

Case Name:

R. v. Lux

Between

**Linda Sophie Lux, Appellant, and
Her Majesty the Queen, Respondent**

[2012] S.J. No. 796

2012 SKCA 129

Docket: CACR2082

Saskatchewan Court of Appeal

**J. Klebuc C.J.S., G.A. Smith and R.K. Ottenbreit
JJ.A.**

Heard: March 20, 2012.

Judgment: December 21, 2012.

(67 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against arbitrary detention or imprisonment -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Appeal by accused from appeal decision that set aside her acquittal on charge of failing to provide breath sample allowed -- Acquittal restored -- Accused arbitrarily detained when police stopped her while driving in private parking lot in unremarkable manner -- Police lacked authority to conduct random stop on private property -- No evidence accused about to enter public highway -- Breach of right resulted in material impact on privacy and liberty rights, warranting exclusion of evidence -- Canadian Charter of Rights and Freedoms, 1982, ss. 1, 9, 24(2).

Transportation law -- Motor vehicles and highway traffic -- Rules of the road -- Parking -- Lots and garages -- Police powers -- Stopping vehicles -- Appeal by accused from appeal decision that set aside her acquittal on charge of failing to provide breath sample allowed -- Acquittal restored -- Accused arbitrarily detained when police stopped her while driving in private parking lot in

unremarkable manner -- Police lacked authority to conduct random stop on private property -- No evidence accused about to enter public highway -- Breach of right resulted in material impact on privacy and liberty rights, warranting exclusion of evidence -- Traffic Safety Act, ss. 2, 32, 57, 209, 209.1, 211.

Appeal by Lux from a summary conviction appeals court decision setting aside her acquittal on a charge of failing to provide a breath sample. Lux was stopped while driving a vehicle in an uneventful manner in the parking lot of a hotel. The officers who stopped her claimed they did so to check her license and registration. After conversing with Lux, the officer placed her in the police car and made a breath sample request. Lux was either unable to or deliberately failed to provide one, and was charged with the present offence. The trial judge acquitted her because the officers had no authority to detain and question Lux in a private parking lot. The appeal judge found the officers were authorized by section 209.1 of the Traffic Safety Act to conduct random stops in private parking areas and to require detained drivers to provide information about their sobriety.

HELD: Appeal allowed. Lux's acquittal was restored. The appeal judge read section 209.1 too broadly, without regard to the penal sanction involved for a driver failing to comply with an officer's demand. He also failed to consider the extent to which a random stop on private property encroached on the rights of drivers and property owners, where the intention to encroach on such rights was not clearly expressed in the section. In the present case, there was no evidence Lux was about to drive onto a public highway or that her driving in the parking lot constituted a public safety concern. In the present case, the officers did not act in bad faith, but should have known they were not entitled to detain Lux. The officers breach of Lux's right not to be arbitrarily detained materially impacted her liberty and privacy interests. The conscripted evidence obtained in violation of Lux's rights was excluded and an acquittal resulted.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 8, s. 9, s. 10(b), s. 24(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 254(5)

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48(1), s. 48(2), s. 216, s. 216(1)

Highway Traffic Act, S.S. 1986, c. H-3.1 C, s. 20(1), s. 40(8), s. 40(9), s. 88(1)(a)

Interpretation Act, 1995, S.S. 1995, c. I-11.2, s. 10

Motor Carrier Act, S.S. 1986, c. M-21.2,

Narcotic Control Act, R.S.C. 1985, c. N-1,

Summary Offences Procedure Act, 1990, S.S. 1990-91, c. S-63.1,

Traffic Safety Act, R.S.A. 2000, c. T-6, "highway

Traffic Safety Act, S.S. 2004, c. T-18.1, s. 2(1)(k), s. 32(1), s. 57(1), s. 209(10), s. 209(11), s. 209.1,

s. 209.1(1), s. 211, s. 211(a), s. 211(j)

Traffic Safety Amendment Act, 2006, S.S. 2004, c. 9,

Vehicle Administration Act, S.S. 1986, c. V-2.1,

Court Summary:

Disposition: Appeal allowed.

Appeal From:

Appeal from 2011 SKQB 424.

Counsel:

James Streeton, for the Appellant.

Anthony Gerein, for the Crown.

The judgment of the Court was delivered by

J. KLEBUC C.J.S.:--

Introduction

1 The appellant seeks leave to appeal and appeals from the decision of the summary conviction appeals court which set aside the acquittal of her by the trial judge on the charge that she failed to provide a sample of her breath in contravention of s. 254(5) of the *Criminal Code*.

2 The following issues arose in this appeal. First, whether s. 209.1 of *The Traffic Safety Act*, S.S. 2004, c. T-18.1 authorizes peace officers to randomly stop vehicles in private parking areas, to check for traffic or safety violations, without reasonable cause to believe or suspect that any violation has occurred. Second, if the answer is "yes", whether the encroachment on a driver's rights pursuant to s. 9 of the *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 (the "*Charter*") is a limit on such rights as can or cannot be justified under s. 1 of the *Charter*. Third, if the infringement of the appellant's s. 9 rights during the random stop cannot be justified under s. 1 of the *Charter*, should the evidence obtained during the random stop be excluded pursuant to s. 24(2) of the *Charter*?

3 Section 209.1 provides:

Authority of peace officer to stop and request information

209.1(1) A peace officer may require the person in charge of or operating a motor

vehicle to stop that vehicle if the peace officer:

is readily identifiable as a peace officer; and
is in the lawful execution of his or her duties and responsibilities.

A peace officer may, at any time when a driver is stopped pursuant to subsection (1):

require the driver to give his or her name, date of birth and address;
request information from the driver about whether and to what extent the driver
consumed, before or while driving, alcohol or any drug or other substance
that causes the driver to be unable to safely operate a vehicle; and
if the peace officer has reasonable grounds to believe that the driver has con-
sumed alcohol or a drug or another substance that causes the driver to be
unable to safely operate a vehicle, require the driver to undergo a field
sobriety test.

No person in charge of or operating a motor vehicle shall, when signalled or requested
to stop by a peace officer pursuant to subsection (1), fail to immediately bring the
vehicle to a safe stop.

No person in charge of or operating a motor vehicle shall fail, when requested by a
peace officer, to comply with the requests of a peace officer pursuant to subsec-
tion (2).

4 For the reasons set forth below, I would grant the appeal and enter an acquittal on the s. 254(5) charge.

II. Background

5 The Bella Vista Hotel is located in Humboldt, Saskatchewan and has a private parking area immediately adjacent to its premises. The terms on which the public may use the parking area, its size, frequency of use, and the location of the exits from it onto a highway are unknown.

6 On October 18, 2009, Csts. Selinger and Jacquet (the "Officers") were conducting a routine patrol and while driving near the Bella Vista Hotel observed a motor vehicle, identified as an "Escalade", move in an uneventful manner along the parking area adjoining the hotel. Cst. Selinger, the driver of the police car, engaged its emergency lights for the purpose of signalling the driver of the Escalade to stop. In his incident report he stated the purpose of the stop was to check for a driver's licence and vehicle registration.

7 The appellant stopped the Escalade in response to the police car's emergency lights at a point very close to the hotel and some distance back from the street in front of the hotel. Cst. Selinger then approached the driver's door of the Escalade and, following a conversation with the appellant, escorted her to the police car where he seated her on its rear seat. He then asked the appellant a series of questions including whether she had recently consumed any alcohol. After the appellant confirmed she had, he advised her that he suspected she had alcohol in her body and demanded a

sample of her breath for analysis by a roadside screening device pursuant to s. 254(2) of the *Criminal Code*.

8 The appellant went through the motions of providing a sample of her breath but failed to produce a suitable one, either intentionally or due to a physical limitation. Cst. Selinger then charged her with failing to comply with the demand by a police officer to provide a sample of her breath, contrary to s. 254(5) of the *Criminal Code*.

9 Cst. Jacquet heard little of the conversation between Cst. Selinger and the appellant before they entered the police car. Nor did he question the appellant at any time before Cst. Selinger made the aforementioned demand.

III. Trial Court and Summary Conviction Appeals Court Decisions

10 Based on his assessment of the evidence presented during a *voir dire* the trial judge, White P.C.J., held the general provisions of *The Traffic Safety Act*, including 209.1, do not apply to private parking areas and, therefore the Officers were not authorized to detain and question the appellant. He went on to say:

Therefore in this particular case I had concluded that the police did not have authority to detain and question the motorist, and that therefore all evidence obtained by the police subsequent to that must be excluded. My brother Judge Kalmakoff, in an erudite and detailed decision recently came to the same conclusion on January 6th, 2011, in his decision in the *Queen v. Jeffrey Anderson*, The citation for that is 2011 SKPC 1.

In this event, therefore, the evidence with respect to Ms. Lux in relation to the charge of failing to comply with a demand for a sample necessary for proper analysis on an approved screening device must fail. And in the circumstances that evidence that the police obtained from her that would otherwise justify a legal demand for a sample on the ASD is excluded. [Trial Transcript, Vol. II, pp. 83-84]

11 In the appeal from the trial judge's decision to the summary conviction appeal court, the appeal judge held s. 209.1 authorizes peace officers to conduct random stops in private parking areas and to require the detained driver to provide information concerning his or her sobriety. He further held the detention of the appellant by Cst. Selinger did not constitute a breach of her rights pursuant to s. 9 of the *Charter* without considering whether the limitation imposed by s. 209.1 on the rights of a driver of a vehicle on private property is demonstrably justified in a free and democratic society. At paras. 17, 20 and 21 he said:

[17] Although *The Traffic Safety Act* was passed by the legislature in 2004, it became effective as of July 1, 2006. Section 209.1 was added to the *Act* by amendment to the legislation, S.S. 2006, c. 9, and became effective December 1, 2005 SKQB 380. At that time there had been a series of cases including *R. v. Schell*, 274 Sask. R. 28, and *R. v. Houben*, 2005 SKQB 179, 263 Sask. R. 97, which ques-

tioned whether a stop of a motor vehicle for the purposes of checking on the sobriety of the operator was authorized by law. In my opinion, the intention of the legislature in passing the amendment was to give peace officers the further power to stop vehicles to check for sobriety. As previously noted, there is no limitation found in s. 209.1 as to where a motor vehicle must be operating before it can be stopped, only that it is being operated. In my opinion, the object of the legislation was to reduce or prevent accidents caused by drinking and driving. In order to achieve that remedy, a fair, large and liberal interpretation of the *Act* is mandated by s. 10 of *The Interpretation Act*.

...

[20] I therefore conclude that the learned trial judge erred in law when he held that the *Act* did not apply in the circumstances of this case and that there had therefore been a breach of the respondent's rights pursuant to s. 9 of the *Charter* not to be arbitrarily detained. The Crown's appeal is allowed and the case is remitted to the Provincial Court for retrial.

[21] The learned trial judge also determined that the circumstances of this case did not allow for an investigative detention because there was nothing about the mode of driving which would indicate that a criminal offence or a traffic violation was being committed or would be committed. In light of my determination as to the remainder of the appeal I would not want to be seen as confirming this finding. As the matter was not argued fully before me, I will not comment further except to refer to the cases: *R. v. Wilson*, [1990] 1 S.C.R. 1291; *R. v. Pearce* (1997), 120 C.C.C. (3d) 467 (Nfld. S.C.); and *R. v. Schell*, 2006 SKCA 128, 214 C.C.C. (3d) 62, 289 Sask. R. 138, as cases in which the Court has held that a detention in very similar circumstances was not arbitrary and not contrary to s. 9 of the *Charter*. [2011 SKQB 424]

The appeal judge granted the appeal and sent the matter back to the Provincial Court for a retrial.

IV. Issues

12 The following issues arise out of the facts, the submissions by the parties and the law applicable thereto.

	A.	Does s. 209.1 of <i>The Traffic Safety Act</i> authorize peace officers to randomly stop and detain a driver operating a vehicle on a private parking area for the purpose of checking for a driver's licence, vehicle registration or the sobriety of the driver?	
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	B.		If the answer to question "A" is "yes", is the resulting infringement on the appellant's s. 9 <i>Charter</i> rights a reasonable limitation that can be demonstrably justified in a free and democratic society pursuant to s. 1 of the <i>Charter</i>?	
	C.		If the answer to question "A" or "B" is "no", should the evidence obtained by the Officers be excluded pursuant to s. 24(2) of the <i>Charter</i>?	

V. Relevant Legislation

13 *The Traffic Safety Act* received Royal Assent on November 30, 2004 but was not proclaimed until July 1, 2006. It essentially consolidated *The Highway Traffic Act*, S.S. 1986, c. H-3.1, *The Vehicle Administration Act*, S.S. 1986, c. V-2.1 and *The Motor Carrier Act*, S.S. 1986, c. M-21.2 into one statute, which deals with more than highway traffic safety matters.

14 When passed by the Legislature, ss. 209(10) and (11) of *The Traffic Safety Act* substantially carried forward the provisions of ss. 40(8) and (9) of *The Highway Traffic Act* (the "*Former Act*"). Subsections 40(8) and (9) of the *Former Act* provided:

A peace officer who:

is readily identifiable as a peace officer; and
is in the lawful execution of his or her duties and responsibilities;

may require the person in charge of or operating a motor vehicle to stop that vehicle.

40(9) A person in charge of or operating a motor vehicle shall, when signalled or requested to stop by a peace officer pursuant to subsection (8), immediately bring that vehicle to a safe stop.

15 Shortly after the decisions in *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3 [Orbanski] were released, *The Traffic Safety Amendment Act, 2006*, S.S. 2006, c. 9 was enacted and subsequently proclaimed in July 2006. It replaced ss. 209(10) and (11) with s. 209.1.

16 The following provisions of *The Traffic Safety Act* are also relevant to aforementioned issues:

2(1)(k) "**highway**" means a road, parkway, driveway, square or place designed and intended for or used by the general public for the passage of vehicles, but does not include any area, whether privately or publicly owned, that is primarily

intended to be used for the parking of vehicles and the necessary passageways on that area; [emphasis added]

...

Driver's licence required to drive a motor vehicle

32(1) No person shall drive a motor vehicle on a highway unless that person holds a valid driver's licence permitting that person to drive that motor vehicle.

...

Prohibition on operation without registration of vehicle

57(1) No person shall operate a motor vehicle ... on a highway, unless a certificate of registration or registration permit is obtained pursuant to this Act with respect to the vehicle.

...

Rules re parking lots

211 No person shall, in or on any place that is not a highway and that the public is ordinarily permitted to use for the parking of vehicles, do anything that, if done on a highway, would be a contravention of:

subsection 199(2) [speed over an applicable speed limit];
clause 209(6)(a) [stop at a stop sign];
sections 213 to 215 [driving without due care and attention, speeding and stunts prohibited, excessive noise prohibited];
clause 217(1)(a) [keep right of centre of the highway];
subsection 218(1) or (2) [rules on turning at an intersection];
subsection 219(1), (3) or (5) [rules on yielding right of way];
section 221 or 222 [rules regarding one-way traffic and backing up];
subsection 223(1) [yielding to pedestrians];
subsection 225(1) [rules for following vehicles]; or
section 234 or 235 [rules on signalling and obeying traffic lights].

VI. Leave to Appeal

17 As this appeal raises a significant question of law that has not been previously addressed by this Court, leave to appeal is granted.

VII. Analysis

	A.	Does s. 209.1 of <i>The Traffic Safety Act</i> authorize peace officers to randomly stop and detain a driver operating a vehicle on a private parking area for the purpose of checking for a driver's licence, vehicle registration or the sobriety of the driver?	
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18 The appellant advanced the following arguments in support of her position that s. 209.1 does not apply to parking areas on private property: (a) by not including private parking areas in the definition of a highway in *The Traffic Safety Act*, as several other provinces have done in their traffic safety legislation, the Legislature demonstrated that it had no intention to authorize peace officers to conduct random stop checks on private parking areas; (b) if the Legislature had intended to allow peace officers to infringe on the s. 9 rights of a citizen, it was required to express its intention in clear terms, as several other provinces have done; (c) the extent the Legislature intended specific provisions of *The Traffic Safety Act* to apply to private parking areas is set out in ss. 211(a) through to (j); and (d) the interpretation of s. 209.1 by the appeal judge renders several provisions of s. 211 meaningless or redundant.

19 The Crown made the following submissions in response to the appellant's arguments: (a) this Court in *R. v. Duncanson* (1991), 93 Sask. R. 193 at paras. 18, 19 and 24 (aff'd [1992] 1 S.C.R. 836) [*Duncanson*], confirmed that s. 40(8) [replaced by s. 209.1] provided peace officers with general investigatory powers, including the right to stop and detain a driver for any purpose related to the performance of their duties and responsibilities; and (b), s. 209.1 was passed, firstly to overcome the limitation on the authority of a peace officer imposed by this Court in *R. v. Houben*, 2006 SKCA 129, [2007] 2 W.W.R. 195 [*Houben*] and *R. v. Schell*, 2006 SKCA 128, [2007] 3 W.W.R. 247 [*Schell*] and secondly, to confirm the authority of peace officers to conduct random stops is not limited to highways.

20 Although s. 209.1 does not expressly authorize peace officers to conduct random stops of vehicles operating on private property, the Crown would propose a broad reading of the provision that would not distinguish public from private property of whatever size or ordinary use. On this argument, police officers would be equally entitled to stop and detain a driver of a vehicle on the driveway of his or her private residence or a farmer operating a truck on his farm, randomly, without any cause to believe that any infraction had been committed. This, in my view, would be a far-reaching infringement of s. 9 of the *Charter* and should not be accepted as the proper reading of this provision in the absence of compelling argument.

21 Accordingly, I turn to the rules and jurisprudence governing the interpretation of statutes. Section 10 of *The Interpretation Act*, 1995, S.S. 1995, c. I-11.2 incorporates the modern purposive approach as articulated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. It provides:

Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its

objects.

22 Moreover, the large and liberal construction provisions of s. 10 is traditionally applied in the interpretation of remedial legislation, meaning legislation directed at securing a social benefit; correcting a defect in the existing law; or alleviating a hardship, but not in interpreting legislation that encroaches on the privacy or individual liberty of a person pursuant to the *Charter*, or at common law. *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada, 2008) at p. 469 stated the rule in these words: "[l]egislation that invades privacy or takes away rights should be interpreted strictly-unless other, more compelling consideration suggests otherwise."

23 However, courts historically have applied the strict construction rule when interpreting legislation that prescribes a fine, forfeiture of a right or privilege, or imprisonment when a rule or regulation is breached. For example, many breaches of *The Traffic Safety Act* are prosecuted in Provincial Courts in the same manner as are summary conviction criminal offences. See: *The Summary Offences Procedure Act, 1990*, S.S. 1990-91, c. S-63.1.

24 The purpose of the strict interpretation rule is discussed in *Marcotte v. Canada (Deputy A.G.)*, [1976] 1 S.C.R. 108 at 115 [*Marcotte*]; *R. v. McLaughlin*, [1980] 2 S.C.R. 331 at 335; *R. v. McIntosh*, [1995] 1 S.C.R. 686 at paras. 38-39 [*McIntosh*]; *R. v. Kelly*, [1992] 2 S.C.R. 170 at 203 [*Kelly*] and by *Sullivan on the Construction of Statutes* at pp. 466 to 480. In *Marcotte*, Dickson J. at p. 115 expressed the need for strict construction in these words:

... No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

25 In *Kelly*, McLachlin C.J. articulated the need for fair notice at p. 203:

It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of the person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the maxim *nullum crimen sine lege, nulla poena sine lege*-there must be no crime or punishment except in accordance with law which is fixed and certain....

26 While in *McIntosh*, Lamer C.J. endorsed the five steps of statutory interpretation suggested in Elmer A. Driedger's *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), he confirmed that they are to be more narrowly applied when interpreting a penal statute. At paras. 38-39 he said:

[38] As stated above, the overriding principle governing the interpretation of penal

provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in *Marcotte, supra*, when freedom is at stake, clarity and certainty are of fundamental importance. He continued, at p. 115:

If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

Under s. 19 of the *Criminal Code*, ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?

[39] The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.

27 It is also to be presumed that legislation does not intend to abolish or interfere with the rights of a person. Justice Estey described this presumption in *Morguard Properties Ltd. et al v. City of Winnipeg*, [1983] 2 S.C.R. 493 at p. 509:

... [T]he courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly.... The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved.

28 In *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 (at p. 228), Sopinka J. approved the following statement by Hogg J.A. in *Re Gordon MacKay & Co. and Dominion Rubber Co.*, [1946] 3 D.L.R. 422 (Ont. C.A.) at p. 425:

The common law rights of the subject are not to be taken away or affected except only to such extent as may be necessary to give effect to the intention of Parliament when clearly expressed or when such result must follow by necessary implication, and if the rights of persons are encroached upon, this intention must

be made manifest by the language of the statute, if not by express words then by clear implication and beyond reasonable doubt.

29 Similar statements were made by Dickson J. in *R. v. Riddle*, [1980] 1 S.C.R. 380 at p. 390, and by Major J. in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405.

30 With the aforementioned principle in mind, I turn to the interpretation of s. 209.1 by the appeal judge. In my view, he erred by applying a broad and liberal approach in interpreting the ambiguous provisions of s. 209.1 without regard to the penal sanctions involved if a driver failed to comply with a demand by a peace officer. Furthermore, he failed to consider the extent a random stop based on his interpretation of s. 209.1 materially encroaches on the rights of drivers and property owners in circumstances where the intention to encroach on such rights is not clearly expressed by words or by clear implication and beyond a reasonable doubt.

31 In my view, s. 209.1 falls far short of establishing by clear words or clear implication that peace officers are entitled to conduct random stops anywhere on private property used as a parking area, where there is no basis to believe the driver is committing any infraction or poses a threat to public safety, or evidence or reason to believe that peace officers would be significantly hampered in performing their duties if they waited until a vehicle exited from a private parking area onto a highway.

32 In the instant case, there is no evidence that the appellant was about to drive her vehicle onto a highway rather than stop within the bounds of the parking area, or that she could not have been safely intercepted upon entering a highway. Nor was there any evidence of the operation of vehicles on the subject parking area or similar parking areas statistically constituting a traffic safety concern. In the result, the appeal judge based his conclusion that s. 209.1 authorizes random stops on private property on his assumption that material traffic safety concerns existed of the nature and kind addressed in *R. v. Hufsky*, [1988] 1 S.C.R. 621 [*Hufsky*] and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 [*Ladouceur (Can.)*]. In addition, he based his interpretation of s. 209.1 on the submission by the Crown that the primary purpose of s. 209.1 is to override the limitation imposed by this Court in *Houben* and in *Schell*, which in my view is not correct for the reasons set forth below.

33 I respectfully disagree with the interpretation of s. 209.1 by the appeal judge and several submissions by the Crown, for the reasons hereinafter canvassed. I start with a brief review of the overarching objective of *The Traffic Safety Act*, which is to provide for the safe operation of motorized vehicles on a "highway." It seeks to accomplish this objective by legislated "rules of the road," licensing and sobriety requirements. To enforce compliance within these rules and regulations *The Traffic Safety Act* imposes a range of penalties including fines, suspension of driving privileges on highways, seizure of a driver's vehicle and, in some instances, imprisonment. In this respect, it is a penal statute.

34 *The Traffic Safety Act* also excludes from its definition of a "highway" any area "whether privately or publicly owned, that is primarily intended to be used for the parking of vehicles and the necessary passageways on that area." By this exception, the Legislature confirmed private parking areas are not to be treated as if they were highways save for the rules of the road prescribed by s. 211. Those rules only apply to parking areas which the public is *ordinarily permitted* to use.

Furthermore, s. 211 does not require a driver to have a driver's licence or the driver's vehicle to be registered.

35 Section 209.1 does not create a rule or regulation to be observed by drivers. Rather, its purpose is to authorize peace officers to temporarily detain a driver for the purpose of determining whether the driver is complying with a specific highway traffic safety requirement imposed by *The Traffic Safety Act*. It, therefore, follows that random stops pursuant to s. 209.1 may only be conducted in relation to a requirement prescribed by *The Traffic Safety Act*, which would not include checking for a driver's licence and vehicle registration when a vehicle is operated on private property. See: ss. 32(1) and 57(1) of *The Traffic Safety Act*.

36 In my view, when the words of *The Traffic Safety Act* are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the *Act*, they do not authorize peace officers to conduct random stops on private parking areas. In this respect, my interpretation is consistent with the interpretation of comparable statutory provisions by the Supreme Court and the courts of Ontario, Nova Scotia and New Brunswick.

37 Of particular relevance are the provisions of s. 48(1) and s. 216 of *The Highway Traffic Act*, R.S.O. 1990, c. H-8 (the "*Ontario Act*") for, like s. 209.1(1), these sections authorize police officers to conduct random stops to check for sobriety:

48.(1) A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 254 of the *Criminal Code* (Canada).

Where, upon demand of a police officer made under section 254 of the *Criminal Code* (Canada), the driver of a motor vehicle or the operator of a vessel provides a sample of breath which, on analysis by an approved screening device as defined in that section, registers "Warn" or "Alert" or otherwise indicates that the concentration of alcohol in the person's blood is 50 milligrams or more of alcohol in 100 millilitres of blood, the police officer may request that the person surrender his or her driver's licence.

...

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.

Although the definition of a "highway" in the *Ontario Act* is broader than the definition of a "highway" in *The Traffic Safety Act*, Ontario Courts have consistently held the definition of a "highway" does not include shopping centre parking areas or other private parking areas. See: *Gill v. Elwood*, [1970] 2 O.R. 59 (Ont. C.A.); *R. v. Mansour*, [1979] 2 S.C.R. 916 and *R. v. Sergalis* (2009), 90 M.V.R. (5th) 116 (Ont. S.C.J.) [*Sergalis*].

38 In *Mansour*, the court held that a parking lot adjacent to an apartment building is not a highway within the meaning of the *Ontario Act*. Therefore, a driver's licence was not required to operate a motor vehicle on it. In *Sergalis*, the summary appeal court confirmed that s. 48(1) of the *Ontario Act* does not authorize officers to conduct a random stop within the bounds of a shopping centre for the purpose of a sobriety test. Simply stated, the appeal judge held a private parking area is not a highway and s. 48(1) does not apply by virtue of traffic safety concerns. A similar conclusion was arrived at in *R. v. Tresham* (1998), 52 C.R.R. (2d) 367 (Ont. Ct. J.).

39 In *R. v. George*, 2004 ONCJ 316 (Ont. Ct. J.), the court held an officer was not entitled to stop the accused on his driveway and question him on whether he had recently consumed alcohol. Similar conclusions were arrived at by courts in other provinces.

40 The definition of a "highway" in *The Traffic Safety Act*, R.S.A. 2000, c. T-6, of Alberta includes private parking areas that are "open" for use by the public and specifically authorizes peace officers to conduct random spot checks on such parking areas. Consequently, decisions dealing with random stops conducted on private parking areas in Alberta are not instructive.

41 The Crown maintains the ratios in the aforementioned decisions dealing with highway safety legislation of other provinces do not apply in Saskatchewan and cites this Court's decisions in *Pichler Ramsay Enterprises v. T & T Trucking*, [1996] 8 W.W.R. 382 [*Pichler Ramsay Enterprises*] and in *Duncanson* in support of its submission. It also maintains s. 209.1 was legislated to overcome the limitation imposed by this Court in *Houben* and *Schell* on the right of peace officers to conduct random stops. I respectfully disagree with both submissions.

42 In *Pichler Ramsay Enterprises*, the issue was whether the one-year limitation imposed by s. 88(1)(a) of the *Former Act* for bringing an action for damages occasioned by a motor vehicle applied to an action for damages occasioned by a vehicle that burned while stored in a building on private property. The court below held that s. 88(1)(a) only applied to damages occurring on a highway. This Court held that s. 88(1)(a), without ambiguity or uncertainty, applied to damage claims occasioned by a motor vehicle, including in a commercial off-highway building. In doing so, it noted that s. 88(1)(a) did not conflict with the provisions of the *Former Act* for it does not deal with matters pertaining to the operation of a vehicle.

43 In my opinion, the ratio in *Pichler Ramsay Enterprises* is not applicable in the instant appeal where the issues involve the operation of a vehicle by a driver, a violation of the driver's s. 9 rights, and a potential penalty of a quasi-criminal nature.

44 In *Duncanson*, the police officers were informed that a person known as J.R. was involved in selling Talwin contrary to the *Narcotic Control Act*, R.S.C. 1985, c. N-1. As part of their investigation, they stopped the driver of a taxicab whom they suspected was J.R. and asked him to produce his driver's licence and cab card. Upon confirming the driver was the accused, the officer detained him, advised him of his right to counsel, searched him, found a prohibited substance in his jacket and charged him under s. 495 of the *Narcotic Control Act*. The trial judge held the detention contravened s. 8 of the *Charter* because it was not made for traffic safety purposes, and therefore, was not authorized by the *Former Act* or any common-law authority. On that basis, he excluded the evidence obtained during the detention and acquitted the accused.

45 This Court concluded in *Duncanson* that ss. 40(8) and 20(1) entitled the peace officers to stop and detain the accused while he was operating a vehicle on a highway and require him to produce a driver's licence notwithstanding they had other reasons for detaining him. It described the nature of a police officer's authority pursuant to s. 40(8) at para. 18:

[18] Section 40(8) empowers a police officer to stop a vehicle "while in the lawful execution of his duties and responsibilities". The only qualification, apart from that, is that the police officer be readily identifiable as such. Obviously, the duties and responsibilities of police officers far exceed the enforcement of *The Highway Traffic Act*, and so read in its ordinary sense, the section empowers a police officer to stop a vehicle for any purpose connected with the lawful execution of his or her duties and responsibilities generally, and however derived.

46 The Supreme Court dismissed the accused's appeal based on the following reasons:

This appeal comes to us as of right. Assuming without deciding that the narcotic was found in violation of the appellant's rights under the *Charter*, we are all of the view that, under the circumstances of this case and in applying the principles enunciated in *R. v. Collins*, [1987] 1 S.C.R. 265, admitting the evidence would not bring the administration of justice into disrepute [[1992] 1 S.C.R. 836 at 836-37]

47 Based on *Duncanson*, Crown counsel maintained that s. 40(8), now s. 209.1, authorizes police officers to stop and question a driver at locations other than a highway in relation to any purpose connected with the lawful execution of their duties and responsibilities as police officers.

48 While the interpretation of s. 40(8) in *Duncanson* appeared to be constitutionally valid in 1991, the Supreme Court in *R. v. Mellenthin*, [1992] 3 S.C.R. 615 materially constrained the authority of peace officers to detain a citizen under legislation similar to s. 40(8) by holding that detentions made pursuant to highway traffic legislation are only constitutionally valid when used in relation to specific highway traffic safety requirements, including checks for sobriety, licences, ownership, insurance and the mechanical fitness of vehicles.

49 Subsequent to *Mellenthin*, this Court interpreted the authority of peace officers under s. 40(8) more narrowly than in *Duncanson* in order to preserve the constitutionality of the section. Justice Jackson described the reduced scope of s. 209.1 in *Houben* at paras. 64-67:

[64] From this Court's recent review of the law in *Ladouceur* (Sask.) and *Schaeffer* and the above review, I conclude that the law may be expressed in this manner. Even though a detention may be arbitrary, if a police officer is acting pursuant to s. 40(8) of *The Highway Traffic Act* any stop effected by the officer is a justifiable infringement of the individual's rights under s. 1 of the *Charter*.

[65] While the police officer acting under s. 40(8) need not have "reasonable grounds to detain," it must be the police officer's intention to be proceeding to satisfy the

aims of that statute as articulated in such authorities as *Mellenthin*. The police officer need not say expressly to himself or herself that he or she is proceeding to exercise the authority under s. 40(8), or testify to this express effect, but the trier of fact must be able to conclude on the basis of the evidence that the police officer was checking for "sobriety, licences, ownership, insurance and the mechanical fitness of cars." In sum, s. 40(8) cannot be used to create a general power of detention for investigative purposes.

[66] The Supreme Court in *Ladouceur* and *Mellenthin* did not justify the equivalent of s. 40(8) as a reasonable limit under s. 1 of the *Charter* on the basis of creating a general power of detention. We have not been presented with any reason to expand the power of police stops beyond that articulated in those cases.

[67] If a police officer has a suspicion that a driver is involved in criminal activity, unrelated to traffic enforcement, such that he or she would like to stop a motor vehicle, the suspicion must meet the test in *Mann*. [Footnotes omitted]

It follows that *Mellenthin* clarified that random stops pursuant to s. 40(8) and similar legislation are limited to matters related to traffic matters akin to those identified in *Ladouceur (Can.)*.

50 I reject the Crown's submission that s. 209.1 was passed to overcome a limitation on the right of peace officers to conduct random stops for traffic safety purposes imposed in *Houben* and *Schell*. In *Houben*, the trial judge found as a fact that the peace officers had not detained the accused pursuant to s. 40(8) of the *Former Act* in relation to highway traffic safety requirements, and therefore their arbitrary detention of the accused was not authorized under s. 40(8) or justified under s. 1 of the *Charter*. This Court went no further than to confirm, based on *Mellenthin*, that arbitrary detention of a driver violates the driver's s. 9 rights and is only justified if made for the purposes articulated in *Hufsky*, *Ladouceur (Can.)* and *Mellenthin*.

51 In *Schell*, the trial judge found that the investigating officer had given no reason for stopping the driver pursuant to any statute or common law right and therefore his detention of the accused was arbitrary and contrary to s. 9 of the *Charter*. In the appeal to the summary conviction appeal court, the appeal judge upheld the decision of the trial judge on the basis that the request by the investigating officer to see the accused's driver's licence and vehicle registration was insufficient to establish his purpose in detaining the accused for the enforcement of *The Highway Traffic Act*.

52 This Court allowed the appeal from the appeal judge's decision because the evidence confirmed the officer had stopped the accused for the purpose of checking the sobriety of the accused and the resulting detention was justified under s. 1 on two bases: first, the random stop was to check the sobriety of the accused; and second, the officer had objective grounds for detaining the respondent in circumstances similar to those in *R. v. Wilson*, [1990] 1 S.C.R. 1291 [*Wilson*].

53 As previously stated, when *The Traffic Safety Act* was enacted in 2006, ss. 209(10) and (11) thereof merely carried forward the provisions of s. 40(8) of the *Former Act*. At this point in time, several courts questioned whether a peace officer had to comply with s. 10(b) of the *Charter* before

questioning the driver on whether he or she had recently consumed alcohol. The question, as it related to the use of a highway, was resolved by Charron J. in *Orbanski* where she stated at paras. 24 and 42:

[24] First, we are concerned here with the use of a vehicle on a highway. This Court has recognized that, while movement in a vehicle involves a "liberty" interest in a general sense, it cannot be equated to the ordinary freedom of movement of the individual that constitutes one of the fundamental values of our democratic society. Rather, it is a licensed activity that is subject to regulation and control for the protection of life and property: see *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 35. The need for regulation and control of the use of vehicles on the highway is heightened both because of the high prevalence of the activity and its inherent dangers.

...

[42] ... Screening measures such as questioning drivers about prior alcohol consumption and requesting them to perform sobriety tests were found to be authorized under s. 48(1) of the Ontario *Highway Traffic Act*: see *R. v. Saunders* (1988), 41 C.C.C. (3d) 532 (Ont. C.A.), and *R. v. Smith* (1996), 105 C.C.C. (3d) 58 (Ont. C.A.).

54 Shortly after the Supreme Court in *Orbanski* confirmed the use of a vehicle on a highway is a "licensed activity that is subject to regulation and control for the protection of life and property" and provinces may authorize peace officers to ask the driver during a random stop whether she or he had recently consumed alcohol without contravening s. 10(b) of the *Charter*, *The Traffic Safety Amendment Act* was enacted and replaced ss. 209(10) and (11) of *The Traffic Safety Act, 2006* with s. 209.1. Several other provinces made similar amendments to their traffic safety legislation, including s. 48(1) of the *Ontario Act* in 2007.

55 In my opinion, neither the changes in s. 209.1 nor the ratio in *Orbanski* authorize peace officers to conduct random stops on private parking areas on private property. Nor was s. 209.1 passed to overcome the limitation on the right of peace officers to conduct random stops unrelated to traffic or safety violations.

56 In sum, I conclude that s. 209.1 does not authorize peace officers to conduct random stops for traffic safety purposes on private parking areas. Consequently, the subject random stop constituted an arbitrary detention that infringed the appellant's s. 9 rights. See: *Ladouceur (Can.)*; *Hufsky*; *Ladouceur (Sask.)*; and *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.).

57 Given my conclusion, it is unnecessary to address question "B".

	C.	If the answer to question "A" or "B" is "no", should the evidence obtained by the Officers be excluded pursuant to s. 24(2) of the <i>Charter</i> ?	
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58 The test to be applied is this: will the admission of evidence obtained by breaching the *Charter* bring the administration of justice into disrepute? In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 [*Grant*], the Supreme Court identified three lines of inquiry relevant to making the requisite determination. They are: (i) the seriousness of the *Charter*-infringing conduct by the state, (ii) the impact of the breach on the *Charter*-protected interests of the accused, and (iii) society's interest in the adjudication of the case on its merits. This said, I will address each factor in turn.

The seriousness of the Charter-infringing conduct by the state

59 With respect to this factor, I am to consider the nature of the infringement of the appellant's *Charter* rights that led to the evidence upon which the s. 254(5) *Criminal Code* offence is founded. Furthermore, I am to consider whether the conduct of the Officers is the kind that a court should be concerned with and should disassociate itself from; the more serious the breach, the greater the need for a court to disassociate itself from such conduct. Conversely, breaches of an insignificant technical nature or the result of an understandable mistake are of lesser concern and weigh in favour of the admission of evidence obtained by means of a breach of *Charter* standards, but ignorance of *Charter* standards, wilful blindness and carelessness will not.

60 While I am satisfied that Cst. Selinger did not act in bad faith, he ought to have known that he was not entitled to detain the appellant and check for a driver's licence or vehicle registration, neither of which was required to operate a vehicle off highway on a private parking area. Furthermore, in the absence of anything unusual in the appellant's driving there was no reason for Cst. Selinger not to wait until she drove onto a highway, assuming that proved to be her course of action. In my view, these factors significantly weigh in favour of the conscripted evidence obtained by the Officers being excluded pursuant to s. 24(2).

The impact of the breach on the Charter-protected interests of the appellant

61 This factor requires me to look at the seriousness of the subject infringement from the perspective of the appellant. In *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, Chief Justice McLachlin indicated the following are among the questions that arise when undertaking the requisite analysis:

[28] ... Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact?

62 In this case, the detention, the demand for information and the sample of the appellant's breath materially impacted on the appellant's liberty and privacy interests. I reject the argument that the

detention was trivial and of little impact because the appellant should have had a low expectation of privacy given that she would have been required to provide the information requested by Cst. Selinger, including the sample of her breath, had the random stop check taken place on a highway. The operation of a vehicle in a private parking area is not a "licensed activity conducted on a highway" which contemplates minor intrusions on a driver's *Charter* rights of the kind discussed in *Orbanski*. Nor do I accept the possibility that the appellant at some point in time may have driven her vehicle onto a highway materially impacts upon the degree of privacy and freedom to which she was entitled. In this case, she may never have driven her vehicle onto a highway. If the approach advanced by the Crown were accepted, virtually all drivers of vehicles could be detained on private property based on the possibility they may drive the vehicle onto a highway without a licence or while impaired.

63 In sum, I conclude the deprivation of the appellant's freedom and privacy by means of an unconstitutional detention significantly weighs in favour of the evidence being excluded. This does not mean that drivers cannot be stopped on private property to enforce the rules in s. 211.

Society's interest in the adjudication of the case on its merits

64 While the public has an interest in serious criminal charges being determined on their merits, it also wants a justice system that is beyond reproach and fair trials. This is especially true when conscripted evidence is obtained for, as a general rule, it renders a trial unfair. See: *R. v. Stillman (W.W.D.)*, [1997] 1 S.C.R. 607 and *Schaeffer*. With these objectives in mind, I turn to the evidence obtained by the Officers by arbitrarily detaining the appellant, demanding an admission as to whether she had recently consumed a beverage containing alcohol and requiring her to provide a sample of her breath for analysis by a screening device. While evidence of the appellant's failure to provide a breath sample is important to the Crown's case, it is conscripted evidence obtained by means of significant infringement of the appellant's rights.

65 In my view, the aforementioned infringement factors favour the subject conscripted evidence being excluded pursuant to s. 24(2) of the *Charter*:

Balancing the factors

66 This leads to the final step of balancing the aforementioned factors in the manner articulated in *Grant*. The nature of the breaches and the manner in which they infringed on the appellant's privacy and freedom outweigh the interests of the public in having the subject charge tried on its merits. Accordingly, I conclude the evidence obtained by Csts. Selinger and Jacquet during their detention of the appellant should be excluded pursuant to s. 24(2). To do otherwise would bring the administration of justice into disrepute.

VIII. Conclusion

67 I would grant leave to appeal and allow the appeal. Given the excluded evidence is essential to the Crown's case, I would enter an acquittal rather than order a new trial.

J. KLEBUC C.J.S.

G.A. SMITH J.A.:-- I concur.

R.K. OTTENBREIT J.A.:-- I concur.

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