

CITATION: R. v. McColman, 2019 ONSC 5359

FACTS

- [6] The facts of this case are straightforward. On March 25, 2016 at approximately 12:30 a.m., Constable Lobsinger of the Ontario Provincial Police observed an all-terrain vehicle (ATV) parked at a store known as Rob's Variety in the vicinity of the Thessalon First Nation on Maple Ridge Road. The appellant was the driver.
- [7] As the ATV left the parking lot of Rob's Variety, Constable Lobsinger turned his vehicle around and followed the ATV for approximately one minute before it turned onto Biish Road and entered into a municipal address at 30 Biish Road. This location is a private driveway on private property.
- [8] After stopping the McColman vehicle in the private driveway, Constable Lobsinger spoke to Walker McColman and testified that he observed signs of impairment as follows:
- (a) he observed McColman to be hanging onto the side of the ATV with his right hand;
 - (b) he observed a strong odor of an alcoholic beverage on McColman;
 - (c) he observed McColman's knees to be buckling;
 - (d) he observed McColman's eyes to be red and bloodshot;
 - (e) he observed McColman to be mumbling while speaking to him.
- [9] Constable Lobsinger arrested Walker McColman for impaired driving of a motor vehicle at 12:36 a.m., having first observed him outside Rob's Variety Store at 12:30 a.m.
- [10] It was the evidence of Constable Lobsinger that he had stopped the ATV pursuant to his statutory authority under section 48 of the *Highway Traffic Act*, and that he was doing so to check on Mr. McColman's sobriety. It was also the evidence of Constable Lobsinger that he did not see any signs of impairment prior to stopping the ATV vehicle in the private driveway at 30 Biish Road. In his evidence, Constable Lobsinger agreed with the suggestion of defence counsel that there was nothing unusual about the driving of Mr. McColman and that no information had been provided to him that Mr. McColman had been drinking.
- [11] In his evidence at the trial, Constable Lobsinger testified that the ATV was not stopped for highway traffic concerns, and that he stopped the ATV solely under his authority under the *Ontario Highway Traffic Act*, which authorized him to stop vehicles to check for sobriety of the operator.

Decision of the Learned Trial Judge

[12] Justice Villeneuve released two decisions in this matter; the first was a ruling on Mr. McColman's *Charter* application released on December 19, 2017, and the second on the trial proper, released on October 4, 2018.

[13] The learned trial judge rejected the *Charter* application of the appellant ruling that there was no infringement of his section 8, 9 and 10(b) *Charter* rights. In his ruling on section 8 of the *Charter* (unreasonable search and seizure) and section 9 of the *Charter* (arbitrary detention) the learned trial judge makes the following comments at paragraphs 44 to 58 inclusive of his reasons:

[44] Police officers in the Province of Ontario have the statutory authority pursuant to s. 48 of the *Highway Traffic Act* to effect a traffic stop to confirm a driver's level of sobriety. Section 48 reads as follows:

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).

[45] That statutory authority has been upheld by the Supreme Court of Canada in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257. In that decision, a majority of the Supreme Court of Canada ruled that statutory authority granted to a police officer by s. 189(a)(1) to check for a driver's documentation did violate s. 7, 8 and 9 of the *Canadian Charter of Rights and Freedoms* but that such violation was stayed by s. 1 of the *Charter*.

[46] Courts have long upheld the police officer's right to stop a motor vehicle being operated on a public street or highway to check a driver's sobriety.

[47] The argument being advanced by the defendant's counsel in this case centers on the police officer's authority to stop the defendant on private property.

[48] The evidence is clear that Officer Lobsinger observed the defendant operating his ATV on Maple Ridge Road, which is a public street or highway within the confines of the Thessalon First Nation. The OPP's authority to patrol that road and Biish Road (another street within the confines of the Thessalon First Nation) was not made an issue at this trial. I find as a matter of course, and it was not argued to the contrary by the defendant's counsel, that these two roads or streets are public roads or highways.

[49] The defendant's counsel has produced case law relating to the exercise of an officer's discretion to stop a motor vehicle on private property. There is a distinction, according to the Crown, to be made between the stopping of a motor vehicle on private property and the pursuit of a motor vehicle onto private and the subsequent dealing of a police officer with a motor vehicle driver.

[50] The case law which I have reviewed, which has been filed by counsel, has been helpful to this court in making the import distinction between confronting an operator of a motor vehicle on private property and following a motor vehicle being operated on a public street or highway onto private property and thereafter confronting the driver thereof.

[51] That is an important distinction to be made in my view. I do not disagree with the defendant's counsel that had the defendant simply been parked in the parking lot at Rob's Variety or in his own parents' residence driveway, that the officer's authority under the *Highway Traffic Act* would not have permitted a stop of any kind. It may be that the officer could have exercised his discretion under the common law. I do not find in the circumstances of this case that I need to resort to any considerations of his police powers under the common law to stop an individual.

[52] The officer was quite clear that he had formed the intention to stop this motor vehicle to check on the driver's sobriety while the motor vehicle was being operated on a public street or highway. The *Highway Traffic Act*, and in particular under s. 48 gave him that authority.

[53] The defendant, in his own evidence, confirmed that the police cruiser followed him while he was driving on Maple Ridge Road and onto Biish Road before turning into his parents' residence and parking in the driveway.

[54] I am satisfied on the evidence that the officer fully intended to stop the defendant's motor vehicle pursuant to his authority under s. 48 of the *Highway Traffic Act*. I am satisfied that he formed that intention while following the defendant on Maple Ridge Road. The mere fact that he did not effect this stop until the defendant had turned into a private driveway and was thus on private property did not eliminate or invalidate the officer's authority under s. 48 of the *Highway Traffic Act*.

[55] To conclude otherwise could lead to the unreasonable outcome that a driver of a motor vehicle could seek refuge within the confines of his private driveway in circumstances where the police had not effected the stop prior thereto. Surely, the statutory authority afforded to police officers under s. 48 of the *Highway Traffic Act* are not suspended by the mere fact that the driver of a motor vehicle succeeds in avoiding being stopped on a public street or highway.

[56] *R. v. Anderson*, [2014] S.J. No. 146 stands for the proposition that an officer may act within his authority conferred to him by statute in stopping a motor vehicle on private property where the officer had already formed the intention to stop the individual while he was driving on a public road.

[57] As I indicated, I am satisfied that the officer had formed an intention to stop the defendant's motor vehicle while that vehicle was being operated on Maple Ridge Road. It should be noted that the distance from Rob's Variety, where the defendant was first spotted by the police officer to 30 Biish Road, where the defendant ultimately parked in his parents' driveway was covered in about a minute, according to both the officer and the defendant.

[58] Under s. 9 of the *Charter*, the defendant bares the onus on the balance of probabilities to show that he was arbitrarily detained. In these circumstances, I do not find, for the reasons I have set out above, that the officer confronting the defendant in the driveway of his parents' private residence and clearly detaining him constituted a breach of the defendant's rights under s. 9 of the *Charter*.

With his ruling dismissing the section 9 *Charter* application, Justice Villeneuve indicated in his reasons that it was unnecessary to rule on the section 8 application. The learned trial judge's ruling on the alleged section 10(b) breach was not argued on this appeal or advanced as a ground of appeal.

- [14] Having reached this conclusion on the section 9 *Charter* application, the learned trial judge goes on in his reasons released on October 4, 2018, to convict Walker McColman of impaired driving, contrary to section 253(1)(b) of the *Criminal Code of Canada*.

The Grounds of Appeal

- [15] The appellant filed a notice of appeal on April 23, 2019 in which three grounds of appeal are raised, as follows:

1. that the learned trial judge erred in finding that a police officer could make a section 48(1) *Highway Traffic Act* stop on private property absent articulable or probable cause;
2. that the learned trial judge erred in failing to resolve material conflicts in the evidence and issues of credibility; and
3. that the learned trial judge erred in failing to deal with the apparent *Charter* breach which arose during the course of the evidence.

- [16] During the course of oral argument on the appeal it was the first ground of appeal that was advanced by appellant's counsel. It was the position of counsel for the appellant that there was a breach of substantive law by the officer in entering the private property of Mr. McColman under section 48(1) of the *Highway Traffic Act*, and without a reasonable or articulable ground to do so and therefore the *Charter* was not really a factor which pertained to this.

The Standard of Review

- [17] As indicated in paragraph 23 of *Housen v. Nikolaisen*, [2007] 2 S.C.R. 235 (S.C.C.) the standard of review for findings of fact and inferences drawn from findings of fact is palpable and overriding error.
- [18] As to questions of law, in paragraph 8 of *Housen*, the Supreme Court of Canada indicates that:

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellant court is free to replace the opinion of the trial judge with its own. Thus, the standard of review on a question of law is that of correctness.

DISCUSSION/ANALYSIS

[19] The first ground of appeal was the ground that was primarily argued on this appeal. This is a matter concerning the scope and application of section 48(1) of the *Highway Traffic Act* and is therefore a question of law. The standard of review is correctness.

[20] Section 48(1) of the *Ontario Highway Traffic Act*, 1993, reads as follows:

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

[21] Section 216(1) of the *Highway Traffic Act* provides that:

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 stop.

[22] Under section 1(1) of the *Highway Traffic Act* “driver” is defined as “a person who drives a vehicle on a highway”.

[23] “Highway” is defined in the *Highway Traffic Act* as including,

[a] common and public highway street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof.

[24] For the appellant to be able to be found to be a “driver” within the meaning of the *Highway Traffic Act*, it must be found that he was driving a vehicle on a highway, as defined in the Act.

[25] The issue of what is or is not a highway was considered by the Ontario Court of Appeal in *R. v. Hajivasilis*, 2013 ONCA 27 (Ont. C.A.). At paragraph 10 of that decision, Doherty J.A. made the following observation:

The phrase “intended for or used by the general public for the passage of vehicles” limits the meaning of “highway”. If a vehicle is being driven on property to which the general public does not have access or if that access is for a limited purpose other than passage (such as parking), the property will not fall within the meaning of “highway”. Most privately owned lots are not “highways” as defined in the *HTA*.

- [26] The comments by the Ontario Court of appeal in *Hajivasilis* suggest that the *Highway Traffic Act* applies to spaces where the public commonly travel in vehicles.
- [27] In *R. v. Cirillo* (1981), 11 MVR 16 (Ont. Co. Ct.), the court considered the case of a construction worker who operated a motor vehicle on a portion of a highway which was temporarily closed to traffic for repairs. The court held that the definition of what constitutes a highway should be strictly interpreted to give the benefit of any vagueness to an accused. The court in *Cirillo* held that because the public was denied access at the time of the alleged offence, the road had ceased to be a “highway” as defined in the *Highway Traffic Act*.
- [28] On an appeal to the Superior Court of Justice in *R. v. Nield*, [2015] O.J. No. 4810, Justice Fregeau considered whether the appellant was a “driver” as defined in the *Highway Traffic Act*. In that case a police officer followed the accused’s vehicle and parked behind it when it stopped in a parking lot. Fregeau J. concluded that the accused was no longer a “driver” as defined by the *Highway Traffic Act* once his vehicle was parked in a hotel parking lot.
- [29] In considering the aforementioned jurisprudence and the definitions of “driver” and “highway” under the *Highway Traffic Act*, I am of the view that under section 48 and 216 of the *Highway Traffic Act* the police do not have the statutory authority to stop drivers on private property unless they have reasonable and probable grounds to believe that the driver has committed an offence. For the learned trial judge to conclude otherwise, as set out in paragraphs 54, 55 and 56 of his reasons released December 19, 2017, constitutes a reversible error in law.
- [30] Although this does not form the basis of the learned trial judge’s decision, the Crown argues that the police officer had the appellant’s implied consent to enter onto his property when he did not object, and common law authority to detain him. I might accept the argument that there is an implied invitation to enter the appellant’s property if Constable Lobsinger had a legitimate reason for entering the appellant’s property in the first place. It was clear on the evidence of Officer Lobsinger at trial that he did not have reasonable grounds to believe that McColman was impaired when he entered on his property or any articulable cause to believe that an offence was being committed by McColman when he entered onto his property. He was relying solely under his authority under section 216 and 48 of the *Ontario Highway Traffic Act*.
- [31] The comments of Rosenberg J.A. in *R. v. Lotozky*, 210 C.C.C. (3d) 509 (Ont. C.A.) at paragraph 35 are important in this regard. The Ontario Court of appeal at paragraph 35 states that:

The fact that the police officer intends to pursue an investigation on the driveway, at least if the investigation relates to a motor vehicle, does not in my view exceed the bounds of implied invitation, provided that the officer has a legitimate basis for entering on the driveway. [Emphasis added.]

[32] In the decision of *R. v. Dillon*, [2006] O.J. No. 1366 (Ont. SCJ), Molloy J. provides an extensive analysis of the common law right to detain for investigative purposes. As Molloy J. notes in paragraph 24, this common law right of the police has limitations. A two-pronged test for the exercise of this common law power has been adopted by the Supreme Court of Canada in *R. v. Mann*, 185 C.C.C. (3d) 308, using the foundations adopted by the English Court of Appeal in *R. v. Waterfield* (1963), 3 All E.R. 659 (Eng. C.A.).

[33] Molloy J. discusses these two stages of analysis in *Dillon* at paragraphs 25 and 26 as follows:

[25] The first stage of the analysis requires a consideration of whether the police conduct falls within the general scope of any duty imposed on the officer by statute or common law. The police have a duty to investigate crime and to protect life. Detecting impaired drivers and preventing them from operating cars on our highways is within the scope of those police duties: *R. v. Dedman*, [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97, 20 D.L.R. (4th) 321 (S.C.C.). In the case before me, the two officers were motivated by a concern about a potential impaired driver. Although he was not operating on the roadway, he was in a parking lot of an establishment that had closed, or was about to close, and his engine was running. It was a reasonable inference that his entry onto the public roadway was imminent. Their investigation of Mr. Dillon was therefore within the general scope of their police duty.

[26] At the second state of the analysis, the prosecution must demonstrate that the police conduct was a justifiable use of the powers associated with the duty. This requires a balancing of interests between the prosecution of the public by police carrying out their duty to prevent crime and the protection of the liberty interests at stake. The court must consider the necessity and reasonableness of the interference with liberty, as assessed in light of the nature of the liberty interfered with and the importance of the public purpose served: *Mann* at para. 26.

[34] In *Dillon*, the court notes in paragraph 35:

[35] At common law, there is an implied license for any member of the public to enter onto private property for a legitimate reason. Thus, a homeowner is deemed to have given to others an implied license to approach his door and knock, provided the person entering the property has a lawful reason for doing so. A police officer on legitimate business has the same implied license to enter as any other member of the public, subject to that officer's purpose for entering. [Emphasis added.]

[35] With respect to the overarching principles on the issue of the implied license to enter property under common law, Molloy J. at paragraph 40 in *Dillon* makes the following observation:

[40] From these cases, I conclude, as a matter of general principle, that the extent of the implied license to enter private property depends on the

nature of the property and on the purpose of the entry. At the heart of the objection to police entering private property for police business is a concern for the invasion of the privacy interest of the property owner. That privacy interest is significantly diminished where the property is one that is generally open for any member of the public to enter. At the lowest end of the spectrum, in my view, would be a parking lot of a commercial establishment such as the one at issue here where the detainee is himself there by license, as opposed to being the owner or tenant of the property with a right to exclude others. There can be virtually no privacy interest on the part of a member of the general public who happens to be parked on a lot adjacent to a public street. The accused, Mr. Dillon, was not on his own private property; he was on a parking lot owned by a business catering to the general public. His expectation of privacy in the parking lot can surely be no greater than his expectation of privacy had he parked at the street curb a few meters away. He had no greater right to be in the parking lot than did the police officers, and no right to exclude the officers from the lot. Indeed, in these circumstances, given the fact that he did not have a valid driver's license and had been suspended from driving for life, it may well be said that he had far less right to be there than did the police officers, and that the deemed invitation to enter from the business owner did not extend to an unlicensed driver, to say nothing of an impaired driver.

[36] Finally, at paragraph 48 of her decision in *Dillon*, Justice Molloy notes:

[48] The Court of appeal noted in *Simpson* the necessity of strictly limiting the circumstances in which the police power referred to in *Dedman* will apply. In order to randomly detain a motorist without reasonable grounds for suspecting that person has committed a crime, the police must be acting legitimately out of a concern for the protection of the public in relation to the operation of a motor vehicle: *Simpson* at p. 492-493; *Ladouceur* at p. 44; *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481 at 487 and 490, [1992] 3 S.C.R. 615, 16 C.R. (4th) 273 (S.C.C.). [Emphasis added.]

[37] In *Dillon*, the case of *R. v. Simpson* (1993), 12 O.R. (3d) 182 (ONCA) was referred to. The issue in *Simpson* was whether there was an arbitrary detention in breach of section 9 of the *Canadian Charter of Rights and Freedoms*. In the *Simpson* case a vehicle was stopped after leaving a residence which was a suspected “crack house”. The vehicle was stopped, searched and ten grams of cocaine was seized. In the *Simpson* case, the Ontario Court of Appeal found sections 8 and 9 of the *Charter* violated. The court held that the detention of the vehicle was not lawful under the *Ontario Highway Traffic Act* since the stop was not limited to the operation of a motor vehicle or other road safety matters. The court further held that the detention was not authorized under the common law in the absence of “articulable cause” to suspect the driver was criminally implicated in an activity under investigation. The court held that the detention both arbitrary and unlawful, found a section 9 *Charter* violation and excluded the evidence after a section 24(2) analysis.

[38] In particular, at paragraph 58, Doherty J.A., speaking for the court, indicates that, “In my opinion, where an individual is detained by the police in the course of efforts to

determine whether that individual is involved in criminal activity being investigated by police, that detention can only be justified if the detaining officer has some ‘articulable cause’ for the detention.”

- [39] Doherty J.A. goes on to make the following observations in paragraphs 66 and 67 in *Simpson*:

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

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

- [40] In both the *Nield* and *Dillon* decisions, the court found that on the facts of those cases the police were acting within the implied license to enter and therefore were acting within their common law authority to detain the accused for investigative purposes. Accordingly, there was no breach of the accused’s rights under section 9 of the *Charter* found in these two decisions. I am of the view that the same result cannot be reached in the case before me involving Mr. McColman. There are clear distinctions between the case involving Mr. McColman and those involving *Nield* and *Dillon*.
- [41] Firstly, in Mr. McColman’s case the detention occurred on the accused’s private property upon which he travelled, and the police followed him on. The fact that the detention occurred on private property, in my view, elevates the appellant’s privacy rights which was not the case in either *Nield* or *Dillon*, where the detention occurred in a parking lot.
- [42] Secondly, there was no public protection interest being served in following Mr. McColman onto his private property. At that point, Constable Lobsinger had no knowledge that the appellant had been drinking and made no personal observations to

suggest to him that the appellant had been drinking or was impaired. As indicated by Constable Lobsinger in his evidence the sole reason that he followed the appellant onto his private roadway was to exercise his authority under the *Ontario Highway Traffic Act* to see if the appellant impaired. When the appellant had entered his private driveway the public interest no longer needed to be protected. There is no evidence to suggest that the appellant intended to take the ATV vehicle back on to the public road. Constable Lobsinger was following the appellant on his property and detained in the hope that he would acquire the grounds to arrest him, not out of legitimate concern for the protection of the public in relation to the operation of a motor vehicle.

- [43] In balancing interests between the protection of the public by the police and the protection of the appellant's privacy interest and his constitutional right to be protected against arbitrary detention, the facts on this appeal clearly favours protecting the privacy interests of the appellant. Simply put, Mr. McColman was in his driveway and not on a highway or public roadway. There were no interests of the public that had to be protected at that point in time that would justify the actions of the police authorities or couch them with implied license or authority under the common law.

CONCLUSION

- [44] Constable Lobsinger did not have the statutory authority under sections 48 or 216 of the *Ontario Highway Traffic Act* to stop Walker McColman on private property unless he had formed reasonable grounds and had articulable cause to believe that he had committed an offence. Mr. McColman was no longer a "driver" as defined in the *Ontario Highway Traffic Act* when he left the public roadway and turned onto his private driveway. Accordingly, Constable Lobsinger had no statutory authority under the *Highway Traffic Act* to randomly detain him in order to check his sobriety.
- [45] Additionally, Constable Lobsinger did not have common law authority to follow Mr. McColman onto his private property and to detain him there. The motivation for Constable Lobsinger in following the appellant onto his property was not the protection of the public, but rather the attempt to secure evidence against him. The public did not require protection from the appellant once he was in his private driveway. Furthermore, the actions of Constable Lobsinger was not a justifiable use of power in the application of the second stage of the analysis set out in *Waterfield* and *Mann*.
- [46] I am of the view that Justice Villeneuve erred in law when he concluded that the officer had statutory authority under section 48 of the *Highway Traffic Act* to follow the appellant onto his private property. The learned trial judge's decision cannot be saved under common law authority as Officer Lobsinger had no common law authority to enter the private property of the appellant on the facts of this case.
- [47] I am of the view that in the absence of such statutory or common law authority that Officer Lobsinger breached the appellant's constitutional rights under section 9 of the *Canadian Charter of Rights and Freedoms*, and that the learned trial judge erred in law when he concluded otherwise.

- [48] A section 24(2) *Charter* analysis under the direction provided by the Supreme Court of Canada in *R. v. Grant*, 245 C.C.C. (3d) 1, would result in the evidence obtained after the stop of Mr. McColman's ATV and his detention being excluded at his trial. Paragraph 71 of the *Grant* decision sets out the analysis required by the court to consider whether evidence should or should not be excluded. Paragraph 71 of *Grant* states as follows:

[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. 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 seriousness of the Charter-infringing state conduct (admission may send the message of 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.

- [49] The actions of the police are serious. They pursued the appellant onto private property when they had neither the statutory or common law authority to do so. The *Charter*-protected interest to be protected is one of privacy. The expectation of privacy on one's own property is a high one. As to the third test set out in *Grant*, clearly society has an interest in having the matter adjudicated on its merits. Having said that, when all three factors are balanced, the balance favours the exclusion of evidence.
- [50] For the reasons set out herein, this appeal succeeds on the first ground advanced, in that I agree that the learned trial judge erred in finding that a police officer could make a section 48(1) *Ontario Highway Traffic Act* stop of a citizen on private property absent articulable or probable cause. Having reached that conclusion, it is not necessary for this court to deal with the two other grounds for appeal advanced by the appellant in his notice of appeal dated April 23, 2019.
- [51] The conviction by the Ontario Court of Justice against Walker McColman, entered on October 4, 2018 for the offence under section 253(1)(b) of the *Criminal Code of Canada*, is set aside and an acquittal is entered.

Gareau J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

WALKER MCCOLMAN

REASONS ON APPEAL

Gareau J.

Released: September 16, 2019