Regina v. Simpson
[Indexed as R. v. Simpson]

12 O.R. (3d) 182
[1993] O.J. No. 308
Action No. C10506

Court of Appeal for Ontario
Krever, McKinlay and Doherty JJ.A.
February 11, 1993

Charter of Rights and Freedoms -- Search and seizure -- Police officer searching accused after noticing bulge in accused's pocket -- Crown seeking to establish lawfulness of search on basis of s. 101(1) of *Criminal Code* -- Police officer not having belief on reasonable grounds that accused was in possession of prohibited or restricted weapon -- Search not being authorized by s. 101 and violating s. 8 of *Charter* -- *Canadian Charter of Rights and Freedoms*, s. 8 -- *Criminal Code*, R.S.C. 1985, c. C-46, s. 101(1).

Charter of Rights and Freedoms -- Arbitrary detention or imprisonment -- Stopping of motor vehicle and detention of occupant for criminal investigation unrelated to driving offences or road safety not being authorized by s. 216(1) of *Highway Traffic Act* -- Detention of individual for investigative purposes only being justified at common law where articulable cause" for detention exists -- Detention of occupant of vehicle for investigation of narcotics offences for no articulable cause being unlawful and arbitrary -- *Canadian Charter of Rights and Freedoms*, s. 9 -- *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 216(1).

Charter of Rights and Freedoms -- Exclusion of evidence -- Evidence being discovered as result of arbitrary detention and unreasonable search -- Constitutional violations being serious -- Evidence being excluded pursuant to s. 24(2) of *Charter* -- *Canadian Charter of Rights and Freedoms*, ss. 8, 9, 24(2).

Acting on information that a particular house was suspected to be a "crack house", a police officer patrolled the area and observed a woman leave a car parked in the driveway of the house and enter the residence. She left a short time later accompanied by the accused and drove away with the accused in the passenger seat. The police officer, who had no information pertaining to either person, followed them and stopped the vehicle. In response to questions from the police officer, the accused indicated that he had previously been in trouble "for theft and a knife", but that he did not have a knife in his possession. The police officer noticed a bulge in the accused's front pant pocket. He touched it and felt a hard lump. At that point the officer did not have reasonable grounds to arrest the accused. He asked the accused to remove the object, which turned out to be a baggie containing cocaine. The accused was charged with possession of cocaine for the purpose of trafficking. The trial judge rejected the accused's argument that his rights under ss. 9 and 8 of the *Canadian Charter of Rights and Freedoms* had been infringed. The accused was convicted. He appealed.

Held, the appeal should be allowed.

The accused was arbitrarily detained contrary to s. 9 of the *Charter*. The police officer admitted that his decision to stop the motor vehicle had nothing to do with the enforcement of laws relating to the operation of motor vehicles. Rather, he was seeking confirmation of the report about the crack house and wanted the opportunity, by questioning the occupants of the vehicle and looking into the vehicle, to

develop grounds to arrest either or both of the occupants for drug-related offences. While s. 216(1) of the *Highway Traffic Act* confers the power to stop a motor vehicle in the lawful execution of his or her duties and responsibilities, only those stops made for the purpose of enforcing driving laws and promoting the safe use of motor vehicles are authorized by s. 216(1) of the Act even where those stops are random. Once, as in this case, road safety concerns are removed as a basis for the stop, the powers associated with and predicated upon those particular concerns cannot be relied on to legitimize the stop. The scope of an officer's power to investigate crimes unrelated to the operation of motor vehicles is unaffected by s. 216(1) except that that section empowers the officer to stop a vehicle where the officer otherwise has the lawful authority to stop and detain one or more of the occupants of the vehicle. The stop and detention in this case were not authorized by s. 216(1).

The detention was also not authorized by the common law. Where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some articulable cause for the detention, that is, there must exist a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. A hunch based entirely on intuition cannot suffice. However, something less than the grounds required to support an arrest will suffice.

The presence of an articulable cause does not render any detention for investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention is justified.

There was no articulable cause in this case justifying the detention. The police officer had information of unknown age that another police officer had been told that the residence was believed to be a crack house. He did not know the primary source of the information and he had no reason to believe that the source in general, or this particular piece of information, was reliable. He had no reason to suspect that the accused or the driver of the car was involved in criminal activity. As there was no articulable cause for the detention, the common law police power did not authorize the police officer's conduct. The detention was both unlawful and arbitrary.

The search of the accused violated s. 8 of the *Charter*. The Crown sought to establish the lawfulness of the search only on the basis of s. 101(1) of the *Criminal Code*, which authorizes a search where a police officer believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of the Code relating to prohibited or restricted weapons. Nothing in the record supported a search based on that authority. The police officer did not have a belief based on reasonable grounds that the accused was in possession of a knife, much less that he was in possession of a knife which was a prohibited or restricted weapon.

The evidence of the cocaine should have been excluded under s. 24(2) of the *Charter*. The fruits of an unreasonable search conducted following an unconstitutional stop should not be admitted. The police officer would not have discovered the narcotics in the possession of the accused but for the double-barrelled infringement of the accused's constitutional rights. The constitutional violations were serious. The police officer obviously considered that any and all individuals who attended at a residence that the police had any reason to believe might be the site of ongoing criminal activity were subject to detention and questioning. Judicial acquiescence in such conduct by the reception of evidence obtained through that conduct would bring the administration of justice into disrepute.

APPEAL from a conviction on a charge of possession of cocaine for the purpose of trafficking. (Further, on the same dates that this appeal was heard, August 26 and 27, 1992, the accused applied for leave to appeal the sentence imposed; it was granted, but the appeal was dismissed: see endorsement of the court reported at p. 208, post.

R. v. Dedman (1981), 1981 CanLII 1631 (ON CA), 32 O.R. (2d) 641, 59 C.C.C. (2d) 97, 10 M.V.R. 59, 23 C.R. (3d) 228, 122 D.L.R. (3d) 655 (C.A.), affd on other grounds 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97, 46 C.R. (3d) 193, 34 M.V.R. 1, 11 O.A.C. 241, 20 D.L.R. (4th) 321, 11 O.A.C. 241, 51 O.R. (2d) 703 n; *R. v. Elshaw* (1989), 45 C.R.R. 140, 70 C.R. (3d) 197 (B.C.C.A.), revd 1991 CanLII 28 (SCC), [1991] 3 S.C.R. 24, 67 C.C.C. (3d) 97, 7 C.R. (4th) 333, 59 B.C.L.R. (2d) 143, 128 N.R. 241; *R. v. Hufsky*, 1988 CanLII 72 (SCC), [1988] 1 S.C.R. 621, 32 C.R.R. 193, 40 C.C.C. (3d) 398, 63 C.R. (3d) 14, 4 M.V.R. (2d) 170, 27 O.A.C. 103, 84 N.R. 365; *R. v. Ladouceur*, 1990 CanLII 108 (SCC), [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22, 77 C.R. (3d) 110, 21 M.V.R. (2d) 165, 40 O.A.C. 1, 108 N.R. 171, 73 O.R. (2d) 736n; *R. v. Mack*, 1988 CanLII 24 (SCC), [1988] 2 S.C.R. 903, 44 C.C.C. (3d) 513, 67 C.R. (3d) 1, [1989] 1 W.W.R. 577, 90 N.R. 173; *R. v. Mellenthin* (1992), 1992 CanLII 50 (SCC), 12 C.R.R. (2d) 65, 76 C.C.C. (3d) 481, 16 C.R. (4th) 273, [1993] 1 W.W.R. 193, 5 Alta. L.R. (3d) 232, 144 N.R. 50 (S.C.C.); *R. v. Waterfield*, [1964] 1 Q.B. 164, [1963] 3 All E.R. 659, [1963] 3 W.L.R. 946, 128 J.P. 48, 107 Sol. Jo. 833, 48 Cr. App. Rep. 42 (C.C.A.); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968); *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690 (1981), consd

Other cases referred to *Alabama v. White*, 110 S. Ct. 2412 (1990); *Eccles v. Bourque*, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739, 19 C.C.C. (2d) 129, 27 C.R.N.S. 325, 50 D.L.R. (3d) 753, [1975] 1 W.W.R. 609, 3 N.R. 259; *R. v. Amato*, 1982 CanLII 31 (SCC), [1982] 2 S.C.R. 418, 69 C.C.C. (2d) 31, 29 C.R. (3d) 1, [1983] 1 W.W.R. 1, 140 D.L.R. (3d) 405, 42 N.R. 487; *R. v. Biron*, 1975 CanLII 13 (SCC), [1976] 2 S.C.R. 56, 23 C.C.C. (2d) 513, 30 C.R.N.S. 109, 59 D.L.R. (3d) 409, 4 N.R. 45; *R. v. Cayer* (1988), 66 C.R. (3d) 30, 6 M.V.R. (2d) 1, 28 O.A.C. 105 (Ont. C.A.), leave to appeal to S.C.C. refused (1989), 99 N.R. 276 n; *R. v. Cluett* (1982), 1982 CanLII 3828 (NS CA), 3 C.C.C. (3d) 333, 55 N.S.R. (2d) 6, 114 A.P.R. 6, sub. nom. *R. v. O'Donnelly*, C.A., revd on other grounds 1985 CanLII 52 (SCC), [1985] 2 S.C.R. 216, 21 C.C.C. (3d) 318, 21 D.L.R. (4th) 306, 70 N.S.R. (2d) 104, 166 A.P.R. 104, 61 N.R. 388; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, 28 C.R.R. 122, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, 38 D.L.R. (4th) 508, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 74 N.R. 276; *R. v. Duguay* (1985), 1985 CanLII 112 (ON CA), 50 O.R. (2d) 375, 17 C.R.R. 203, 18 C.C.C. (3d) 289, 45 C.R. (3d) 140, 18 D.L.R. (4th) 32, 8 O.A.C. 31 (C.A.), affd on other grounds 1989 CanLII 110 (SCC), [1989] 1 S.C.R. 93, 46 C.C.C. (3d) 1, 67 C.R. (3d) 252, 56 D.L.R. (4th) 46, 31 O.A.C. 177, 91 N.R. 201, 67 O.R. (2d) 160n; *R. v. Duncanson* (1991), 1991 CanLII 2760 (SK CA), 12 C.R. (4th) 86, 30 M.V.R. (2d) 17, 93 Sask. R. 193, 4 W.A.C. 103 (C.A.), affd on other grounds 1992 CanLII 92 (SCC), [1992] 1 S.C.R. 836, 12 C.R. (4th) 98, 36 M.V.R. (2d) 125, 97 Sask. R. 96, 12 W.A.C. 96, 100 Sask. R. 181; *R. v. Esposito* (1985), 1985 CanLII 118 (ON CA), 53 O.R. (2d) 356, 20 C.R.R. 102, 24 C.C.C. (3d) 88, 49 C.R. (3d) 193, 12 O.A.C. 350 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 53 O.R. (2d) 356 n, 20 C.R.R. 102n, 24 C.C.C. (3d) 88n, 50 C.R. (3d) xxv, 15 O.A.C. 237 n, 65 N.R. 244n; *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421, 50 C.R.R. 206, 60 C.C.C. (3d) 161, 80 C.R. (3d) 317, 113 O.A.C. 1, 36 Q.A.C. 161, 116 N.R. 241; *R. v. Hicks* (1988), 1988 CanLII 7148 (ON CA), 42 C.C.C. (3d) 394, 37 C.R.R. 151, 64 C.R. (3d) 68, 8 M.V.R. (2d) 191, 28 O.A.C. 118 (Ont. C.A.), affd 1990 CanLII 156 (SCC), [1990] 1 S.C.R. 120, 44 C.R.R. 282, 54 C.C.C. (3d) 575, 73 C.R. (3d) 204, 37 O.A.C. 143, 104 N.R. 399; *R. v. Hisey* (1985), 1985 CanLII 3648 (ON CA), 24 C.C.C. (3d) 20, 40 M.V.R. 152, 12 O.A.C. 191 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 40 M.V.R. 152 n, 16 O.A.C. 79n, 67 N.R. 160n; *R. v. Knowlton*, 1973 CanLII 148 (SCC), [1974] S.C.R. 443, 10 C.C.C. (2d) 377, 21 C.R.N.S. 344, [1973] 4 W.W.R. 659, 33 D.L.R. (3d) 755; *R. v.*

Landry, 1986 CanLII 48 (SCC), [1986] 1 S.C.R. 145, 25 C.C.C. (3d) 1, 50 C.R. (3d) 55, 26 D.L.R. (4th) 368, 14 O.A.C. 241, 65 N.R. 161, 54 O.R. (2d) 512n; *R. v. Moore*, 1978 CanLII 160 (SCC), [1979] 1 S.C.R. 195, 43 C.C.C. (2d) 83, 5 C.R. (3d) 289, 90 D.L.R. (3d) 112, [1978] 6 W.W.R. 462, 24 N.R. 181; *R. v. Moran* (1987), 1987 CanLII 124 (ON CA), 36 C.C.C. (3d) 225, 21 O.A.C. 257 (C.A.); *R. v. Nelson* (1987), 1987 CanLII 140 (MB CA), 29 C.R.R. 80, 35 C.C.C. (3d) 347, 46 M.V.R. 145, [1987] 3 W.W.R. 144, 45 Man. R. (2d) 68 (C.A.); *R. v. Stenning*, 1970 CanLII 12 (SCC), [1970] S.C.R. 631, 11 C.R.N.S. 68, [1970] 3 C.C.C. 145, 10 D.L.R. (3d) 224; *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1, 37 O.A.C. 161, 105 N.R. 81; *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 45 C.R. 3d) 97, 32 M.V.R. 153, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 18 D.L.R. (4th) 655, 40 Sask. R. 122; *R. v. Thomsen*, 1988 CanLII 73 (SCC), [1980] 1 S.C.R. 640, 40 C.C.C. (3d) 411; R*. v. Wilson*, 1990 CanLII 109 (SCC), [1990] 1 S.C.R. 1291, 56 C.C.C. (3d) 142, 77 C.R. (3d) 137, 74 Alta. L.R. (2d) 1, [1990] 5 W.W.R. 188, 107 A.R. 321, 108 N.R. 207; *Reference re s. 27 of Judicature Act (Alberta)*, 1984 CanLII 31 (SCC), [1984] 2 S.C.R. 697, 15 C.C.C. (3d) 466, 43 C.R. (3d) 151, 14 D.L.R. (4th) 456, 1 M.V.R. (2d) 96, 35 Alta L.R. (2d) 97, [1985] 2 W.W.R. 143, 58 A.R. 39, 56 N.R. 43 sub nom. *Reference re Interception of Private Communications*

Statutes referred to *Canadian Charter of Rights and Freedoms*, ss. 1, 8, 9, 10(b), 24(2); *Criminal Code*, R.S.C. 1985, c. C-46, s. 101(1) [since rep. & sub. 1991, c. 40, s. 13 (not yet proclaimed)]; *Highway Traffic Act*, R.S.O. 1980, c. 198, s. 189a(1) [enacted 1981, c. 72, s. 2]; *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 216(1); *Narcotic Control Act*, R.S.C. 1985, c. N-1, ss. 10, 11; *Police Services Act*, R.S.O. 1990, c. P-15, s. 42

Authorities referred to Barton, P.G., "Developments in Criminal Procedure: the 1985-86 Term" (1987), 9 Sup. Ct. L. Rev. 277, pp. 296-302 Gold, A.D., "The Supreme Court of Canada and the Police: 1970-76" (1978), 20 Crim. L.Q. 152 Hogg, P., Constitutional Law of Canada, 4th ed. (Toronto: Carswell, 1992), p. 1072 Ouimet, R., Chair, Report of the Canadian Committee on Corrections, Towards Unity: Criminal Justice and Corrections (Ottawa: The Queen's Printer, 1969), pp. 56-57 Report of the Federal/Provincial Committee of Criminal Justice Officials with respect to the McDonald Commission Report (Ottawa, Solicitor-General of Canada, June, 1983), pp. 9-58 Way, "The Law of Police Authority: The McDonald Commission and the McLeod Report" (1985), 9 Dalhousie L.J. 683 Young, "All Along the Watch Tower: Arbitrary Detention and the Police Function" (1991), 29 Osgoode Hall L.J. 329

Morris Pistyner, for the Crown, respondent.

Russell S. Silverstein, for appellant.

The judgment of the court was delivered by

DOHERTY J.A.:--

I. OVERVIEW

The appellant was convicted of possession of cocaine for the purposes of trafficking and sentenced to 12 months' imprisonment. He appeals his conviction only.

The appellant was a passenger in a motor vehicle stopped by police Constable Wilkin on December 5, 1989. After the vehicle was stopped, Constable Wilkin searched the appellant and seized ten grams of cocaine. At trial, counsel argued that the appellant's rights under ss. 9 and 8 of the *Canadian Charter of Rights and Freedoms* had been infringed and that the cocaine, as the product of those violations, should be excluded from evidence pursuant to s. 24(2) of the *Charter*. The trial judge held that neither right had been infringed, admitted the cocaine and convicted the appellant.

On this appeal, the appellant renews his objection to the admissibility of the cocaine.

II. THE TRIAL PROCEEDINGS

The relevant facts are not in dispute. Constable Wilkin was the only witness called on the *voir dire* to determine the admissibility of the cocaine. He testified that shortly before December 5, 1989, he read an internal police memorandum authored by another officer describing a particular residence as a suspected "crack house". The author of the memorandum had apparently received his information from an unidentified "street contact". Officer Wilkin knew nothing about this source. Officer Wilkin had been given similar information by a member of the police morality squad but it was unclear whether that officer's source was also the memorandum read by Constable Wilkin. Apart from this information, Constable Wilkin knew nothing about the residence.

On the evening of December 5, 1989, Constable Wilkin, who was in a marked police cruiser, decided to patrol the area around the suspect residence. He observed a car in the driveway of the residence. The sole occupant, a woman, exited the vehicle, leaving the motor running, entered the residence and stood inside the doorway. After a short time, she left the residence accompanied by the appellant, returned to her vehicle and drove away with the appellant seated in the front passenger seat. Constable Wilkin did not know either the woman or the appellant, and had no information pertaining to either of them.

Constable Wilkin followed the vehicle. When asked why he did so, he replied:

> I had every intention of pulling them over to ask them where they had been, to see what story they were going to give me, see whether any of their story would substantiate what I believed my information to be at that time.

Constable Wilkin was also asked whether he anticipated searching the vehicle or the occupants when he directed the driver to pull the vehicle over. He responded:

> Before I pulled them over it was for investigative purposes. I was looking for identification, see what stories they were going to give me as to who was coming from where, looking for them to trip themselves up to give me more grounds for an arrest.

If I had seen something in full view once pulling them over, that would have given me more grounds. At this time it was strictly investigative.

After following the vehicle for a short distance, Constable Wilkin activated his flashing lights and directed the vehicle to pull over. He approached the woman driver who seemed very nervous. He asked her to step out of the vehicle and to sit in the back of the police cruiser. She did so.

Constable Wilkin then approached the passenger side of the vehicle and asked the appellant to get out of the vehicle. He did so. In response to questions from Constable Wilkin, the appellant identified himself and indicated that he had previously been in trouble "for theft and a knife". The appellant also said that he did not have a knife in his possession at that time. While talking to the appellant, Constable Wilkin noticed a bulge in the appellant's front pant pocket. He reached out and touched the appellant's pocket and felt a "hard lump". Constable Wilkin then asked the appellant what was in his pocket. The appellant replied, "Nothing". Constable Wilkin asked the appellant to remove the object from his pocket "very carefully". The appellant put his hand into his pocket and removed it very quickly as if trying to throw something away. The officer grabbed the appellant's hand and after a slight struggle, subdued the appellant. Constable Wilkin removed a baggie containing cocaine from the appellant's hand.

In cross-examination, Constable Wilkin confirmed that he did not have reasonable and probable grounds to arrest the appellant until he realized that the appellant was in possession of what appeared to be cocaine. Constable Wilkin stated that he felt the appellant's pocket after noticing the bulge, in part because the appellant said that he had been in trouble involving a knife at some earlier time. He denied that he formed the intention to search the appellant for a weapon when he saw the bulge in his pant pocket.

The trial judge found that the information provided to Constable Wilkin from the police sources provided a legitimate reason "to embark on the investigative course he undertook". He further held that as the officer was engaged in a legal investigation "he had a right to stop the vehicle as he did" and that his actions were not arbitrary.

The trial judge also concluded that the officer had the right to insist that the appellant empty his pocket and that the seizure of the cocaine was reasonable. He said:

> All those circumstances, in my view, were the natural flow of what a policeman might be expected to do and say, confronted as he was with the situation as described. Accordingly, I think the answer to the second question, "Was the resultant search and seizure an unreasonable search pursuant to s. 8 of the *Charter*?" must also be answered in the negative.

III. THE GROUNDS OF APPEAL

A. Was the appellant arbitrarily detained?

Section 9 provides:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

The appellant was clearly detained when the motor vehicle in which he was riding was pulled over by Constable Wilkins: *R. v. Ladouceur*, 1990 CanLII 108 (SCC), [1990] 1 S.C.R. 1257 at pp. 1276-78, 56 C.C.C. (3d) 22 at pp. 36-37; *R. v. Hufsky*, 1988 CanLII 72 (SCC), [1988] 1 S.C.R. 621 at pp. 631-32, 40 C.C.C. (3d) 398 at p. 406; *R. v. Wilson*, 1990 CanLII 109 (SCC), [1990] 1 S.C.R. 1291, 56 C.C.C. (3d) 142.

Section 9 of the *Charter* limits the power of the police to detain individuals. It draws the line, subject to s. 1 of the *Charter*, at detentions which are arbitrary. The words "arbitrary" and "unlawful" are not synonymous. A lawful detention may be arbitrary: *Ladouceur* and *Hufsky*, *supra*; and an unlawful

detention is not necessarily arbitrary: *R. v. Duguay* (1985), 1985 CanLII 112 (ON CA), 50 O.R. (2d) 375, 18 C.C.C. (3d) 289 (C.A.), at p. 382 O.R., p. 296 C.C.C., affirmed without reference to this point by the majority 1989 CanLII 110 (SCC), [1989] 1 S.C.R. 93, 46 C.C.C. (3d) 1; *R. v. Cayer* (1988), 66 C.R. (3d) 30, 6 M.V.R. (2d) 1 (Ont. C.A.), at p. 43 C.R., p. 13 M.V.R., leave to appeal refused (1989), 99 N.R. 276 n (S.C.C.). Although an assessment of the lawfulness of a detention is not dispositive of the s. 9 claim, it is appropriate to begin by addressing the lawfulness of the detention. If the detention is lawful, it is not arbitrary unless the law authorizing the detention is arbitrary. If the detention is found to be unlawful, that finding will play a central role in determining whether the detention is also arbitrary.

This detention was a direct result of the stopping of a motor vehicle. The lawfulness of the detention depends on the police officer's authority to stop the vehicle. The officer's purpose in effecting the stop is, in turn, relevant to the lawfulness of that stop. Constable Wilkin candidly acknowledged that his decision to stop the motor vehicle had nothing to do with the enforcement of laws relating to the operation of motor vehicles. Nor did Constable Wilkin rely on any specific statutory authority (for example, s. 10 or 11 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1) when he stopped the vehicle. Constable Wilkin stopped the car for two reasons. He was seeking confirmation of the report concerning the activities at the alleged "crack house" and he wanted the opportunity, by questioning the occupants of the vehicle and looking into the vehicle, to develop grounds to arrest either or both of the occupants for drug-related offences. As Constable Wilkin put it, the stop was made for purely "investigative purposes".

The respondent submits that Constable Wilkin's power to stop the vehicle and detain its occupants for purposes relating to the investigation of possible criminal activity can be found in s. 216(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. That section reads:

> 216(1) A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

(Emphasis added)

The respondent contends that the duties referred to in s. 216(1) include the general duty to prevent and investigate crime recognized at common law and given statutory force by the *Police Services Act*, R.S.O. 1990, c. P.15, s. 42. I agree: *R. v. Hisey* (1985), 1985 CanLII 3648 (ON CA), 24 C.C.C. (3d) 20, 40 M.V.R. 152 (Ont. C.A.), at p. 26 C.C.C., p. 158 M.V.R., leave to appeal refused (1986), 67 N.R. 160n, 40 M.V.R. 152 n (S.C.C.).

Counsel for the respondent goes on to argue that s. 216(1) empowers the officer to stop motor vehicles and of necessity detain the occupants of those vehicles where that stop occurs in the context of an investigation of possible criminal activity such as the possession of illicit narcotics. In making this submission, counsel relies on the decision of the Saskatchewan Court of Appeal in *R. v. Duncanson* (1991), 1991 CanLII 2760 (SK CA), 12 C.R. (4th) 86, 30 M.V.R. (2d) 17, affirmed without reference to this point 1992 CanLII 92 (SCC), [1992] 1 S.C.R. 836, 12 C.R. (4th) 98. In *Duncanson*, the Court of Appeal held that the Saskatchewan statutory equivalent of s. 216(1) of the *Highway Traffic Act* authorized vehicle stops in the course of the investigation of drug- related criminal activity. In so concluding, the court relied on the judgment of the Supreme Court of Canada in *R. v. Ladouceur*, *supra*.

Ladouceur is one of a series of judgments of the Supreme Court of Canada involving the constitutionality of various forms of police "check stops". In these cases, the police randomly stopped automobiles to investigate the mechanical fitness of the vehicles, to determine whether the drivers were impaired and to ensure that the drivers were licensed and in possession of the required documents. In doing so, the police were enforcing the laws relating to the operation of motor vehicles on public thoroughfares. None of these cases involved a stop for investigative purposes not related to the operation of the motor vehicle stopped.

In *Ladouceur*, and the earlier case of *Hufsky*, *supra*, the Crown argued that the stops were authorized by s. 189 a(1) of the *Highway Traffic Act*, R.S.O. 1980, c. 198, as amended by S.O. 1981, c.72, s. 2. That was the predecessor section to the present s. 216(1) of the *Highway Traffic Act*. The language in the two sections is identical.

In *Hufsky*, at pp. 632-33 S.C.R., p. 406 C.C.C., Le Dain J., for the court, held:

> Section 189a(1) of the *Highway Traffic Act* empowers a police officer who is in the lawful execution of his duties and responsibilities to require the driver of a motor vehicle to stop. It does not specify that there must be some grounds or cause for stopping a particular driver but on its face leaves the choice of the drivers to be stopped to the discretion of the officer. In carrying out the purposes of the spot check procedure, including the observation of the condition or "sobriety" of the driver, the officer was clearly in the lawful execution of his duties and responsibilities.

Read in isolation, this passage might support the respondent's position. However, when the judgment is read in its entirety, particularly the passages referrable to s. 1 of the *Charter*, it is clear to me that Le Dain J. was addressing the scope of s. 189 a(1) of the *Highway Traffic Act* only in connection with stops made to assist in the enforcement of laws relating to the operation of motor vehicles.

Similarly, in *Ladouceur*, the authority to stop provided under the *Highway Traffic Act* was addressed entirely in the context of a "routine check" of drivers and their vehicles for purposes referrable to the enforcement of motor vehicle-related laws. Cory J., for the majority, wrote at p. 1278 S.C.R., pp. 37-38 C.C.C.:

> The power of a police officer to stop motor vehicles at random is derived from s. 189 a(1) of the *Highway Traffic Act* and is thus prescribed by law: see *Hufsky*, *supra*, at p. 407. The authority also has been justified by this court in its decision in *Dedman* [*infra*], as a prescription of the common law.

Equating the statutory power to stop found in the *Highway Traffic Act* with the common law power to stop referred to in *R. v. Dedman* (1981), 1981 CanLII 1631 (ON CA), 32 O.R. (2d) 641, 59 C.C.C. (2d) 97, appeal dismissed for different reasons 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97, is particularly illuminating. In *Dedman*, at pp. 32-36 S.C.R., pp. 119-22 C.C.C., the court held that the common law ancillary police power justified random stops of vehicles in the course of the enforcement of laws relating to the operation of those vehicles. This power to stop was, however, closely tied to the particular purpose of the stops, the dangers presented by the activity targeted by the stops, the qualified nature of the liberty interfered with by the stops, and the absence of other less intrusive means of effective enforcement of the relevant laws. The authority to stop described in *Dedman* was

clearly not a general power to stop for all police purposes, but was limited to stops made in furtherance of the police duty to protect those who use the public roadways from those who use those roadways in a dangerous manner.

Mr. Justice Cory's analysis in *Ladouceur* of the applicability of s. 1 of the *Charter* also indicates that he was considering s. 189a(1) of the *Highway Traffic Act* only as an authority for stops made in the course of the enforcement of laws relating to the operation of motor vehicles. He described the purpose of the legislation as being to achieve safety on the highway and referred to random stops as the only means capable of providing adequate enforcement of laws designed to provide for that safety. In deciding whether the legislation impaired individual rights as little as possible, Cory J. referred to the serious hazards posed by impaired and incompetent drivers and to the close regulation of motor vehicles and their operation. The entire s. 1 analysis of Cory J. and all of the evidence put before him proceeded on the premise that the section authorized stops as part of a scheme for the enforcement of motor vehicle-related laws. Had the court been considering the constitutionality of s. 189a(1) as authority for stops outside of the highway safety context, s. 1 of the *Charter* would have required a much broader approach.

At the conclusion of his s. 1 analysis, Cory J. again made it very clear that he was concerned only with vehicular stops made for particular purposes. He said at p. 1287 S.C.R., p. 44 C.C.C.:

> Finally, it must be shown that the routine check does not so severely trench upon the s. 9 right so a to outweigh the legislative objective. The concern at this stage is the perceived potential for abuse of this power by law enforcement officials. In my opinion, these fears are unfounded. There are mechanisms already in place which prevent abuse. Officers can stop persons only for legal reasons, in this case 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. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the *Charter*.

(Emphasis added)

The limited reach of *Ladouceur* and *Hufsky* was made clear in *R. v. Mellenthin* (1992), 1992 CanLII 50 (SCC), 12 C.R.R. (2d) 65, 76 C.C.C. (3d) 481 (S.C.C.). In *Mellenthin*, the police pulled the appellant's vehicle over at random to check his documentation and his physical condition. After asking the driver to produce the appropriate documentation, the officers questioned the driver concerning the contents of a bag on the seat of the car. Eventually they searched that bag and found narcotics.

As the initial detention in *Mellenthin* was for purposes related to the enforcement of motor vehicle-related laws, it was a constitutional, although arbitrary, detention. The court, however, through Cory J., emphatically set the permissible limits for such stops (at pp. 72, 75 C.R.R., pp. 487, 490 C.C.C.):

> Check stop programs result in the arbitrary detention of motorists. The programs are justified as a means aimed at reducing the terrible toll of death and injury so often occasioned by impaired drivers or by dangerous vehicles. The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops

> should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search. . . . . .
>
> As noted earlier, check stops infringe the *Charter* rights against arbitrary detention. They are permitted as means designed to meet the pressing need to prevent the needless death and injury resulting from the dangerous operation of motor vehicles. The rights granted to police to conduct check stop programs or random stops of motorists should not be extended.

In my opinion, the "check stop" cases decide only that stops made for the purposes of enforcing driving related laws and promoting the safe use of motor vehicles are authorized by s. 216(1) of the *Highway Traffic Act*, even where those stops are random. These cases do not declare that all stops which assist the police in the performance of any of their duties are authorized by s. 216(1) of the *Highway Traffic Act*.

Once, as in this case, road safety concerns are removed as a basis for the stop, then powers associated with and predicated upon those particular concerns cannot be relied on to legitimize the stop. Where the stop and the detention are unrelated to the operation of the vehicle or other road safety matters, the fact that the target of the detention is in an automobile cannot enhance the police power to detain that individual.

Section 216(1) of the *Highway Traffic Act* refers to stops made in the "lawful execution" of the officer's duty. In my opinion, the scope of the officer's power to investigate crimes unrelated to the operation of motor vehicles is unaffected by s. 216(1) except that the section empowers the officer to stop a vehicle where the officer otherwise has the lawful authority to stop and detain one or more of the occupants of the vehicle. Constable Wilkin had the authority to stop the vehicle and detain the occupants only if at the time he did so he could lawfully have stopped or detained one or both of the occupants had he encountered them on the street. If he had no such authority, he was not acting in the "lawful execution" of his duty as required by s. 216.

The search for a legal authority for this stop and detention must go beyond s. 216(1) of the *Highway Traffic Act*.

The law imposes broad general duties on the police but it provides them with only limited powers to perform those duties. Police duties and their authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to the police. Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law. That law may be a specific statutory power or it may be the common law. As I have rejected the only statutory authority put forward to support this detention (s. 216(1) of the *Highway Traffic Act*), I will now consider whether the common law authorized this detention.

Attempts to set the ambit of police common law powers fill many pages of the reports and law journals: *R. v. Knowlton*, 1973 CanLII 148 (SCC), [1974] S.C.R. 443, 10 C.C.C. (2d) 377; *R. v. Biron*, 1975 CanLII 13 (SCC), [1976] 2 S.C.R. 56, 23 C.C.C. (2d) 513; *Eccles v. Bourque*, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739, 19 C.C.C. (2d) 129; *R. v. Moore*, 1978 CanLII 160 (SCC), [1979] 1 S.C.R. 195, 43 C.C.C. (2d) 83; *R. v. Landry*, 1986 CanLII 48 (SCC), [1986] 1 S.C.R. 145, 25 C.C.C. (3d) 1; *Reference re s. 27(1) of the Judicature Act* (Alberta) , 1984 CanLII 31 (SCC), [1984] 2 S.C.R. 697, 15 C.C.C. (3d) 466; *Dedman*, *supra* ; Barton,

"Developments in Criminal Procedure: the 1985-86 Term" (1987), 9 Sup. Ct. L. Rev. 277 at pp. 296-302; Way, "The Law of Police Authority: The McDonald Commission and the McLeod Report" (1985), 9 Dalhousie L.J. 683; Gold, "The Supreme Court of Canada and the Police: 1970-76" (1978), 20 Crim. L.Q. 152; Report of the Federal/Provincial Committee of Criminal Justice Officials with respect to the McDonald Commission Report (Ottawa Solicitor-General of Canada, June, 1983) at pp. 9-58; Young, "All Along the Watch Tower: Arbitrary Detention and the Police Function" (1991), 29 Osgoode Hall L.J. 329.

As the authorities plainly show, judicial efforts to define the police common law power have generated considerable disagreement. The appellant submits that, whatever uncertainties may exist concerning the reach of police common law powers, this court has held that a detention for investigative purposes, absent proper grounds for an arrest, is an unauthorized and potentially arbitrary detention. In *Duguay*, *supra*, at p. 383 O.R., p. 296 C.C.C., MacKinnon A.C.J.O. said:

> In my view, on the facts as found by the trial judge, the arrest or detention was arbitrary, being for quite an improper purpose -- namely, to assist in the investigation.

The facts which precipitated this statement were, however, significantly different than those present in this case. In *Duguay*, the police formally arrested the suspects near the scene of the alleged crime, placed them in a police cruiser, transported them to the police station and held them in locked interview rooms for a considerable period of time during which the suspects were interrogated at some length. It was that prolonged and highly intrusive detention, premised only on a suspicion short of reasonable and probable grounds for an arrest, that was held to be arbitrary. In my view, it does not follow from *Duguay* that any and all detentions for investigative purposes constitute a violation of s. 9 of the *Charter*; Young, "All Along the Watch Tower", supra, at p. 367.

The appellant also relies on this court's judgment in *R. v. Dedman*, *supra*, at pp. 652-53 O.R., 108-09 C.C.C., where Martin J.A. for the court said:

> In carrying out their general duties, the police have limited powers, and they are entitled to interfere with the liberty and property of the citizen only where such interference is authorized by law. It is, of course, a constitutional principle, that the citizen has a right not to be subjected to imprisonment, arrest or physical restraint that is not justified by law, and every invasion of the property of the citizen is a trespass unless legally justified . . . Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or for further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to police officers as to anyone else.

(Emphasis added)

The appellant argues that this passage limits the police power to detain to those situations where there are reasonable and probable grounds to arrest the individual detained. There is certainly support for this contention: Report of the Canadian Committee on Corrections, Towards Unity: Criminal Justice and Corrections (Ottawa: The Queen's Printer, 1969) (Chair, R. Ouimet), at pp. 56-56; Hogg, Constitutional Law of Canada, 4th ed. (Toronto: Carswell, 1992) at p. 1072; *Dedman*, per Dickson C.J.C. in dissent at p. 13 S.C.R., p. 104 C.C.C.

I have no doubt that the passage from Dedman accurately states the law. It has been approved in numerous subsequent judgments including *Duguay*, at p. 385 O.R., p. 297 C.C.C.; *R. v. Esposito* (1985), 1985 CanLII 118 (ON CA), 53 O.R. (2d) 356, 24 C.C.C. (3d) 88 (C.A.), at pp. 362-63 O.R., pp. 94-95 C.C.C., leave to appeal refused 53 O.R. (2d) 356 n, 24 C.C.C. (3d) 88n (S.C.C.); *R. v. Hicks* (1988), 1988 CanLII 7148 (ON CA), 42 C.C.C. (3d) 394, 64 C.R. (3d) 68 (Ont. C.A.), at p. 400 C.C.C., p. 73 C.R., affirmed 1990 CanLII 156 (SCC), [1990] 1 S.C.R. 120, 54 C.C.C. (3d) 575; *R. v. Moran* (1987), 1987 CanLII 124 (ON CA), 21 O.A.C. 257, 36 C.C.C. (3d) 225 (C.A.), at p. 280 O.A.C., p. 258 C.C.C.; and *R. v. Cluett* (1982), 1982 CanLII 3828 (NS CA), 3 C.C.C. (3d) 333, 55 N.S.R. (2d) 6 (C.A.), at pp. 347-48 C.C.C., p. 22 N.S.R., affirmed without reference to this point 1985 CanLII 52 (SCC), [1985] 2 S.C.R. 216, 21 C.C.C. (3d) 318.

I do not, however, read the words of Martin J.A. in *Dedman* as holding that the common law power of the police never extends to the power to detain an individual in the course of a criminal investigation unless the police have the power to arrest that individual. I understand the passage to state that the desire to question or otherwise investigate an individual does not, in and of itself, authorize the detention of that individual. In other words, there is no general power to detain whenever that detention will assist a police officer in the execution of his or her duty. To deny that general power is not, however, to deny the authority to detain short of arrest in all circumstances where the detention has an investigative purpose.

I come to my interpretation of the language of Martin J.A. in *Dedman*, *supra*, in part from an examination of the judgment of the majority of the Supreme Court of Canada in the same case. In *Dedman*, the police had established check points where vehicles were stopped at random and drivers asked to produce their licence, insurance and ownership documents. The stops were part of an organized publicized program designed to deter drinking and driving and apprehend those who were not deterred. There was no statutory authority for the stops. Motorists who were stopped were detained during the stops to permit the police to assess the driver's sobriety.

The majority (per Le Dain J.) and the dissent (per Dickson C.J.C.) agreed that police powers were limited to those provided by statute or existing at common law. Le Dain J. said at p. 28 S.C.R., p. 116 C.C.C.:

> In my opinion, police officers, when acting or purporting to act in their official capacity as agents of the State, only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties.

There was, however, strong disagreement between the majority and dissent as to the limits of the acknowledged common law authority. I need refer to only the majority position. Le Dain J. adopted the "ancillary power doctrine" set down in *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.C.A.), and reflected in *R. v. Knowlton*, *supra*, and *R. v. Stenning*, 1970 CanLII 12 (SCC), [1970] S.C.R. 631, 11 C.R.N.S. 68. Quoting from Ashworth J. in *Waterfield*, Le Dain J. said at pp. 13-14 S.C.R., p. 105 C.C.C.:

> In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or

> recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

Le Dain J. applied the *Waterfield* test to the random stops and detentions effected by the R.I.D.E. program and decided that they were a lawful manifestation of the common law powers of the police. His conclusion constitutes a recognition that the common law police power can, in appropriate circumstances, authorize some forms of detention for investigative purposes.

Dedman in this court, pronounces against a general power at common law to detain for investigative purposes. *Dedman* in the Supreme Court of Canada does not detract from that pronouncement but acknowledges that detentions imposed in the execution of a police officer's duty will be lawful if they meet the *Waterfield* criteria although they are for investigative purposes and although there are no grounds for the arrest of the detainee.

I observe that in *Esposito*, *supra*, Martin J.A., after referring to the above-quoted passage from his judgment in *Dedman*, and the judgments of the Supreme Court of Canada in that case, said at p. 363 O.R., p. 95 C.C.C.:

> Although no reference is made to the passage in the majority judgment, I do not read the majority as disagreeing with this statement.

Further support for a common law power to detain short of arrest for investigative purposes can be found in *R. v. Elshaw* (1989), 45 C.R.R. 140, 70 C.R. (3d) 197 (B.C.C.A.), reversed 1991 CanLII 28 (SCC), [1991] 3 S.C.R. 24, 67 C.C.C. (3d) 97. Elshaw was seen going into the bushes with two young boys in circumstances which aroused the suspicion of two onlookers. One of those individuals contacted the police and two officers were dispatched to the scene. Upon arriving at the scene, the officers met the individual who had called the police. He pointed out Elshaw as the man who had gone into the bushes. One officer stopped Elshaw and questioned him briefly. The two persons who had observed the events and the two young boys who had gone into the bushes were present in the immediate vicinity and the police wanted to question them. Elshaw was placed in the back of the police patrol wagon out of the sight of the potential witnesses. At this point, the police had no basis upon which they could arrest Elshaw. After questioning the four potential witnesses for about five minutes, one of the officers returned to the patrol wagon and spoke to Elshaw. Elshaw immediately made an incriminatory statement which led to his arrest. He was not advised of his right to counsel prior to making this statement.

In the British Columbia Court of Appeal, it was conceded that Elshaw had been detained when he was placed in the patrol wagon and that his right to counsel as set out in s.10(b) of the *Charter* had been infringed. In the course of considering whether Elshaw's statement should have been excluded under s. 24(2) of the *Charter*, Toy J.A. addressed the propriety of the detention (at pp. 146-48 C.R.R., pp. 203-05 C.R.):

> To effectively continue the investigation, each of those four possible witnesses had to be questioned, and the only facility available in which to place the accused while those brief interviews took place would be the patrol wagon. I do not consider that there was anything inappropriate in utilizing the patrol wagon to house the accused for a short period of time while the police officers obtained whatever information they could relating to the complaint they

> were investigating. I consider that placing the accused in the patrol wagon was more appropriate than just leaving him standing beside the patrol wagon in full view of the four potential witnesses, which might seriously impair any defence that the accused might have if identification was in issue at any subsequent trial he might have to face. . . . . .
>
> Here the two police officers were faced with a complaint of possible child molesting that had just taken place, and they were required to make some very hasty decisions. They had four potential witnesses to immediately question, and a suspect under their control. In my view, it would have been unreasonable to expect the police officers to immediately release the suspect and let him go his way and then commence investigating the stories of the four witnesses. . . . . .
>
> Under the circumstances, it is my view that the police officers did what was not only reasonable but necessary in placing the accused in the patrol wagon for a short period of time to maintain control over the accused until their questioning of the witnesses was concluded and at the same time to remove him from the continued surveillance of four prospective witnesses.

Toy J.A. concluded, as had the trial judge, that the detention of Elshaw was entirely appropriate. I take this to mean that in the entirety of the circumstances, the police had the authority to briefly detain Elshaw for purposes related to their investigation of possible criminal activity.

In the Supreme Court of Canada, the majority did not decide whether the police had the authority to detain Elshaw, but held that regardless of any authority the police may have had to do so, the failure to comply with s. 10(b) of the *Charter* required the exclusion of Elshaw's statement. In dissent, L'Heureux-Dubé, J. did not reach the question of whether the police were entitled to detain Elshaw as she found that, at least for the purposes of s. 10(b) of the *Charter*, Elshaw was not detained. Her detailed and approving reference to the American "stop and frisk" jurisprudence (pp. 57-64 S.C.R., pp. 108-14 C.C.C.) strongly suggests that she would recognize that the police have, in some circumstances, the power to detain individuals in the course of the investigative process, even where there is no power to arrest those individuals.

Especially in light of the definition of "detention" adopted in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481, and *R. v. Thomsen*, 1988 CanLII 73 (SCC), [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411, I have no doubt that the police detain individuals for investigative purposes when they have no basis to arrest them. In some situations the police would be regarded as derelict in their duties if they did not do so. I agree with Professor Young, "All Along the Watch Tower", supra, at p. 367, when he asserts:

> The courts must recognize the reality of investigatory detention and begin the process of regulating the practice so that street detentions do not end up being non-stationhouse incommunicado arrests.

Unless and until Parliament or the legislature acts, the common law and specifically the criteria formulated in *Waterfield*, *supra*, must provide the means whereby the courts regulate the police power to detain for investigatory purposes.

In deciding whether an interference with an individual's liberty is authorized under the common law, one must first decide whether the police were acting in the course of their duty when they effected that interference. In this case, Constable Wilkin indicated that he was investigating the possible commission

of drug-related criminal offences at the suspected "crack house". While a police officer's stated purpose is not determinative when deciding whether the officer was acting in the course of his or her duty, there is no suggestion here that Constable Wilkin was not pursuing an investigation into the possible commission of drug-related crimes when he stopped and detained the appellant. The wide duties placed on police officers in relation to the prevention of crime and the enforcement of criminal laws encompass investigations to determine whether criminal activities are occurring at a particular location as well as efforts to substantiate police intelligence. I am satisfied that Constable Wilkin was engaged in the execution of his duty when he stopped and detained the appellant. The lawfulness of that conduct will depend on whether the stop and detention involved an unjustifiable use of the powers associated with Constable Wilkin's duty.

The reasons of Le Dain J. in *Dedman*, *supra*, at pp. 35-36 S.C.R., pp. 121-22 C.C.C., indicate that the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference. This "totality of the circumstances" approach is similar to that found in the American jurisprudence referrable to the constitutionality of investigative stops: *United States v. Cortez*, 449 U.S. 411 at pp. 417-18, 101 S.Ct. 690 (1981); *Alabama v. White*, 110 S. Ct. 2412 (1990) at p. 2416; and in the Canadian case law relating to s. 8 of the *Charter*: *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421 at pp. 1454-55, 60 C.C.C. (3d) 161 at pp. 189-90.

In applying the analytical technique developed in *Dedman*, *supra*, it is apparent that many of the factors relied on there have no application to this case. The appellant's liberty interest interfered with in this case was not the qualified right to drive a motor vehicle but what Le Dain J. referred to at p. 35 S.C.R., p. 121 C.C.C., as "the fundamental liberty" to move about in society without governmental interference. Further, there is no suggestion that detentions such as the one which occurred in this case are necessary to properly and effectively enforce laws prescribing drug-related criminal activity. Some bases other than the limited nature of the right interfered with and the necessity of the interference must be found before this detention can meet the justifiability requirement in *Waterfield*.

In addressing this requirement, it is also essential to keep in mind the context of the particular police/citizen confrontation. Constable Wilkin was investigating the appellant and the driver of the car. They were his targets. Constable Wilkin interfered with the appellant's liberty in the hope that he would acquire grounds to arrest him. He was not performing any service-related police function and the detention was not aimed at protecting or assisting the detainee. It was an adversarial and confrontational process intended to bring the force of the criminal justice process into operation against the appellant. The validity of the stop and the detention must be addressed with that purpose in mind. Different criteria may well govern detentions which occur in a non-adversarial setting not involving the exercise of the police crime prevention function.

In my opinion, where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some "articulable cause" for the detention.

The phrase "articulable cause" appears in American jurisprudence concerned with the constitutionality of investigative detentions. In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), the court considered whether a police officer could "stop and frisk" a suspect whom he did not have reasonable cause to

arrest. In an analysis that bears a similarity to the *Waterfield* description of the common law ancillary police power doctrine, the court held at pp. 20-21 U.S., p. 1880 S. Ct., that no interference with the individual's right to move about could be justified absent articulable cause for that interference. Chief Justice Warren for the majority said:

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. *Carroll v. United States*, 267 U.S. 132 (1925); *Beck v. Ohio*, 379 U.S. 89, 96-97 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e.g., *Beck v. Ohio, supra; Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959). And simple " `good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be `secure in their persons, houses, papers and effects,' only in the discretion of the police." *Beck v. Ohio*, *supra*, at 97.

(Footnotes omitted)

U.S. v. Cortez, *supra*, at pp. 417-18 U.S., 695 S. Ct. provides a further articulation of the concept of articulable cause:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances -- the whole picture -- must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. See, e.g., *Brown v. Texas*, supra, at 51; [443 U.S. 47, (1979)] *United States v. Brignoni-Ponce*, supra, at 884 [422 U.S. 873 (1975)].
>
> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense

> conclusions about human behaviour; jurors as fact-finders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The requirement that the facts must meet an objectively discernible standard is recognized in connection with the arrest power: *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241 at p. 251, 53 C.C.C. (3d) 316 at p. 324, and serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be. Such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a "hunch". In this regard, I must disagree with *R. v. Nelson* (1987), 1987 CanLII 140 (MB CA), 35 C.C.C. (3d) 347, 29 C.R.R. 80 (Man. C.A.), at p. 355 C.C.C., p. 87 C.R.R. where it is said that detention may be justified if the officer "intuitively senses that his intervention may be required in the public interest". Rather, I agree with Professor Young in "All Along the Watch Tower", supra, at p. 375:

> In order to avoid an attribution of arbitrary conduct, the state official must be operating under a set of criteria that at minimum, bears some relationship to a reasonable suspicion of crime but not necessarily to a credibly-based probability of crime.

Support for the application of the "articulable cause" doctrine to Canadian experience can be found in *Wilson*, *supra*. That case involved the random stop of a motorist for purposes related to the enforcement of laws pertaining to the operation of motor vehicles. In holding that the conduct of the police did not result in a constitutional violation, Cory J., for the majority, held firstly that even if the detention was regarded as arbitrary, it was not, under the authority of *Ladouceur*, unconstitutional. Cory J. went on, however, to hold that the detention was not arbitrary. He said at p. 1297 S.C.R., p. 147 C.C.C.:

> In a case such as this, where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed (the articulable cause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant was detained, the detention was not arbitrary in this case and the stop did not violate s. 9 of the *Charter*.

The facts relied on by Cory J. to support the articulable cause for the stop in *Wilson* demonstrate that something less than the grounds required to support an arrest will suffice.

I also find some support for the fixing of the limits of police interference with an individual's right to move about to instances where the police can demonstrate articulable cause in *R. v. Mack*, 1988 CanLII 24 (SCC), [1988] 2 S.C.R. 903, 44 C.C.C. (3d) 513. In setting the contours of the defence of entrapment,

Lamer J. said at p. 956 S.C.R., p. 552 C.C.C., after referring to *R. v. Amato*, 1982 CanLII 31 (SCC), [1982] 2 S.C.R. 418, 69 C.C.C. (2d) 31:

> I take this statement to mean that the police are entitled to provide opportunities for the commission of offences where they have reasonable suspicion to believe that the individuals in question are already engaged in criminal conduct. The absence of a reasonable suspicion may establish a defence of entrapment for two reasons: firstly, it may indicate the police are engaged in random virtue-testing or, worse, are carrying on in that way for dubious motives unrelated to the investigation and repression of crimes and are as such mala fides.

(Emphasis in the original)

I appreciate that *Mack* was not concerned with police conduct which interfered with a discrete constitutionally protected right. It was, however, addressing the same fundamental concern which must be confronted here -- the need to balance society's interest in the detection of crime and the punishment of criminals with society's interest in maintaining the freedom of its individual members. The dangers articulated in *Mack* also exist where the police purport to exercise their coercive powers to detain an individual without the existence of facts which, objectively viewed, support a reasonable suspicion that the detained individual was engaged in criminal conduct.

I should not be taken as holding that the presence of an articulable cause renders any detention for investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances and consequently a lawful exercise of the officer's common law powers as described in *Waterfield*, *supra*, and approved in *Dedman*, *supra*. Without articulable cause, no detention to investigate the detainee for possible criminal activity could be viewed as a proper exercise of the common law power. If articulable cause exists, the detention may or may not be justified. For example, a reasonably based suspicion that a person committed some property related offence at a distant point in the past while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation.

In summary, I do not consider the articulable cause inquiry as providing the answer to the lawfulness of the police conduct but rather as the first step in the broader inquiry described in *Waterfield* and *Dedman*.

Turning to this case, I can find no articulable cause justifying the detention. Constable Wilkin had information of unknown age that another police officer had been told that the residence was believed to be a "crack house". Constable Wilkin did not know the primary source of the information and he had no reason to believe that the source in general, or this particular piece of information, was reliable. It is doubtful that this information standing alone could provide a reasonable suspicion that the suspect residence was the scene of criminal activity.

Any glimmer of an articulable cause disappears, however, when one considers whether Constable Wilkin had reason to suspect that the appellant or the driver of the car was involved in criminal activity. He knew nothing about either person and he did not suggest that anything either had done, apart from being at the house, aroused his suspicion or suggested criminal activity. Attendance at a location believed to be the site of ongoing criminal activity is a factor which may contribute to the existence of "articulable cause". Where that is the sole factor, however, and the information concerning the location is itself of unknown age and reliability, no articulable cause exists. Were it otherwise, the police would have a general warrant to stop anyone who happened to attend at any place which the police had a reason to believe could be the site of ongoing criminal activity.

As Constable Wilkin had no articulable cause for the detention, the common law police power did not authorize his conduct. It was unlawful. Following *Duguay*, *supra*, it may be that a detention although unlawful would not be arbitrary if the officer erroneously believed on reasonable grounds that he had an articulable cause. I need not decide whether such a belief could avoid an infringement of s. 9 of the *Charter*. Constable Wilkin clearly had no belief that the facts, as he believed them to be, constituted an articulable cause as I have defined it. The detention was both unlawful and arbitrary as that word has been defined in the jurisprudence: *Duguay*, *supra*; *Cayer*, *supra*. As the detention was not authorized by law, s. 1 of the *Charter* has no application. The appellant's right not to be arbitrarily detained was infringed by Constable Wilkin.

Before I turn to s. 8 of the *Charter*, I should add that although the appellant was not advised of his right to counsel until after he was formally arrested, counsel has not alleged a violation of s. 10(b) of the *Charter* and I will not address the s. 10(b) implications raised by this case.

B. Was the search of the appellant unreasonable?

Section 8 of the *Charter* states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

The search of the appellant was a warrantless one. The onus rests on the Crown to demonstrate that it was reasonable: *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265 at p. 278, 33 C.C.C. (3d) 1 at p. 14. The respondent concedes that he can only demonstrate the reasonableness of the search by first showing that it was a lawful one. The respondent seeks to establish the lawfulness of this search only on the basis of s. 101(1) of the *Criminal Code*:

> 101(1) Whenever a peace officer believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of this Act relating to prohibited weapons, restricted weapons, firearms or ammunition, he may search, without warrant, a person or vehicle, or place or premises other than a dwelling-house, and may seize anything by means of or in relation to which he believes on reasonable grounds the offence is being committed or has been committed.

Assuming that this section is constitutional, I find nothing in the record which supports a search based on this authority. The officer never suggested that he had any belief, much less a belief based on reasonable grounds, that the appellant was in possession of a prohibited or restricted weapon. He said that he had some concern that the appellant was in possession of a knife when he saw the bulge in the

appellant's pocket. However, he denied that he searched the appellant because of that concern. He gave the following evidence:

Q. I suppose once he admitted having some involvement in the past with a knife is it fair that you would have searched him? You noticed the bulge, and then you would have searched him because you feared that he might have a knife. You would have searched him regardless of the circumstances.

A. It is not fair to say that, no, sir.

Q. How would you put it then? You see him. He's standing there. He admits to having previous dealings with a knife. That caused you some concern, obviously.

A. It made me think, yes.

Q. And then you noticed this bulge in his pants?

A. That's correct.

Q. And it was a possibility that it could have been a knife, in your mind.

A. That possibility does exist, yes.

This evidence does not establish even a belief based on reasonable grounds that the appellant was in possession of a knife, much less a reasonable belief that he was in possession of a knife which was a prohibited or restricted weapon. Constable Wilkin did not advert to the powers provided by s. 101(1) of the *Criminal Code* when questioned concerning the reasons for his search of the appellant. I regard this argument as an after-the-fact attempt to justify the search. The evidence cannot support it.

The appellant's reliance on s. 101 of the *Criminal Code* also assumes that the search of the appellant began when Constable Wilkin felt the appellant's front pant pocket. The reasons in *Mellenthin*, *supra*, indicate that the search cannot be so limited but must be taken as having commenced when the appellant was initially questioned by the police officer. The search proceeded from that point until the cocaine was recovered. Once the questioning of the appellant is taken as part of the search, then s. 101 of the *Criminal Code* cannot provide any authority for the search.

The search of the appellant by Constable Wilkin was unreasonable and in violation of the appellant's right to be secure against unreasonable search or seizure.

C. The admissibility of the cocaine

Although the appellant's rights, as guaranteed by ss. 9 and 8 of the *Charter* were infringed, the evidence obtained as a consequence of those violations remains admissible unless the appellant establishes that the admission of the evidence could bring the administration of justice into disrepute. The analysis required by s. 24(2) of the *Charter* has been developed by the Supreme Court of Canada in numerous decisions beginning with *Collins*, *supra*. The recent pronouncement in *Mellenthin*, *supra*, is particularly helpful because of the factual similarities between that case and this one. In *Mellenthin*, as indicated earlier, the appellant was stopped while driving his motor vehicle. Subsequent to the stop, he was questioned and eventually the contents of his vehicle were searched. That search yielded narcotics. The trial judge held that the search was unreasonable and excluded the seized drugs and statements made by *Mellenthin* after he was stopped. In concluding that the trial judge had properly excluded the

narcotics from evidence, Cory J. held that the evidence entitled the trial judge to conclude that the narcotics would not have been discovered but for the *Charter* violation and that she correctly characterized the breach as a serious one. Cory J. concluded that the strong casual nexus between the unconstitutional search and the state's ability to discover the narcotics in the possession of the appellant meant that the admission of the narcotics into evidence would adversely affect the fairness of the trial. In a statement clearly intended to dissuade unreasonable searches of those properly detained at random check stops, Cory J. said at p. 491 C.C.C., p. 75 C.R.R.:

> The unreasonable search carried out in this case is the very kind which the Court wished to make clear is unacceptable. A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted.

(Emphasis added)

The circumstances presented here are exacerbated by the unconstitutionality of the initial detention. If, as Cory J. indicated, the fruits of an unreasonable search conducted following a lawful stop "should not be admitted", the case for the exclusion of such evidence where the stop is unconstitutional becomes even stronger. There can be no doubt that Constable Wilkin would not have discovered the narcotics in the possession of the appellant but for the double-barrelled infringement of the appellant's constitutional rights.

The seriousness of these constitutional violations is also clear. Constable Wilkin obviously considered that any and all individuals who attended at a residence that the police had any reason to believe might be the site of ongoing criminal activity were subject to detention and questioning by the police. This dangerous and erroneous perception of the reach of police powers must be emphatically rejected. Judicial acquiescence in such conduct by the reception of evidence obtained through that conduct would bring the administration of justice into disrepute.

The evidence should have been excluded.

IV. CONCLUSION

In my view, the appeal must be allowed and the conviction quashed. As the Crown had no evidence against the appellant, absent the seized cocaine, this is an appropriate case in which to enter an acquittal.

Appeal allowed.