evidence would bring the administration of justice into disrepute. This is primarily because of the seriousness of the *Charter*-infringing conduct. The law regarding police powers of search and detention is well established. Yet Cst. Burke followed his standard practice even though there were *no* reasonable grounds for proceeding as he did in the context of a motor vehicle infraction. The Court must dissociate itself from this conduct if it is to maintain the long-term repute of the justice system.

VI. Disposition

1. I would allow the appeal, exclude the evidence, and enter a verdict of acquittal.

*Appeal dismissed,* LeBel *and* Fish JJ. *dissenting.*

Solicitor for the appellant:  Nova Scotia Legal Aid, Halifax.

Solicitor for the respondent:  Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener:  Attorney General of Ontario, Toronto.

1. Although Constable Burke was accompanied that evening by a cadet, this was the cadet’s first on-the-job training assignment and he was unarmed. In Constable Burke’s opinion, the cadet would probably have “had no idea how to even work a radio” (A.R., vol. II, at p. 46). [↑](#footnote-ref-1)
2. Of itself, the increased restriction on the appellant’s liberty interests by placing him in the rear of the police cruiser required a standard of reasonable necessity. On these facts, the accompanying pat-down search, which affected his privacy interests, amounted to an aggravating factor. [↑](#footnote-ref-2)
3. In light of this fact, I need not consider, as the respondent has urged, whether a police officer may always — that is, even in the absence of any specific information of a potential threat to the officer or the detainee — conduct a pat-down search as a prelude to lawfully securing the detainee in the rear of a police cruiser (R.F., at paras. 20, 46 and 50-51). By the same token, had the decision to secure the appellant in the cruiser been lawful, I should not be taken as endorsing the minority’s view that the police required “reasonable grounds” to believe officer or detainee safety was at risk in order to pat him down (para. 39). [↑](#footnote-ref-3)