

## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

HIS MAJESTY THE KING,	) <u>Daniel A. Manning</u>
	) for the Crown
- and -	)
	) <u>Mandeep S. Bhangu</u>
MINH PHUOC TRAN and	) <u>Franco Aiello</u>
RUSSELL HUGH MULLIGAN,	) for the accused, Russell Hugh Mulligan
	)
accused.	) <u>Judgment Delivered:</u>
	) November 09, 2023

### **RULING ON VOIR DIRE**

### **GRAMMOND J.**

#### **BACKGROUND**

[1] The accused Russell Hugh Mulligan is charged with drug trafficking and a series of related offences arising from an encounter with police on April 3, 2021. The charges against the accused Minh Phuoc Tran have been resolved.

[2] Mr. Mulligan challenged the admissibility of the evidence obtained by police during a warrantless search of a taxicab in which he was a passenger. As a result of the search, police found multiple plastic bags containing methamphetamine and

fentanyl on the floor in the back seat of the vehicle. They also found on Mr. Mulligan's person 11 grams of methamphetamine, a hunting knife, and \$100 cash.

[3] Mr. Mulligan alleged that police detained and searched the taxicab illegally, infringing his ss. 8 and 9 rights under ***The Canadian Charter of Rights and Freedoms***.

[4] On October 31, 2023, I advised counsel, in writing, that Mr. Mulligan's motion to exclude evidence was granted, with written reasons to follow. These are those reasons.

[5] The evidence led by the Crown at the *voir dire* consisted of the testimony of two police officers. Mr. Mulligan did not testify at the *voir dire*, and the defence did not lead any evidence.

## **SECTION 9**

[6] The Crown called as witnesses Constable Niemczak and Constable Friesen, who searched the taxicab. At approximately 11:15 p.m., the officers were patrolling in the Elmwood area of Winnipeg in a marked cruiser car when they observed a taxicab stopped outside a residence with its four-way hazard lights flashing. The officers believed one of the four suites in the residence to be a drug house ("Suite 4"), so they parked across the road to observe the taxicab.

[7] Constable Niemczak testified that the manner in which the taxicab was stopped got his attention, because there is no parking lane on that road and vehicles do not generally park there. He testified that the taxicab was partially obstructing the roadway, but he was not concerned about that because it was late in the evening.

Neither officer identified anything else unusual about the taxicab and they did not approach it.

[8] After a few minutes, the taxicab moved to the back lane of the residence and the officers followed to observe. From a distance they saw three individuals exit the residence and enter the back seat of the taxicab. Officer Niemczak observed that the three individuals seemed to be in a hurry to enter the taxicab, though he stated that his concerns about the taxicab were not heightened by the three individuals entering the back seat.

[9] The taxicab then drove away and the officers followed. Officer Friesen was driving. Shortly thereafter, at approximately 11:19 p.m., they stopped the vehicle.

[10] Both officers testified that there were previous arrests and information of drug trafficking at Suite 4. When cross-examined on the details, both officers acknowledged that approximately seven months earlier an individual who was arrested at a different address advised police that he had come from Suite 4.

[11] Officer Friesen testified that this prior arrest aroused his suspicions, and that he had been reading intelligence on Suite 4, including previous events and notes that other officers made. He had also spoken with multiple people about the address though he could not recall with whom he had spoken. Nevertheless, he had intelligence that included who was living or had been present at Suite 4 in the past.

[12] Officer Friesen testified that there were indicia of drug trafficking present on the night in question because a taxicab was being used, which was empty when parked in

front of the residence, and then went to back of the residence which is suspicious. In addition, the only lights on in the residence were in Suite 4.

[13] Both officers acknowledged that they believed the taxicab was waiting to pick up drug traffickers, and that until they conducted the traffic stop, they did not know who was in the taxicab. Officer Friesen stated quite candidly that he wanted to identify the occupants of the back seat of the taxicab.

[14] Officer Niemczak testified initially that they detained the taxicab to ensure it was insured, that the driver had a licence, and that the vehicle was sound, as part of ***The Highway Traffic Act***, C.C.S.M. c. H60, (the "***HTA***") enforcement. He later added that they wanted to ensure that the occupants of the back seat were obeying traffic laws. He testified that detaining the taxicab was "pure ***HTA*** enforcement" and that checking for seatbelt compliance is part of a police officer's duties under the ***HTA***.

[15] Officer Friesen testified that notwithstanding any drug trafficking suspicions, they conducted a traffic enforcement stop to identify the occupants and the driver of the vehicle, and to check for safety and seatbelts. He acknowledged that when they observed the taxicab at the front of the residence they did not have grounds to conduct a traffic stop, nor was one necessary, but he testified that he has often detained taxicabs to check for seatbelt compliance.

[16] In other words, although both officers testified that the taxicab was detained for general ***HTA*** enforcement, their evidence as to the more specific purpose of the detention was not entirely consistent. Officer Niemczak testified that they sought to confirm whether the vehicle was insured and sound, and whether the driver was

licenced. Officer Friesen testified that he wanted to identify the occupants of the vehicle, including the driver, and to check for safety and seatbelts.

[17] Both officers testified that there was nothing about the manner of driving<sup>1</sup> of the taxicab that caused them concern under the **HTA** or gave rise to their decision to perform a traffic stop.

[18] When the officers exited the cruiser car, Officer Friesen approached the back seat of the taxicab on the driver's side, and Officer Niemczak did the same on the passenger side. Neither officer approached the driver.

[19] Officer Niemczak testified that he observed a lot of movement in the back seat of the taxicab as they approached it, which was a major concern because it could mean efforts to either conceal or gain access to something, whether a weapon or drugs.

[20] Officer Friesen testified that when he attended at the taxicab he shone a flashlight into the back seat on the driver's side for officer safety, at which time he saw that none of the three occupants were wearing seat belts and that they seemed fidgety and nervous. He spoke to them about their lack of seatbelt use, and then observed multiple plastic bags on the rear driver's side floor board, that he believed contained methamphetamine. He immediately called out that the occupants of the back seat were under arrest pursuant to a drug investigation. Officer Niemczak confirmed that Officer Friesen made this announcement within a few seconds of approaching the vehicle.

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<sup>1</sup> The law is clear that there need not be an issue with the manner of driving for police to conduct a traffic stop. See, for example, **R. v. McCammon**, 2012 MBQB 154.

[21] The question before me is whether the traffic stop in this case was permissible, or a violation of s. 9 of the **Charter**, which provides that everyone has the right not to be arbitrarily detained.

## **THE LAW**

[22] Section 76.1 of the **HTA** provides:

### **Peace officer may stop vehicles**

76.1(1) A peace officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a vehicle to stop, and the driver of the vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as such, shall immediately come to a safe stop and remain stopped until permitted by the peace officer to depart.

...

### **Peace officer's authority — driver information**

76.1(4) Without limiting the generality of subsection (1), a peace officer may, at any time when a driver is stopped,

- (a) require the driver to give his or her name, date of birth and address to the officer;
- (b) require the driver to produce his or her licence, and the vehicle's insurance certificate and registration card and any other document respecting the vehicle that the peace officer considers necessary;
- (c) inspect any item produced under clause (b);
- (d) request information from the driver about whether and to what extent the driver consumed alcohol or drugs before or while driving;
- (e) require the driver to go through a field sobriety test under section 76.2;
- (f) request information from the driver about whether and to what extent the driver is experiencing a physical or mental condition that may affect his or her driving ability; and
- (g) inspect the vehicle's mechanical condition and request information from the driver about it.

**Peace officer's authority — passenger information**

76.1(5) For the purpose of enforcing any provision of this Act or the regulations, a peace officer may require a vehicle's passenger to give his or her name, date of birth and address to the officer.

...

**Peace officer's authority unaffected**

76.1(7) Nothing in this section limits or negates a peace officer's authority to request information from a driver or passenger or to make any observations of a driver or passenger that are necessary for the purposes of road safety enforcement.

[23] Courts have considered and interpreted these or similar powers afforded to officers on many previous occasions. I note in particular the following case law authorities.

[24] In ***R. v. Nolet***, 2010 SCC 24, the court stated:

[3] Clearly random checks of vehicles for highway purposes must be limited to their intended purpose and cannot be turned into "an unfounded general inquisition or an unreasonable search": *R. v. Mellenthin*, 1992 CanLII 50 (SCC), [1992] 3 S.C.R. 615, at p. 624.

[4] Nevertheless, roadside stops sometimes develop in unpredictable ways. It is necessary for a court to proceed step by step through the interactions of the police and the appellants from the initial stop onwards to determine whether, as the situation developed, the police stayed within their authority, having regard to the information lawfully obtained at each stage of their inquiry.

[25] In this case, the traffic stop was not random, according to both officers and particularly Officer Friesen. Rather, the officers had formed suspicions about the occupants of the taxicab based upon specific factors, including the residence from which they came and the movement of the taxicab to the back lane. The Crown argued, however, that the detention was valid under the **HTA** and that the context of the drug-related issues did not invalidate an otherwise lawful traffic stop.

[26] In ***R. v. R. (I.S.)***, 2010 MBPC 4, the court considered a case where police followed a vehicle after it left what they believed was a drug reloading house. The vehicle was missing its front licence plate and the officers followed it approximately eight blocks before activating their emergency equipment. As occurred here, once the officers approached the vehicle, they observed drug related evidence very quickly. The court concluded that the reason for the stop was a drug investigation and then considered whether an investigative detention was permitted. More particularly, the court considered whether there was an articulable cause and reasonable grounds for the detention. In this case, the Crown did not argue that the detention was investigative in nature.

[27] In ***McCammon*** Greenberg J. stated:

[24] The legal principles governing the validity of road side stops are not in dispute. A police officer's stop of a vehicle constitutes a "detention" under s. 9 of the *Charter*. However, such a detention is not arbitrary if there is a lawful basis for it. Section 76.1 of the *HTA* provides a lawful basis for officers to stop motor vehicles where the purpose of the stop is related to road safety, which includes checking the mechanical fitness of the vehicle, whether the driver has a valid licence and the vehicle is insured, and checking the sobriety of the driver (*R. v. Ladouceur*, 1990 CanLII 108 (SCC), [1990] 1 S.C.R. 1257). Checking whether a car is stolen has also been held to fall within road safety concerns that form a legitimate reason for stopping a car under the authority of s. 76.1. As stated by the court in *R. v. Dhuna*, 2009 ABCA 103, (2009), 3 Alta. L.R. (5th) 47, [2009] A.J. No. 273 (QL):

17 The mandate of the *TSA* [Alberta's *Traffic Safety Act*] includes administration and enforcement of registration. The purpose of stopping someone to check registration includes checking that the vehicle is properly in the possession of the driver. This falls within the broader purpose of traffic safety, as well as within the realm of "legal reasons" contemplated by the majority in *Ladouceur*.

[25] It is also clear that police stops of motor vehicles do not have to be based on a suspicion of a driving infraction, but can be completely random as long as the purpose of the stop is related to road safety. Moreover, a random stop of a



vehicle for a legitimate highway safety purpose is not rendered invalid simply because there is also a non-highway safety purpose for the stop. For example, in *Brown v. Durham Regional Police Force*, 1998 CanLII 7198 (ON CA), [1998] O.J. No. 5274 (C.A.)(QL), the police set up a checkpoint on a road which led to property owned by an outlaw motorcycle club and stopped everyone they believed were on their way to that destination to check licences, registration and mechanical fitness of the vehicles. The police also used the stops to gather intelligence about the club. The Court of Appeal upheld the decision of the trial judge that the detentions did not violate s. 9 of the *Charter*. Doherty J.A. stated:

25 The appellants argued at trial and on appeal that highway safety concerns were a ruse used by the police to justify the stopping of the appellants, their friends and associates. Had this argument been accepted, s. 216(1) of the HTA could provide no lawful authority for the stops and detentions: *R. v. Dedman*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2 at 31; *R. v. Zammit* (1993), 1993 CanLII 3424 (ON CA), 13 O.R. (3d) 76 (C.A.).

26 There was evidence to support the appellants' position. The trial judge concluded, however, that highway safety concerns was one of the purposes motivating the stops. He referred to the intention to "investigate for contravention of the Highway Traffic Act and Compulsory Automobile Insurance Act" and to the concerns that some persons driving to and from the party could be under the influence of alcohol or other drugs. The trial judge could not rank the highway safety purpose for the stops as more or less significant than any of the other police purposes for the stops.

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[emphasis in original]

[26] In *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, [2010] S.C.J. No. 24 (QL), the Supreme Court confirmed that "dual purpose" stops were legitimate. However, the Court warned that highway traffic legislation cannot be used as a ruse to support an otherwise invalid search. Binnie J. explained:

25 The Court has ruled on a number of occasions that pursuant to statutory authority, the police officers can randomly stop persons for "reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle": *Ladouceur (Ont.)*, at p. 1287. See also *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 41; *Mellenthin*, at p. 624. The courts below held that the appellants' truck was stopped for the valid purpose of carrying out an H&TA document check, and this issue is no longer seriously in dispute. The stop was valid. On this basis, the case is readily distinguishable from our Court's recent ruling in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, where the accused

had been pulled over for no valid purpose. The police equally exceed their powers in the Saskatchewan case of *R. v. Ladouceur*, 2002 SKCA 73, 165 C.C.C. (3d) 321 (hereinafter "*Ladouceur (Sask.)*"), where the officers set up a random stop program called "Operation Recovery" specifically to detect not only highway infractions but to "locate contraband being transported on our highways" (para. 69). For that purpose the Saskatchewan checkpoint was staffed not only with police, but on occasion customs and immigration officials, "tobacco people", wildlife officials and sniffer dogs (para. 44). The random stop program in *Ladouceur (Sask.)* was designed as a "comprehensive check for criminal activity" (para. 43) and was therefore fatally flawed from the outset.

[emphasis in original]

[28] In *R. v. Gonzales*, 2017 ONCA 543, the court stated:

[58] Sometimes, a traffic stop may have more than one purpose. However, the mere existence of another purpose motivating the stop, beyond highway regulation and safety concerns, does not render the stop unlawful. But the additional purpose must itself not be improper, or proper but pursued through improper means, and must not entail an infringement on the liberty or security of any detained person beyond that contemplated by the purpose that underpins s. 216(1): *Brown v. Durham*, at paras. 31, 34, 37-39 and 45.

[59] Gathering police intelligence falls within the ongoing police duty to investigate criminal activity. And so it is that it is permissible for police to intend, within the confines of a stop and detention authorized by s. 216(1), to avail themselves of the opportunity to further the legitimate police interest of gathering intelligence in their investigation of criminal activity: *Brown v. Durham*, at paras. 31 and 33; *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, [1990] S.C.J. No. 12, at pp. 254-55 S.C.R.

[60] Stops made under s. 216(1) will not result in an arbitrary detention provided the decision to stop is made in accordance with some standard or standards which promote the legislative purpose underlying the statutory authorization for the stop, that [page238] is to say, road safety concerns: *Brown v. Durham*, at paras. 51-54. Where road safety concerns are removed as a basis for the stop, then powers associated with and predicated upon those concerns cannot be summoned to legitimize the stop and some other legal authority must be found as a sponsor: *Simpson*, at pp. 492-93 C.C.C.

[29] In other words, police officers are permitted to stop vehicles without a preceding violation as long as they are acting in accordance with their lawful duties and

responsibilities when doing so<sup>2</sup>. In addition, a traffic stop can serve a dual purpose, but highway traffic legislation cannot be used to validate an otherwise illegal search where road safety is not the true purpose of the stop.

[30] Here, the officers were empowered to detain the taxicab by s. 76.1 of the **HTA**, for the purposes of enforcing that legislation, but I have concluded that **HTA** enforcement was not the purpose of the stop. Instead, for the reasons that follow, the officers sought to determine whether their suspicions about the occupants of the back seat being involved in drug trafficking were borne out. Officer Friesen testified that he sought to identify the occupants of the back seat, but the **HTA** does not permit detaining a vehicle for that purpose. Rather, after a vehicle is detained for a legitimate **HTA** purpose, officers can identify passengers pursuant to s. 76.1(5).

[31] The officers testified candidly that they had no reason to initiate a traffic stop when the taxicab was stopped in front of the residence, prior to the three occupants entering the back seat. As such, I have concluded that the only factor related to road safety that arose after the occupants entered the vehicle was whether they were wearing seatbelts. The officers did not testify either that they observed the three individuals not wearing seatbelts, or that they attempted to observe whether their seatbelts were in use prior to the detention. Rather, Officer Niemczak stated that “most” passengers in taxicabs do not wear their seatbelt.

[32] Nevertheless, the officers pointed to multiple reasons for conducting the traffic stop, including whether the vehicle was insured, whether the driver was licenced, and

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<sup>2</sup> See also *R. v. Oriak-Moreno et al.*, 2012 MBQB 118.

whether the vehicle was safe. It is clear that those reasons did not arise after the three individuals entered the taxicab.

[33] In addition, in my view, the fact that neither officer approached or attempted to speak with the driver of the taxicab until after the arrests is inconsistent with their stated reasons for detaining the vehicle. I note also the evidence of both officers that when pulling over a taxicab, their first area of concern is the occupants of the back seat, including who they are and what they are doing. As such, their practice is to approach the back seat and look at the occupants before approaching the driver, as they did in this case.

[34] Although I appreciate that certain factors that may distinguish the detention of a taxicab from that of a private vehicle<sup>3</sup>, I have concluded that if the taxicab was truly detained for **HTA** enforcement, one of the officers would have approached or spoken to the driver when they detained the vehicle initially.

[35] In other words, the detention in this case was not a dual purpose stop, and the officers' primary objective was to investigate criminal activity. I understand why, in all of the circumstances, the officers were suspicious about drug activity, but the fact remains that their suspicions amounted to no more than a hunch. As I have stated, the Crown did not argue that the stop was a lawful investigative detention, submitting in its brief that the detention "was not part of an active or ongoing criminal investigation".

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<sup>3</sup> For example, Officer Niemczak testified that although in his experience taxicabs are usually insured, running the licence plate through the police computer generally does not inform who might be driving the vehicle. As a result, he typically does not run the plate before initiating a traffic stop of a taxicab, and he did not do so in this case.

[36] Given that the true purpose of the stop was not to enforce the **HTA**, there was no lawful basis for the detention. It was, therefore, an arbitrary detention and a breach of s. 9 of the **Charter**.

## **SECTION 8**

[37] Section 8 of the **Charter** provides that everyone has the right to be secure against unreasonable search and seizure. An accused who alleges a s. 8 breach must satisfy the court that they had a reasonable expectation of privacy, both subjectively and objectively, with respect to the subject of the search. The Crown did not contest that issue in this case.

[38] The court must then consider whether the search was reasonable, and the onus of so establishing rests upon the Crown. In this case, given that the detention of the taxicab was arbitrary and infringed s. 9 of the **Charter**, the search that followed was not reasonable.

## **SECTION 10(B)**

[39] Mr. Mulligan also argued that his s. 10(b) rights were violated because of an approximate 90-minute delay that ensued after his arrest and prior to his opportunity to contact counsel. Given my findings with respect to ss. 8 and 9, I need not comment upon this issue further.

## **SECTION 24(2)**

### **The Law**

[40] Section 24(2) of the **Charter** requires that evidence be excluded where it was obtained in a manner that infringed or denied a **Charter** right, and admitting the evidence would bring the administration of justice into disrepute.

[41] Mr. Mulligan bears the onus of establishing both aspects of this test on a balance of probabilities (**R. v. Henrikson (W.O.)**, 2005 MBCA 49, at para. 17). Having said that, the Crown conceded that if I found an illegal detention in this case, the evidence should be excluded under s. 24(2), and did not make submissions on the factors set out in **R. v. Grant**, 2009 SCC 32. As such, I will make no further comment upon the s. 24(2) issues in this case.

## **CONCLUSION**

[42] Mr. Mulligan's s. 9 **Charter** rights were breached and his motion to exclude evidence is granted.

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J.