[Indexed as: **R. v. K. (A.)**]
Her Majesty the Queen and A. K., A young person
Ontario Court of Justice
Docket: Toronto Y132644
2014 ONCJ 374
Brian Weagant J.
Judgment: July 30, 2014*

Charter of Rights and Freedoms —— Arbitrary detention or imprisonment [s. 9] —— Police carding practice without reasonable suspicion violating s. 9.

Charter of Rights and Freedoms —— Unreasonable search and seizure [s. 8] — Reasonable grounds —— Search following detention not justified for reasons of officer safety.

Charter of Rights and Freedoms —— Arrest or detention [s. 10] — Right to be informed of reasons for arrest [s. 10(a)] —— Carding without being advised of reason for detention violating s. 10 rights.

Charter of Rights and Freedoms —— Charter remedies [s. 24] — Exclusion of evidence —— Evidence of gun found as result of police carding practice contrary to Charter to be excluded as violations very serious.

This case stemmed from a street investigation of five youths in a lane without sidewalks near a construction zone. The police prevented the youth from leaving the scene in their BMW vehicle parked in that lane. The accused youth was charged with eight counts relating to the possession of an unregistered loaded handgun found in his coat pocket.

The police employed the "carding" practice of a Toronto Anti-violence Intervention Strategy unit. This practice involves stopping citizens, whether there is an offense being committed or not, and recording the contact and personal information about the citizen on a "208" card. This case involves the practice at the time of the alleged offense. The Toronto Police Board has since passed a new policy on the use of carding. The trial judge evidence included the oral testimony called by the Crown, in-car police videos, and an audio recording of the testimony of officers who appeared at the Special Investigative Unit for questioning, made in response to an investigation of the accused's fractured jaw caused by the police throwing the accused to the ground face first when he did not consent to be searched. The accused argued for exclusion of evidence because his *Charter* rights had been violated and for a stay of proceeding because of the police violence.

Held: Sections 8, 9 and 10 of the *Charter* were breached and the evidence of the gun was excluded under s. 24(2) of the *Charter*.

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*A corrigendum issued by the court on September 18, 2014 has been incorporated herein.

The police had arbitrarily and illegally detained the youth contrary to s. 9 from the moment a police car blocked the BMW and the police called for backup as the police "had" about six males. It was clear that once the group became people of interest, anything and everything they did became suspicious. Even though it became clear the youth were in the street getting to their car, suspicions were not laid to rest on the basis that the vehicle was "high end" and some of the youth were black. This was an unspecified investigation based on unsupported suspicion; the officers arbitrarily prolonged this interaction between themselves and the males, with a view to acquiring the reasonable suspicion to detain. The coordinated response of the officers suggested this was a modus operandi known to all officers present. *R. v. Mann* made it clear that a brief detention for investigative purposes is a recognized but limited police power, but there needs to be reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. Here the officers' evidence on public safety as a reason for the search had been discredited. The accused had not been advised of his detention, the reason for it and that he could speak to counsel.

The evidence of the gun should be excluded under s. 24(2). The *Charter* violations were very serious. The violations were probably in good faith, given that the carding practice was the modus operandi at the time. The officers tailored their evidence to suggest their state of mind at the time accorded with constitutional requirements. They intentionally danced around the lines of legality by wilful blindness or by using deliberately illegitimate policing policy. They casually violated the *Charter* to fulfill their TAVIS mandate. They fractured the accused's jaw even though there were no grounds for suspicion. This case did involve the frightening prospect of a teenager with a loaded gun. However, the police had a heightened duty to protect the youth's constitutional rights when they discovered his age. In the long term, the courts are the final guardians of constitutional rights and police practices placing a premium on a citizen being denied his constitutional rights can only be seen as bringing disrepute to the justice system.

It was not necessary to deal with the application for a stay.

Comment

On April 24, 2014, the Toronto Police Service implemented a "Community Contacts" policy to guide the collection and retention of personal information obtained during police-initiated encounters (colloquially known as "208 carding") following a *Toronto Star* investigative report that Black males are disproportionately carded by police. The policy is a "proactive rights-based" attempt to place limits on the use of carding and, in particular, discriminatory carding and to better educate individuals about their rights, including their right to refuse to co-operate, during these encounters. For example, the policy limits carding to public safety investigations and requires the Chief to establish procedures and training practices to ensure compliance with *Charter* and human rights standards.

The concerns with carding were first raised by Justice Harry LaForme, as he then was, in *R. v. Ferdinand* (2004), 21 C.R. (6th) 65 (Ont. S.C.J.), wherein he observed (paras. 20-21):

> While I am not at all deciding that this is the case — and it is not necessary for me to do so — I make my observations only to express a profound note of caution. If the manner in which these 208 cards are currently being used continues; there will be serious consequences ahead. They are but another means whereby subjective assessments based upon race — or some other irrelevant factor — can be used to mask discriminatory conduct. If this is someday made out — this court for one will not tolerate it.
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> This kind of daily tracking of the whereabouts of persons — including many innocent law-abiding persons — has an aspect to it that reminds me of former government regimes that I am certain all of us would prefer not to replicate.

K. (A.) is another stinging rebuke of TAVIS policing in Toronto for racial profiling and carding. In finding a section 9 *Charter* violation, Justice Weagent concluded that the police decided to prolong the investigation because of "the price of the vehicle, the age and colour of the occupants" (at para. 54). This is the essence of racial profiling. He further observed (at para. 59) that

> Every movement of these males was cast by the police in a nefarious light in order to justify what unfolded. Walking, trotting, running, head turning, slowing down, getting into a high end car, being young, being black, being in the back seat of a car - all of these behaviours and characteristics were cited somewhere in the testimony as being in the officer's mind.

Ten years later, Justice Weagent's decision in *K. (A.)* is welcome. It is the most direct ruling to date, based on a very careful review of the evidence, that the much criticised carding practices used for so long in Toronto are clearly a violation of the strict *Mann* standards for investigative detention. These require, for example, individualised reasonable suspicion of a suspected crime for a police stop and reasonable grounds for public safety concerns to permit any search (as recently confirmed in *R. v. MacDonald* (2014), 7 C.R. (7th) 229 (S.C.C.)). The British Columbia Court of Appeal has been particularly firm in excluding evidence found as a result of stops that do not meet these *Charter* standards; see *R. v. Reddy* (2010), 71 C.R. (6th) 327 (B.C. C.A.) and *R. v. Dhillon* (2012), 93 C.R. (6th) 260 (B.C. C.A.).

K. (A.) marks the second recent case to find that the police improperly used race as a proxy for criminality. See also *R. v. Lam* (2014), 2014 ONSC 3538 (Ont. S.C.J.).

K. (A.) is also significant because it is yet another case involving a judicial finding of police perjury. In relation to one of the officer's testimony, the trial judge noted that "this is the first of several fabrications . . . fed to the court in order to give his explanation of the events that followed a patina of legality" (at para. 11). See further the discussion of this issue in David M. Tanovich, "Judicial and Prosecutorial Control of Lying by the Police" (2014) 100 C.R. (6th) 100.

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Cases considered by *Brian Weagant J.*:

R. v. Clayton (2007), 2007 CarswellOnt 4268, 2007 CarswellOnt 4269, 2007 SCC 32, 364 N.R. 199, 281 D.L.R. (4th) 1, 47 C.R. (6th) 219, 158 C.R.R. (2d) 81, 227 O.A.C. 314, [2007] 2 S.C.R. 725, 220 C.C.C. (3d) 449, [2007] S.C.J. No. 32 (S.C.C.) — referred to

R. v. Grant (1993), [1993] 8 W.W.R. 257, 84 C.C.C. (3d) 173, 159 N.R. 161, [1993] 3 S.C.R. 223, 24 C.R. (4th) 1, 35 B.C.A.C. 1, 57 W.A.C. 1, 17 C.R.R. (2d) 269, 1993 CarswellBC 1168, 1993 CarswellBC 1265, [1993] S.C.J. No. 98, EYB 1993-67107 (S.C.C.) — followed

R. v. Kokesch (1990), [1990] 3 S.C.R. 3, [1991] 1 W.W.R. 193, 121 N.R. 161, 51 B.C.L.R. (2d) 157, 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, 50 C.R.R. 285, 1990 CarswellBC 255, 1990 CarswellBC 763, EYB 1990-67022, [1990] S.C.J. No. 117 (S.C.C.) — considered

R. v. Mann (2004), 21 C.R. (6th) 1, 241 D.L.R. (4th) 214, 185 C.C.C. (3d) 308, 122 C.R.R. (2d) 189, 324 N.R. 215, [2004] 3 S.C.R. 59, 2004 SCC 52, 2004 CarswellMan 303, 2004 CarswellMan 304, [2004] 11 W.W.R. 601, 187 Man. R. (2d) 1, 330 W.A.C. 1, [2004] S.C.J. No. 49, REJB 2004-68801 (S.C.C.) — considered

R. v. N. (A.) (2014), 2014 CarswellOnt 9393, 2014 ONCJ 331, [2014] O.J. No. 3347 (Ont. C.J.) — followed

R. v. Simpson (1993), 1993 CarswellOnt 83, 43 M.V.R. (2d) 1, 79 C.C.C. (3d) 482, 60 O.A.C. 327, 20 C.R. (4th) 1, 12 O.R. (3d) 182, 14 C.R.R. (2d) 338, [1993] O.J. No. 308 (Ont. C.A.) — considered

R. v. Suberu (2009), 193 C.R.R. (2d) 96, 2009 SCC 33, 2009 CarswellOnt 4106, 2009 CarswellOnt 4107, 390 N.R. 303, 66 C.R. (6th) 127, 245 C.C.C. (3d) 112, 97 O.R. (3d) 480 (note), [2009] 2 S.C.R. 460, 309 D.L.R. (4th) 114, 252 O.A.C. 340, [2009] S.C.J. No. 33 (S.C.C.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to
s. 7 — considered
s. 8 — considered
s. 9 — considered
s. 10 — considered
s. 24 — considered
s. 24(2) — considered

Youth Criminal Justice Act, S.C. 2002, c. 1
s. 2(1) "young person" — referred to

TRIAL of accused on eight charges of weapons-related offences.

Ms Jody Milstein, for Crown
Mr. Ugo Cara, for Defendant, A.K.

***Brian Weagant J.*:**

1 A. K., a young person within the meaning of the *Youth Criminal Justice Act,* stands charged that on the 17th day of February in the year 2013 in the City of Toronto, he was in possession of an illegal handgun, was an occupant in a motor vehicle knowing there was a firearm in the car, had in his possession a loaded handgun, had a handgun that he knew was obtained by the commission of an offence, possessed the gun knowing that A. K. did not have a proper licence to so possess, carried a concealed weapon, stored a handgun in a careless manner and store ammunition in a careless manner. All eight of these counts stem from a single occurrence: on the night of the 17th of February, A. K. was searched and a loaded handgun was found in his possession.

2 The accused seeks alternative remedies under s. 24 of the *Charter.* First, he claims that there was a persistent series of *Charter* violations by the police that are beyond justification. As a result, the accused claims that the evidence collected, the handgun and ammunition, should be excluded from evidence lest the justice system would be brought into disrepute. Further, the accused claims that his treatment at the scene — his jaw was fractured in a takedown and there was an inordinate delay in getting him to medical treatment — amounts to a s. 7 violation of such gravity, that the integrity of the judicial process would be undermined to let the case proceed. The accused seeks a stay of proceedings on these grounds.

3 For what I say below, it is my view that the accused young person's s. 8, 9 and 10 rights were severely violated on February 17, and in spite of the community's enormous interest in seeing a handgun case properly disposed of on its merits, my application of the appropriate test leads me to conclude that the evidence must be excluded. Thus, I do not need to definitively decide the stay of proceedings application, but I necessarily need to review the takedown and injury of the young person in the context of the facts and the s. 24(2) analysis.

4 The Crown concedes there was a detention and search in this case, but argues that the key to any analysis about the justification therefor, requires a determination of when the detention began. The Crown argues that the actions of the police were justified, primarily on the grounds of officer safety.

5 This case is about the street practices of a Toronto Anti-violence Intervention Strategy unit. In particular, it is about the controversial practice of 'carding', a practice involving stops of citizens by the police, whether there is an offense being committed or not, and recording the contact and personal information about the citizen on a "208" card. This case involves the way this was done at the time of the alleged offense.

The Toronto Police Board has since passed a new policy[1] on the use of carding, according to the local press

The Facts

6 I put the following fact scenario together, using the testimony I heard in court, by watching in-car police videos, and by listening to the testimony of officers who appeared at the Special Investigative Unit for questioning, subsequent to the facial injury of the young person before the court.

7 On February 17, 2013, Officers A. Shymchonak and C. Alexakis were partnered in a marked police vehicle in the downtown core, working for the unit known as TAVIS (Toronto Anti-violence Intervention Strategy). Officer Alexakis was driving. Two other TAVIS unit cars were making traffic stops on Yonge Street, one north of Gould Street and the other south of Gould Street. Gould Street runs parallel to Dundas, just north of the Eaton Centre. TAVIS officers working in a defined area generally try to see how their colleagues are faring should citizens be engaged, so the officers tend to try to view other cars to see if assistance is needed.

8 Officers Shymchonak and Alexakis were in a vehicle designated TAVIS 59. They travelled west along Dundas Street to Yonge Street and heard of the other TAVIS car stops on the police band. They decided to get a view of the stops. The stops were north and south of Gould Street, in the west curb lane. TAVIS 59 proceeded north on Yonge Street and turned onto Gould Street. Officer Alexakis testified that he did this so that he could do a U-turn and then park at the mouth of Gould Street and Yonge Street and keep an eye on the two traffic stops.

9 It was 7:21 in the evening. It was dark and there had been snowfall two days before, then a melt, and it was now minus 12 Celsius.

10 Officer Alexakis executed a U-turn on Gould Street. Gould Street was and is currently blocked to through traffic, as there is a construction project at the northeast corner of Gould and Yonge. The portion of Gould between Yonge and the warning signs blocking through traffic, is for construction traffic, and for anyone having business on O'Keefe lane. O'Keefe lane runs north-south and is parallel to Yonge Street. On its east side are buildings belonging to Ryerson University. On its west side there are back entrances and parking spaces for the business on Yonge Street. The lane runs between Gould Street and Gerrard Street., and as with most lanes in the older part of Toronto, the properties on it come

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[1]See *The Toronto Star,* April 24, 2014, "Police board clears tough new carding rules" and *The Toronto Star,* July 26, 2014, "Carding drops but proportion of blacks stopped by Toronto police rises".

right to the lane paving — i.e. there are no sidewalks. Pedestrians must share the street with any vehicular traffic.

11 As Officer Alexakis passed the lane after his U-turn he saw two figures running down the lane. They were, according to him, 20 to 30 metres up the lane. After a pause of several seconds he decided to drive up the lane to determine what business these people had being in the lane. It took the car more time to reach the figures than it did to make the U-turn. This is significant, because Officer Shymchonak testified that he saw a group of 3 to 5 males very close to the corner of Gould Street and the lane and that they were headed northbound. The in-car video tape reveals it took less than 5 seconds for the car to execute a U-turn; it then paused for 2 seconds at the entrance to O'Keefe Lane; the figures travelling northbound on the lane are almost out of sight. To reach them, the police car took 9-plus seconds, travelling at car speed. That Officer Shymchonak saw 3-5 people at the corner of Gould and O'Keefe is, therefore, a physical impossibility. In my view, this is the first of several convenient fabrications Officer Shymchonak fed to the court in order to give his explanation of the events that followed a patina of legality. It was Officer Shymchonak's evidence that the group he saw at the corner were suspicious because several were trotting and several weren't. Several turned their heads back as if to see if they were being followed by the police which they had just seen making a traffic stop on Yonge Street.

12 Officer Shymchonak could not possibly have seen these males at the corner of Gould Street and O'Keefe lane.

13 Officer Alexakis' observation, that the figures were far down the lane at first sighting, is the version I accept, because the video tape is consistent with this. Both officers testified that the figures seemed to be turning around and looking backwards, as if to see if they were being "followed". I accept that this observation may have been made, but in all likelihood if a group of people walking in this narrow lane were suddenly confronted by headlights (the lane is not lit; probably the only thing someone looking back could see would be headlights), it would behoove them to reposition themselves carefully along one side or another of the lane in single file in order to accommodate the vehicle. If the officers' testimony about the amount of ice in the lane is correct, then one might naturally slow one's pace to ensure footing if sharing a narrow lane with a vehicle.

14 The officers testified that some of the figures were walking quickly, or running and some were walking. Some one or two glanced back. Officer Shymchonak testified that when they saw the car, the group started walking slowly.

15 The mystery of why the males were in the lane was completely unraveled for the officers when they finally reached the group. The group

had parked their car behind a business and were returning to their vehicle, situated in an enclave with a wall on one side and a parked car on the other. They were starting to enter the vehicle as the police car pulled up. Officer Shymchonak testified that the police car "partially blocked" the front bumper of the group's car.

16 Upon stopping, the officers could see they were dealing with four young men. All officers who testified referred to the make of the car or its value: the car was variously referred to as a BMW, high-end car, BMW SUV, X-5 — as if this had any significance. One seldom refers to the only relevant car in a story by its make or value. It was obviously significant to the officers. The following answer, given in chief by Officer Shymchonak, may shine a little light on the significance of the make of the car. When asked by Madam Crown, "where is the destination of this group", she was given the following perplexing answer:

> Once — ah — we're approaching the entrance to this enclave first thing I see a high end vehicle, blue colour M — BMW. I see that we have about five, six parties, again, I didn't do calculation how many. At this point I see that some males are male black.

17 This answer is perplexing because the officer was asked for the group's destination. His answer referred to a valuable car and the fact that some of the parties are male black. What he actually did was testify about what he thought was significant at that moment.

18 After the police car came to a stop, Officer Alexakis rolled down his window and started to ask some questions of the men. When asked why he did this, he said:

> Well, it, um, it struck me as odd. I now have four people in a dark laneway. Two of them are running north, away from my car. I don't know why they're running. I don't know if they're hurt, I don't know if somebody else is hurt. I don't know if they need help. I don't know if they're running away from the police. Maybe, um, they got scared from the two vehicle stops on Yonge Street. I don't know. It just struck me as odd that two were running away from my car, and even more peculiar was that they were about to enter a high-end vehicle that was parked in a dark alleyway. The men I was — the people I was talking to were, I thought, young, very young, to be — to have a car like that. Not that young people don't have high-end cars but it just struck me as peculiar. I don't know what's going on. I want to know what is, what is going on. It's a construction site. It's a place where such a vehicle should not be at. Um, it's dangerous. There's signs that say, "Danger. Do not enter."

19 The construction site to which Officer Alexakis refers is now behind them, to the south. Further, the rest of O'Keefe lane is lined with Ryerson offices and classrooms on one side and the back entrances to businesses on the other. The only reference I heard to something akin to "danger, do not enter" signs was in a description of how Gould Street

eastbound is blocked to through traffic. There was no evidence that could support the notion that these figures were running from anything, but in fact were running *to* their car. There was no evidence to suggest that they were running away from the police car, because they were quite far down the lane before the police car even entered the lane. There is no evidence that the people in the lane could even tell it was a police car, given the lighting and the fact it was night. When shown his own in-car video, Officer Alexakis has to admit that when the group comes into view, no-one is looking backwards.

20 If what these two officers say is to make any sense at all, it is they had now abandoned their investigation of 'why' the males are in the lane, and the focus of the investigation now turned to 'why young black males would be getting into a BMW'.

21 The next important fact is that the instance Officer Shymchonak observed that the young men were getting into a BMW and that at least some of them were black, he gets on TAVIS radio band and announces to other cars in the area that they needed back-up because they "had about six males". He testified that he did this because he needed another car to assist in the "investigation" of this "strange behavior" as there were 6 of them and only 2 officers.

22 Officer Alexakis gets out of the police car and three of the males walk over to him. They are asked if they go to Ryerson and they say no. Officer Alexakis tells them that there are problems in the lane with construction theft (none of the males was holding anything) and that the officers would be 'checking them out' and making sure 'everything is in order. He then said, "Then you'll be on your way."

23 These males were not free to leave until they were checked out for construction site theft, an offence for which there isn't one shred of evidence.

24 At the same time, Officers Khan, Osman and Fadel were arriving on the scene. Officer Shymchonak exited the police car and approached the group's vehicle with a flashlight. He testified that he saw a male trying to conceal himself in the back seat of the SUV. He came to the conclusion he was trying to hide because he was wearing"...dark clothing and appeared to me he was ducking behind the driver seat and was looking from behind there are a head support of the driver seat towards that area where our car was stopped (sic)." The observation time would have been several seconds because Officer Shymchonak went up to the rear passenger window and shone his flashlight on the head of the person in the back seat who, on the video filed as evidence, is sitting upright and appears to move away from the glare of the flashlight.

25 At this point Officer Alexakis asks the person he is investigating what 'that guy is doing there' and 'why there is a person hiding in the car'. He is told he is not hiding. Officer Alexakis asks if the group had permission

to park there and he was told that an Asian man had given permission. The person that the officer was investigating tells of outstanding weapons charges and then 'consents' to a pat-down by Officer Alexakis for safety reasons.

26 The person in the back of the SUV moves forward across the console and between the front seats in order to exit the vehicle. This manoeuvre was described as suspicious by both Officer Shymchonak and Officer Khan because the person in the car managed this feat with his left hand in his pocket the entire time. Both officers told me that one would need two hands to steady oneself. In any event, Officer Shymchonak testified that he now suspected the person had a gun and that explained the hand in the pocket. According to Officer Shymchonak, this was where the 'detention' began. When Officer Shymchonak was played the video showing the person in the back seat exiting by going over the console between the front seats, he reluctantly admits that both hands are visible. Next, it was put to him by counsel that for two days the officer had been testifying that he had seen the left hand in the pocket throughout; Officer Shymchonak tried to explain why the video is inconsistent with that previous testimony:

> After that. I testified that I cannot be hundred percent sure that it always was in the, um, pocket but at some point it did appear to me it was in the left; not appear it was in the left pocket while he was crossing the central console.

27 It is not clear from the video whether the person in the back of the car does put his left hand in his pocket "after that"; what is important is that the Officer had previously testified in chief that he had grounds to detain on the basis of how the person suspiciously crossed the central console, now admitting that there was nothing unusual about how it was done and visibly using both hands.

28 The person in the back of the car was the young person in front of the court. He immediately supplied Officer Shymchonak with a driver's licence; according to the Officer this was done before he was even asked to identify himself, although on the video tape it is clear some officer was asking the group members to provide identification.

29 Upon looking at the driver's licence, he Officer knew he was dealing with a young person within the meaning of the *Youth Criminal Justice Act.*

30 At this point there are at least five police officers on scene investigating the five members of the group (not six). Officer Shymchonak never tells A.K. that he is detained for the purpose of investigation. A. K. is told, briefly, that he is being recorded, that the questioning is due to the fact that there are thefts from the construction site and there is graffiti in the area, all of which is concerning for local businesses. At this point it is

clear from the video that no one in the group is carrying anything, let alone burglary tools, stolen construction equipment, or tagging paint.

31 Officer Shymchonak also proceeded to collect information from the young person in order to fill out the 208 card, as was the practice at the time. Because the Officer testified that he determined that the young person was not free to leave when the Officer made the observations of how the young person exited his vehicle, he was asked by Madam Crown why he did not provide the young person with notification of his rights once he was out of the car. The officer gave the following answer:

> At this point I was advising him of reasons why we talk to his friends and himself, and I continued giving observations. And then, um, once belief that he was in possession of a firearm became a priority, that became my main concern, my safety.

32 I take from this answer that either the officer had no genuine concerns for officer safety, and he used the 'carding' as an opportunity for "continued giving observations" (which I take to mean making more observations as part of his investigation), or that his concern for his own safety suspended the young person's constitutional rights. In a similar vein, the Officer was asked why paper identification is sought from the people being investigated. The officer replied that it was so that the officers had names of the people with whom they were engaged. Upon further cross-examination, the officer admitted that the identification information is used to do a CPIC search on the investigated citizen.

33 At some point Officer Shymchonak tells the young person that he is going to search the young person for safety reasons. Officer Alexakis testified that Officer Shymchonak told the young person that he could not leave, although this is not audible on the video tape. The young person tells Officer Shymchonak that he is not consenting to a search. The situation escalates and the young person tries to leave the scene, repeating over and over that he is not consenting to a search. He is bear-hugged by Officer Shymchonak and the two falls to the ground in a struggle. Officer Alexakis gets involved at this point. As the young person attempts to get on his feet, Officer Alexakis grabs the seat of his pants and drops him face first on the ground. His pants are pulled down in the process. Within seconds the young person is handcuffed to the rear and he is held in place by Officer Alexakis. It is out of view on the video, but the testimony tends to suggest that the officer used his weight by putting his knees on the back or shoulders of the accused. The young person complained of pain in his face and was told to shut-up. He was searched in this position before being told he was detained or under arrest. According to the testimony, this again was done for officer safety, as even handcuffed people have been known to get to weapons in their clothing and use them.

34 Officer Shymchonak describes what happened outside of the car as dynamic. He describes a young person looking around for a route to escape, with a look of desperation and nervousness on his face. He describes a young person that is 'blading' the left side of his body away from Officer Shymchonak, which according to the Officer, is a common body move of someone with a gun. Officer Shymchonak testified that he thought the young person had a gun and was going to shoot him and that is why the situation escalated so quickly. Needless to say, this is contradicted by what can be seen on the video. Not only does it not appear that the young person is preparing to take a shot, but he is actively trying to leave the scene, as he has never been told he is detained and is not under arrest. The only thing the young person is saying (over and over) is that he is not consenting to a search.

35 Officer Shymchonak wrote in his notes that he felt a hard object when he bear-hugged A. K. In his testimony he added that before the struggle began he actually had occasion to begin a search of the front of A.K.'s coat with his hand and he felt a hard object, thus adding to his suspicions. This is an important change in the chronology, for it provides, at least in the mind of the Officer, more of a justification for the coming takedown. However, if he indeed did search A.K.'s coat, this search was undertaken *before* the accused objected to a search.

36 Officer Alexakis did not know why the struggle started, but felt compelled to assist his partner.

37 As I stated above, once the young person is on the ground and being physical detained and told to shut-up, his person is search. A gun was located in an inside pocket (not the front left pocket that figured so prominently in Officer's suspicions). All of the group are now told they are under arrest. At this time other 4 other officers arrive and run from their cars.

38 An ambulance was called at 19:33 and it arrived at 19:46. After a brief examination of the young person, the ambulance drivers waited for the police to assign various duties amongst themselves, including who would accompany the young person to the hospital. The young person was not taken from the cruiser to the waiting ambulance until 20:20, some 45 minutes. The evidence did not suggest *male fides* on the part of the attending officers, but the lack of dispatch strongly suggests indifference in dealing with a young person who needed medical examination.

39 The scene had to be held as this became a matter for the SIU because of the injury to A.K. The testimony at the SIU is of limited importance in the current application, except where testimony may have changed. Of significance is the testimony of Officer Alexakis at the SIU. He never mentions that the young person when head first down to the ground because Officer Alexakis picked him up by the seat of his pants and grounded him. When Officer Alexakis was asked why he never men-

tioned this to the SIU he replied that he was never asked. I might have thought that the exact physical chronology of the takedown was the entire focus of the SIU and by not mentioning how the young person actually went down, even if someone is not specifically asked, raising serious concerns about that investigative process. However, the only relevance to the case in front of me is that how the testimony was given at the SIU may reflect on general credibility.

40 To a certain extent, the practices of TAVIS play a role in this saga. For example, neither Officer Alexakis or Shymchonak could remember any conversation in the car leading to the car entering the lane in order to investigate the people there. In fact, Officer Shymchonak testified that it might have been something like a hand signal, indicting there is something to investigate in this direction. When there were five officers on scene, each went about his business in a routine fashion. None of the three officers who arrived first to assist were even told why the males were being investigated, yet participated in an investigation. It is clear that this was routine TAVIS procedure. Officer Osman, when asked if the person he was 'carding' was free to leave, said that he would defer to Officers Shymchonak or Alexakis, because he (Osman) didn't know whether the group were detained or under arrest. In other words, the person he was carding could not leave Osman's presence, as Osman was in the dark about where the investigation was at procedurally.

41 In a completely different thread of evidence, Officer Shymchonak's credibility was tested directly. He was asked if in the course of his TAVIS duties he engaged in illegal searches. Of course his answer was "no". Evidence was called that in the fall of 2013, TAVIS was patrolling 1 Vendome Place complex. There were 12 to 16 officers. Officer Shymchonak was part of this patrol. When he saw A. K. walking from a building in the complex to the street, he told the officer beside him that he recognized A.K. from a previous arrest. Depending upon which officer's account is reliable, Officer Shymchonak either walked quickly after A.K., or broke out into a full run. Sgt. Stephanie Burritt says that she had to run to catch up to him. When she reached the scene there was Officer Shymchonak, A.K. and another person who we now know was A. K.'s surety. A.K.'s surety was bringing her car to the curb in order to give A.K. a ride to school. Sgt. Burritt conveniently cannot remember anything about the interaction between Officer Shymchonak and A.K., because she says her focus was on the incredibly loud anger coming from A. K.'s surety. A.K.'s surety, V.G., gave evidence that she saw A.K. being searched. She quickly attended and asked Officer Shymchonak what was going on. She was told that A.K. was being searched for safety reasons. She testified that Officer Shymchonak, after being apprised of where A.K. was headed, looked in A.K.'s knapsack, as well. She testified that she got very irate and asked if A.K. was under arrest for something. She got no reply. She then accused the officers of harassing A.K. be-

cause he is black. Neither Officer Kim nor Sgt. Burritt remember seeing anything that was described by V.G., although they conceded a search *might possibly* have taken place as they say their true attention was focused elsewhere (i.e. at the irate surety). Sgt. Burritt added, "I wouldn't blame him if he did search him." When Officer Shymchonak was asked about the incident, the furthest he would go is accepting the 'possibility' that he did the searches.

42 I accept the evidence of V.G. on the point.

Analysis

43 Obviously, there are marching orders that members of TAVIS are given. As I refer to above, without any dialogue, Officers Shymchonak and Alexakis knew exactly what to do when they arrived at the enclave to investigate why the males were in the lane. Other officers arriving at the scene went directly into 'carding' procedure, without even being briefed on why these men were targeted.

44 There is another layer of TAVIS procedure that became evident in this case. Once people become of interest, anything and everything they do becomes suspicious. Walking or running in a lane on a cold night and looking about while travelling, according to Officers Shymchonak and Alexakis is behavior consistent with any number of nefarious explanations: they were running from the police stops on Yonge, they were making sure they weren't being followed, they were trying to get away from Officer Alexakis' police car, they were breaking into the construction site, or they were tagging the backs of buildings. Nowhere in the evidence did they ever countenance the notion that people might be in the lane as it was the only route to their destination. However, once these males were targeted, even though the real reason for their being in the lane — to get to their car — should have put prior suspicions to bed, the fact that they had already been targeted for investigation, all of the nefarious and suspicious conclusions I have listed above still seemed to apply for the purposes of TAVIS procedure. It is worth repeating that these males had no goods in their hands, no construction site property, no spray paint cans or anything else that suggested they were involved in crime.

45 The simple act of trying to get into one's car was suspicious. Even more suspicious: what were these young men doing getting into a BMW?

46 I note that upon observing young black men getting into the BMW, Officer Shymchonak was on the TAVIS band immediately asking for backup, saying they "had" six males. This is obviously some sort of TAVIS code. He testified that the police car stopped, partially blocking the bumper of the SUV.

47 In my view the detention in this case began when the police car partially blocked the SUV and a call was made for backup as the officers

"had" about six males. Any reasonable individual would assume there was going to be a threat to individual freedom of choice because the police had already targeted this group for investigation and were blocking their exit. The detention here was both physical and psychological. Officer Alexakis made it clear that no one could go until the police determined that 'everything was in order'.

48 It is difficult to say what exactly was in the minds of the two officers, because of the overreaching importance they put on every single thing they saw. And when they knew of the true and legitimate reason the males were in the lane, the officers refused to abandon their characterization of the actions of the males as suspicious. Once the officers learned the males were in the lane to get into their car, the officers then decided that getting into *that particular car* was now the focus of suspicion. When Officer Alexakis learns there is someone sitting in the backseat of the car, he immediately asks why the person is hiding. The citizen cannot win in this scenario.

49 This was an unspecified investigation based on unsupported suspicion; the officers arbitrarily prolonged this interaction between themselves and the males, with a view to acquiring the reasonable suspicion to detain. This seems to be the *modus operandi* that all officers knew.

50 In my view the prolonged questioning to obtain grounds to detain was for naught: it is my opinion they had already detained these males within the meaning of *R. v. Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.) and *R. v. Suberu*, [2009] 2 S.C.R. 460 (S.C.C.). These males were almost immediately asked to turn over identification to the police. The requests can be heard on the video. Once in the hands of police, how can one reasonably argue that the citizen is free to leave, especially since it was admitted that the purpose of getting the identification is to run it on CPIC.

51 If I am wrong and the reasonable suspicion necessary to support an investigative detention came later in the scenario, it would be impossible to pinpoint exactly where. For example, Officer Shymchonak says that he formed the necessary reasonable suspicion when the accused was crossing the console. The officer remembers him crossing with one hand in a pocket, as if to protect a gun (the officer was very specific: not knife, or drugs, but gun). Unfortunately for the officer, the video revealed and the officer conceded that both hands are visible as the young person crosses the console. The hand in the pocket must have been later, according to the officer. However, he testified that in his mind, the accused was not free to leave at that point. The reliability of the officer on the issue of suspicion was left in tatters by the end of cross-examination.

52 It does appear that the embellishments and chronology of observations leading to grounds to detain were put together by the officers *after* the gun was found. They knew they had no grounds to stop these men. They did know, however, that the search would be scrutinized for consti-

tutionality. The two officers were unreliable at best and fraudulent at worst, when describing what was going through their minds *vis a vis* their grounds for detention.

53 All of this discussion is, in a way, meaningless. I say that because no one was ever told they were detained and given the reasons for the detention. The entire explanation of why the officer couldn't tell the young person he was detained and that he had a right to counsel as he exited the vehicle, boils down to 'officer safety'. Yet, the officer took the time to explain that everything was being recorded, filled out a 208 card and scrutinized A. K.'s identification after he exited the vehicle. This is the most telling evidence that the chronology of 'officer safety' concerns leading to a suspension of A. K.'s constitutional rights was a fraudulent bill of goods.

54 The Respondent (Crown) must establish that Officer Shymchonak was acting within the scope of his common law powers when he detained Mr. K. (*R. v. Clayton*, [2007] 2 S.C.R. 725 (S.C.C.)). In my view, the pro-active policing aspect of the night's events — going down a lane to see why citizens might be there - was legitimate. But once the police new the group was going to their parked car, to now prolong the investigation because of the price of the vehicle, the age and colour of the occupants takes this fact situation out of legitimate. *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.) makes it clear that a brief detention for investigative purposes is a recognized but limited police power, but there need to be reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. The officers in this case cited graffiti and theft of construction materials as the particular crime, yet there existed no evidence that would give them the requisite reasonable grounds. In *R. v. Simpson* (1993), 12 O.R. (3d) 182 (Ont. C.A.), the Court specifically warned against allowing officers to act on 'hunches'. The Court said,

> 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.

55 In this case "value of auto" would be appropriately added to the list.

56 I find the detention to be arbitrary and illegal. A. K. should have been advised of his detention, the reason for it, and told he could speak to counsel. I find that there was a complete suspension of A. K.'s constitutional rights the moment it became clear the group was the target of TAVIS street investigation. This occurred when Officer Shymchonak sent out a call for back-up.

57 I conclude that there was s. 9 violation.

58 Justice Sopinka wrote 24 years ago that where the police have nothing but a suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.). That is what happened here.

59 Every movement of these males was cast by the police in a nefarious light in order to justify what unfolded. Walking, trotting, running, head turning, slowing down, getting into a high end car, being young, being black, being in the back seat of a car — all of these behaviours and characteristics were cited somewhere in the testimony as being in the officers' minds. Everything, according to the officers, was suspicious. However, on the issue of weapons, the way the accused crossed the center console in order to get out of the car was critical to Officer Shymchonak's belief that the accused was concealing a gun (not a knife, not drugs, but a gun). Even after he admits that both of the accused's hands are visible in the video while he crosses the console, he never backs down from his position that the entire collection of factors points in the direction of the young person having a weapon. At the moment in testimony that Officer Shymchonak admits he can see the young person's hands, he should have equally admitted that no suspicion could be based on how the young person got out of the car (he conceded that what we can see on the video is not unusual).

60 That being the case, he didn't even have grounds for a suspicion. Given he was equally discredited on his statement that the search was necessary for officer safety (saying he already suspected the young person had a gun, but he went ahead and explained about the video tape, crime in the area and also collected information for a 208 card), there were no grounds here for a search. Even if his suspicion took on gravity at the moment the young person was refusing to consent to a search, his testimony in court was that he had started a search of the front of the accused's coat much earlier, before his full suspicion had blossomed.

61 I am finding a section 8 violation.

62 Needless to say, since I have found a section 9 violation and there was no articulation of the detention, the reasons for the detention or the right to counsel, there is also a section 10 violation.

63 Should the evidence be excluded?

64 The evidence in this case was obtained in violation of the *Charter*. I must determine whether admission of the evidence would bring the administration of justice into disrepute.

65 I turn to *Grant*, *supra* for a concise articulation of the test I must bring to bear:

> When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seri-

> ousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

Seriousness of the violations

66 The violations in this case were probably committed in good faith, because it seems that investigations commencing with 'carding' stops was the *modus operandi* of TAVIS at the time. However, the fact is it appears the officers tried to tailor their evidence to suggest their state of mind at the time accorded with constitutional requirements. It appears they were working backwards from the fact that they found evidence. This would explain the overreaching characterization of each aspect of the males' behavior on that evening. This suggests to me that TAVIS officers operated in a way that intentionally danced around the lines of legality, with either willful blindness or by using deliberately illegitimate policing policy.

67 There was also an atmosphere at this investigation that suggested the constitutional rights of all being investigated were suspended until the police decided everything was in order. In spite of the fact I cannot say there was bad faith, the willful blindness of the police cannot be equated with good faith. It would appear to anyone apprised of what went on that the police casually violate the *Charter* in order to make their jobs easier.

68 There is a pattern of violation that reflects a disregard for the rights of the citizen, at the very best.

69 I regard the violations as very serious. This ground favours exclusion.

Impact on the citizen

70 This case ended with a young person being grounded face first and sustaining a fractured jaw. The police had no grounds to prolong their investigation when they had no specific illegal behavior as a target. The message to the citizen is that constitutional rights are not inalienable and can be taken away, even temporarily, by persons in power not playing by the rules.

71 This ground also favours exclusion.

Society's Interest in seeing the case decided on it merits

72 This case involves a teenager with a loaded gun in his pocket. In spite of the relative safety Canadians enjoy, it is my guess that most Canadian's would endorse the notion that a teenager with a loaded gun in his pocket is a threat to that sense of safety. In fact, I would go so far as to say that the facts of this case would frighten most people.

73 Against that I weigh the frightening proposition that Canadians enjoy certain constitutional rights, except when they are arbitrarily and illegally suspended by a person in authority. The average citizen would not have the fortitude to stand up to a police officer who is illegally detaining them, because the situation could escalate and the citizen could get hurt. From the point of view of the police in this case, a citizen standing on their right to leave this encounter would almost certainly have been characterized as suspicious. As I said above, the citizen cannot win.\There is another consideration at play here that makes this case different from many of the 24(2) cases put to me. While doing the balancing I am required to do under *Grant (supra),* I must also factor into the exercise the significance of this being a case involving a young person within the meaning of the *Youth Criminal Justice Act.* In my view, this aspect of the facts touches all three components of the *Grant (supra).*

74 It is my opinion that A. K. was entitled to a special protection of his rights that evening. I recently had a chance to consider the significance of this in a different context, but I believe the analysis is apposite in the present case.

75 The Youth Criminal Justice Act's preamble contains the following statement:

> WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and have special guarantees of their rights and freedoms.
>
> The preamble is part of the legislation. However, lest there be any controversy over the role played by the philosophy of the preamble, the Declaration of Principle, section 3, explicitly imports and rearticulates this philosophy:
>
> (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms.
>
> Further, the youth justice system is charged with the obligation of ensuring this principle is brought to bear, and courts are given explicit instruction to construe the Act such that this will happen:

> (2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).
>
> Justice Abella, writing for the Supreme Court in *R. v. D.B.*, 2008 SCC 25 (CanLII), [2008] 2 S.C.R. 3, found that the guarantees of section 7 of the Charter embraced a presumption of diminished moral blameworthiness or culpability for young persons; because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment (at para. 41).
>
> In *R. v. S.J.L.*, [2009] S.C.J. No. 14, Justice Abella, writing in dissent, said that "... Parliament intended that procedural rights of young people be emphatically protected, and supports an interpretive approach that respects, rather than derogates from, their enhanced protection and special guarantees."
>
> It is the notion of 'heightened vulnerability' that is the basis for all of the law and principle quoted above.
>
> If the Preamble and the Statement of Principle are to have any meaning, then it is the adults, law enforcement officers and lawyers who deal with young persons that must take responsibility for ensuring the 'special guarantee of their rights'.

76 In my opinion, this means the police officers investigating A. K. that evening had a commensurate heightened duty to jealously guard the young person's constitutional rights. In my view, the exact opposite occurred.

77 This leads me to the view that the third component of the test also favours exclusion of evidence. In the long term, it is the courts that are the final guardians of constitutional rights, and police practices that place a premium on a citizen being denied his/her constitutional rights can only be seen as bringing disrepute to the justice system.

78 Accordingly, I am excluding all evidence collected as a result of the constitutional violations. A. K. is acquitted of all charges.

Application granted; accused acquitted.