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| R. c. Nimeri | | | | | | | 2024 QCCQ 1412 | |
| COURT OF QUEBEC | | | | | | | | |
| Criminal & Penal Division | | | | | | | | |
| CANADA | | | | | | | | |
| PROVINCE OF QUEBEC | | | | | | | | |
| DISTRICT OF | | | MONTREAL | | | | | |
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| **BEFORE THE HONOURABLE DENNIS GALIATSATOS, J.C.Q.** | | | | | | | | |
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| HIS MAJESTY THE KING | | | | | | | | |
| Prosecution - Respondent | | | | | | | | |
| v.  MARCUS NIMERI | | | | | | | | |
| Accused - Applicant | | | | | | | | |
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| **JUDGMENT ON THE APPLICATION TO EXCLUDE EVIDENCE**  **(ss. 8, 9, 24(2) of the *Canadian Charter of Rights and Freedoms*)**  **[English version – prepared by the Court – of the French judgment. In case of any discrepancy,**  **the French version shall take precedence]** | | | | | | | | |
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1. The accused, Marcus Nimeri, is charged with possession of a loaded prohibited handgun (s. 95(2)(a) *C.C.*), carrying a concealed weapon (s. 90(2)(a) *C.C.*) and obstructing a police officer in the execution of his duties (s. 129(a)(d) *C.C.*).
2. It is common ground that on the morning of October 17th 2023, he was walking on a downtown Montreal street with a modified, fully automatic, loaded Glock 19 pistol nestled in his man-purse.
3. At trial, the defence presents an application for the exclusion of the firearm and the bullets. It argues that the police officers had no reason to stop and detain the accused, who was simply walking down the street without incident on a sunny day. Nor were they entitled to search him. Fundamentally, it is not illegal to possess a man-purse, nor it is automatically an indicator of some criminal activity.
4. The Crown responds that several elements in the accused’s behaviour amply warranted his investigative detention by the officers. Similarly, cogent safety concerns required that the officers conduct a pat-down search of the man-purse in order to ensure that he was not armed.
5. The parties’ respective perceptions of the uncontested fact pattern are diametrically opposed. One considers this to have been an oppressive, unfair and unjustified violation of the accused’s rights. The other sees an example of remarkably diligent, potentially life-saving police work that took a dangerous weapon off the streets.
6. The parties have agreed that this application is dispositive of the case. The accused did not testify on *voir-dire*. Moreover, the defence formally announced that it would have no evidence to adduce on the merits and the parties accept that, should the handgun and bullets be admitted, the application evidence would apply to the trial proper and a guilty verdict would ensue.[[1]](#footnote-1)

# THE FACTS

# 1- The police officers’ testimony

1. Officers Nicolas Boivin and Patrick Laleyan were on a regular patrol on the morning of October 17th 2023, on board a marked squad car. Laleyan drove; Boivin was the passenger. It was a bright, sunny day.
2. At around 10:15 am, the officers were at the intersection of De la Montagne and Saint-Jacques Streets, in downtown Montreal near the Bell Centre. They were stopped at a red light. At the north-west corner of the intersection, they noticed a man exiting the Drivers Licence Bureau. The building’s exit was approximately 10-20 metres away from the intersection.
3. The man in question, *i.e.* the accused, walked towards the intersection while looking at his cell phone, which he held in his right hand. Once he reached the intersection, he was facing south[[2]](#footnote-2) and was waiting his turn to cross the road. His body was placed in a southbound direction.[[3]](#footnote-3) He was right at the edge of the corner,[[4]](#footnote-4) ready to cross.[[5]](#footnote-5)
4. Once he raised his eyes, he noticed the police car. Upon seeing them, he immediately changed direction, turning on a dime and doing a 180° before starting to walk northbound on De la Montagne, which attracted the officers’ attention.
5. The officers, who were still waiting at their own red light, decided to observe him.
6. Nimeri wore a man-purse-type strap bag under his right armpit, hanging down to his hip.
7. As he walked away northbound, using his elbow, the accused discretely pushed the man-purse forward in an effort to shield it from the view of the police officers (who were now positioned behind him). His right hand still held his cell phone. This made the police officers even more vigilant. During the subtle pushing of the purse forward, the officers noticed that the accused’s arm remained very rigid, kept bent at a 90° angle at the elbow.
8. The officers then noticed that as he walked away, the man had a “dead-arm”, described as follows:

* His right arm was firmly squeezed against the bag, pinning it against his body in order to prevent it from moving. The bag was now partially in front of his body, at the height of his lower ribs.
* As he walked, the man put his cell phone in his pants pocket. Even when he made this movement, he was careful not to unstick his elbow from his ribs. Only his forearm slightly extended, just enough to reach his pocket and insert his cell phone in it. The movement was awkward and unnatural.
* As he walked, his left arm was swinging and swaying normally. Conversely, his right arm remained stuck and immobile. The contrast was striking.

1. Officer Boivin explains that three or four years ago, he completed a specialized training program dispensed by the ENSALA unit of the Royal Canadian Mounted Police on the topic of the physical and behavioural characteristics of persons carrying weapons. The course sensitized the offices to various indicia, some conscious and other unconscious, that tend to suggest that the individual is concealing a weapon on his person. Among those markers were (1) walking with dead-arm and (2) repositioning one’s body in such a manner that it is angled away from the police, thereby removing something from their field of vision. The training course also taught them that the armed person might also make subconscious self-pat movements in order to verify that the weapon was still in its intended place. Finally, the course provided a list of the most common hiding places for handguns, which included man-purses, waistbands and different types of holsters. In the majority of seizures, the handgun was hidden in a man-purse or belt. This ENSALA course was based on data from all firearms seizure reports in the province, irrespective of which police force made the find. Every gun seizure in the province is reported to ENSALA, which in turns compiles updated comprehensive data.
2. Since following this course, Boivin personally seized at least 25 concealed handguns on suspects. All of those seizures resulted from police-initiated contacts, after he noticed the tell-tale signs of hidden gun possession that he learned in the training. Among the 25 seizures he made, at least 80% of the guns were concealed in man-purses.
3. In addition to the training course, officer Boivin had seven years of experience patrolling in downtown Montreal. He had an interest in firearms and he followed any training course offered on the topic.[[6]](#footnote-6)
4. Officer Laleyan had followed the same training program. When he explained dead-arm and self-checks in his testimony, the officer specified that these movements are often involuntary. In fact, he sometimes notices his colleagues doing it when they are working undercover; they also tend to check – subconsciously – to ensure that their weapon is concealed where it should be. Laleyan has six years experience patrolling in downtown Montreal. Based on his experience, he knew that the area surrounding the Bell Centre is often problematic, as it attracts organized crime figures and street gangs, due in part to the prevalence of restaurants, bars and nightclubs. In his patrol sector, he is often called to respond to gunshot calls, including attempted murders. He estimates that he has responded to approximately 100 gun shot calls.
5. Before the interaction in the case at bar, he was involved in 30 concealed handgun seizures, the majority of which were hidden in man-purses. He knows man-purses to be particularly efficient vessels to carry weapons. In fact, he acknowledges using them himself when he is working undercover. He has a personal interest for firearms. He is a gun owner himself. He describes himself as a “gun fanatic”. He was able to explain the Glock switch mechanism to the Court.
6. Back to the facts, as Nimeri continued to walk northbound, away from the police car, he quickly turned his head to see if the officers were still there. During this “back check” manoeuvre, the officers and the suspect made eye contact. Nimeri continued northbound, his arm still locked in as a dead-arm.
7. The accused then took his phone out of his pocket, still carefully keeping his elbow pinned, before re-locking his arm in a 90° angle. He then put his phone back in his pocket. Officer Boivin considered this to be relevant too: if someone is carrying a man-purse, it is generally because he is transporting personal items, such as a cell phone. Yet, here, Nimeri was putting his cell phone in his pants pocket. Thus, he must have had something else, something different, in his man-purse.
8. When their traffic light became green, the officers drove up northbound as the accused continued to maintain his dead-arm. When Nimeri noticed them nearby, he froze. He stared at the officers, now keeping both arms immobile.
9. The officers decided to intercept him. On the basis of all their observations, both considered that they had reasonable grounds to suspect that he was carrying a concealed gun. They quickly chose to perform a U-turn first, in order to ensure that the suspect saw them coming. They thought it would be unwise to intercept him from behind, since he might react adversely. For related reasons, the officers wanted to have a clear view of the accused “to face the threat” in order to ensure their own safety. Notably, they wanted to see his hands, since they suspected he was armed.
10. As they did their U-turn, before they even turned their flashing lights on, unprompted, Nimeri took out his health insurance card from his pocket. Yet, the police had not asked him for anything yet. In addition to being odd in and of itself, this also suggested to officer Boivin that there must have been something else of interest in the man-purse, since the suspect was clearly not carrying his I.D. or his phone in it.
11. The officers exited their vehicle and approached the accused. They immediately ordered him to show his hands and they informed him that he was detained for investigation regarding a gun matter. They also read him his right to counsel while officer Laleyan closely monitored the man-purse.
12. At that moment, Nimeri started yelling, gesturing wildly and protesting that they had no right to intercept him. He kept putting his hand in his left pocket despite the officers’ orders to keep them out. Furthermore, he started frantically looking left and right, which the officers interpreted as an obvious sign that he was scanning his surroundings to flee on a moment’s notice. Officer Boivin explains that he certainly didn’t want Nimeri to flee, given the fact that he possibly had a gun on him. Nor did he want him to take the gun out, which directly threatened their safety. Finally, Boivin hoped to not have to unholster his own service weapon on a downtown street.
13. In order to ensure everyone’s safety, the officers grabbed his arms. Nimeri continued to look for escape routes.
14. That is when officer Laleyan patted down the man-purse for security reasons. He immediately felt a rectangular metallic shape. As he ran his fingers along the purse’s exterior, he unmistakably recognized the shape of a pistol.
15. He immediately warned his partner by calling “gun!”. With a sense of urgency, Laleyan cut the strap off the purse in order to withdraw it from the suspect. Given his aggressivity, it would be too dangerous to attempt to remove it by pulling the strap over his head. The suspect might have tried to get his hands on the gun.
16. Nimeri yelled and resisted to being handcuffed so aggressively that another passing police car saw the commotion and stopped to provide backup. It took four officers to subdue the accused.
17. Finally, the Givenchy brand man-purse was confirmed to contain an illegal loaded handgun, described below. On his person, the accused had 5 230$ in cash.
18. Even after being placed in the patrol car, the accused continued to scream and kick the vehicle’s doors.

# 2- The handgun and bullets seized

1. The weapon seized is a Glock-19 pistol. In the purse, the police also found a magazine loaded with ten 9 mm calibre bullets.
2. Normally, such a weapon is a restricted handgun. However, Nimeri’s pistol had been modified with a Glock switch, rending it capable of firing in fully automatic mode, much like a machine gun. The weapon was therefore prohibited.
3. In fact, the knob on Nimeri’s Glock switch was missing, such that the handgun could only be fired in fully automatic mode.[[7]](#footnote-7)

# ANALYSIS AND DECISION

# 1- Reasonable grounds for an investigative detention

1. Through the years, a long line of appellate caselaw led to the recognition of a limited common law power allowing the police to detain a suspect for investigative purposes. The applicable standard, previously described as “articulable cause”, was more clearly defined by the Supreme Court of Canada in ***R.* v. *Mann***.[[8]](#footnote-8)
2. Articulable cause, while clearly a threshold somewhat lower than the reasonable and probable grounds for lawful arrest, is likewise both an objective and subjective standard.[[9]](#footnote-9) Investigative detentions must be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer’s suspicion that there is a clear nexus between the individual to be detained and a recent **or ongoing** criminal offence. Reasonable grounds figures at the font end of such an assessment, underlying the officer’s reasonable suspicion that the particular individual is implicated in the criminal activity under investigation.[[10]](#footnote-10) A mere hunch will not suffice.
3. As was said in ***Mann***, police officers must be empowered to respond quickly, effectively and flexibly to the diversity of encounters experienced daily on the front lines of policing.[[11]](#footnote-11)
4. The concept of “reasonable grounds to suspect”, which forms the basis of an investigative detention, was further explained by the Supreme Court in ***R.* v. *Chehil***. Once again, a unanimous Court reiterated that the reasonable suspicion standard, although grounded in objective facts, is lower than that which is required to justify an arrest. An arrest requires facts that sustain a reasonable *probability* of crime. However, an investigative detention needs only rest on the reasonable *possibility* of crime, which is a lower threshold.[[12]](#footnote-12) The grounds must be indicative of a possibility of a particular crime[[13]](#footnote-13).
5. By setting those parameters, the Court was keenly aware that in some cases, it would be inevitable that the police reasonably suspect that innocent people were involved in crime.[[14]](#footnote-14) Although such an occurrence will always be unfortunate, the Court knowingly endorsed this standard, holding that it strikes the proper balance between the State’s interest in detecting and preventing crime and the individual’s interest in being left alone.
6. Writing for the Court, Karakatsanis J. explained that reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the officer reasonable cause to suspect that the person is involved in the type of criminal activity under investigation. The inquiry must be fact-based, flexible and grounded in common sense and practical, everyday experience. The grounds must not be assessed in isolation.[[15]](#footnote-15)
7. Given the fact that the assessment is grounded in *possibility* rather than *probability*, it is entirely possible that an investigative detention be justified, even when an opposing – innocent – inference could have been drawn.[[16]](#footnote-16)
8. In fact, appellate courts across the country have repeatedly warned against upping the ante for reasonable suspicion, under the banner of rigorous judicial oversight, to the point that it virtually mirrors the test for reasonable and probable grounds.[[17]](#footnote-17)
9. As expressed in ***R.* v. *MacKenzie***, the assessment on review must not devolve into a scientific or metaphysical exercise. The Court is to consider the police officer’s experience and training, especially when it is precisely in the field of the specific criminal conduct at issue.[[18]](#footnote-18)

# 2- When may police officers conduct a pat-down search incidental to an investigative detention?

## The standard established by the Supreme Court in R. v. Mann

1. Appellate courts have recognized that the *Charter* does not impose the obligation on police officers to work in conditions that unduly place their lives at risk.[[19]](#footnote-19) The basis for such reasoning is obvious: such conditions would inevitably lead to a serious shortage of officers, as well as an understandable collapse in motivation in the execution of their duties.
2. In the performance of their duties, police officers are often in a position of special vulnerability and are entitled to such protection as the law can give.[[20]](#footnote-20) As the Supreme Court has underscored, officers are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible.[[21]](#footnote-21)
3. As such, a search incident to investigative detention will sometimes be permitted. It is essential that such a search be conducted for security concerns alone and it cannot be prompted by “vague or non-existent” worries, nor be based on mere instinct or officer intuition.[[22]](#footnote-22) A search will withstand *Charter* scrutiny and will not be considered abusive if it was conducted in such a way that was reasonably necessary to eliminate a security threat to the officers or to the public.[[23]](#footnote-23)
4. In ***R.* v. *Mann***, the Supreme Court specified that the general duty of police officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course. Instead, the officer must believe on reasonable grounds that his safety is at risk. The officer’s decision to search must also be reasonably necessary in light of the totality of the circumstances.[[24]](#footnote-24)
5. Although the most-commonly discussed method is the frisk or pat-down, ten years after ***Mann***, the Supreme Court clarified in ***R.* v. *MacDonald*** that a safety search may take other forms too, varying from case to case, as long as it is minimally intrusive and it serves only a protective function.[[25]](#footnote-25) Various appellate Courts have similarly reiterated that ***Mann*** does not restrict the police to pat-downs.[[26]](#footnote-26)
6. In fact, it is trite law that an officer may – when evidence supports it – search other places than the body or clothing of the suspect.[[27]](#footnote-27) Beyond a mere pat-down search, this certainly extends to searching fanny packs[[28]](#footnote-28), backpacks[[29]](#footnote-29) and man-purses,[[30]](#footnote-30) provided they are minimally intrusive in the circumstances. This may include opening them and looking inside.[[31]](#footnote-31)

## Can reasonable suspicion of danger suffice?

1. Although the terms used by the Supreme Court appeared straightforward enough, there has been much commentary (both judicial and doctrinal) suggesting that the standard was perhaps awkwardly phrased.
2. The main criticism can be summarized as follows. It is common ground that the detention may be based on a *possibility* of criminal conduct, as opposed to a probability. Yet, if that standard is met and the police reasonably suspect that the person is in possession of a dangerous firearm, they could arguably not perform a security search unless they have reasonable and probable grounds to *believe* that the person is in fact armed. This could create an untenable situation for the police, who on one hand, need to quickly detain a potentially armed man, but on the other, can do nothing to protect themselves. In the context of firearms-related interactions, this may lead to absurd results.
3. The criticism was aptly summarized by the Manitoba Court of Appeal in ***R.* v. *McKenzie***:

The language in *Mann* as to the threshold for this warrantless search power was, with respect, imprecise. In several places in the decision, the standard for a protective search was described as “reasonable grounds” that the safety of the officer or others is at risk (at paras. 40, 43, 45). Yet, in the result, the Court said the initial pat-down search of the detainee in *Mann* was justified because there was a “logical possibility” that the [detainee], suspected on reasonable grounds of having recently committed a break-and-enter, was in possession of break-and-enter tools, which could be used as weapons” (at para. 48). Of some significance is the fact that the American case law relied on in *Mann* to justify the constitutionality of a search incident to an investigative detention is premised on the basis of the reasonable suspicion standard, not the higher standard of reasonable grounds.[[32]](#footnote-32)

[emphasis by the Manitoba Court of Appeal]

1. In fact, in the subsequent leading case on investigative detention, ***R.* v. *Clayton***, the Supreme Court seems to have readjusted the standard. In that case, the officers detained the suspects, had them exit their vehicles and searched them. The Court concluded that the investigative detention was valid, on the basis that the facts “gave rise to the **reasonable suspicion** that the occupants of the Jaguar **could be** in possession of the handguns reported in the 9-1-1 call and that, as a result, the lives of the police officers and of the public were at risk”.[[33]](#footnote-33) On that same basis, the Court held that “the officers’ safety concerns also justified the searches incidental to the detention”.[[34]](#footnote-34)
2. In 2013, in ***R.* v. *Chehil***, the Supreme Court reiterated that in some cases, searches will be justified on a lower standard than reasonable and probable grounds. When listing examples, it notably mentioned that some searches are allowed on the basis of a lower threshold of reasonable suspicion, including “limited searches accompanying investigative detentions [pursuant to] *R.* v. *Mann*”.[[35]](#footnote-35)
3. Interestingly, on the same day ***Chehil*** was released, the Ontario Court of Appeal delivered its decision in ***R.* v. *Atkins***. In that case, after first concluding that the officers had the requisite reasonable suspicion to detain the suspect for investigation, it then held that the pat-down search that followed was justified on officer safety grounds, since they **reasonably suspected** that the accused was in possession of a weapon.[[36]](#footnote-36)
4. In ***R.* v. *Webber***, the British Columbia Court of Appeal also respectfully observed that the language used in ***Mann*** had given rise to interpretive difficulties. However, after reviewing subsequent caselaw, it opined that the **reasonable suspicion** standard did in fact authorize safety searches in certain contexts, particularly where privacy interests are reduced.[[37]](#footnote-37)
5. A few years earlier in ***R.* v. *Sheck***, the same Court, after citing the ***Mann*** terminology verbatim, stated the following:

The test for valid investigative detention and a search incident thereto is to be based on the same safety concerns. In the case of the detention, it is to be based on a reasonable suspicion and in the case of the search, it is to be based on a reasonable belief that safety is at risk.[[38]](#footnote-38)

[emphasis in the original]

1. As such, although the duality was superficially maintained, the underlined words denote that to justify an incidental security search, the officer need not reasonable grounds to believe that the accused is carrying a gun. Instead, he needs to have reasonable grounds to believe that there is a risk that the accused has a gun. The devil is in the details.
2. In ***R.* v. *Peterkin***, the Ontario Cour of Appeal highlighted the same nuance. It stressed, with italics, that ***Mann*** required reasonable grounds to believe that the officers’ or the public’s safety was at risk or at stake, which inherently built in the *possibility* that the suspect have a gun.[[39]](#footnote-39)
3. While this review provides insight into the national appellate perspective on the ***Mann*** search standard, I am of course bound by the Quebec Court of Appeal’s precedents.
4. Indeed, in ***R.* c. *Legoute***, the Quebec Court of Appeal also quoted the ***Mann*** language verbatim. However, interestingly, when concluding that the security search (incident to investigative detention) was valid in that case, it skewed the language ever so slightly:

[Translation] The preventive search fell under the police’s general duty to protect life and it was based on reasonable grounds to believe that the respondent **might have been** armed with a weapon or blunt object capable of injuring the officer.[[40]](#footnote-40)

[emphasis added]

1. In my view, there is unquestionably a difference between:
2. Reasonable grounds to believe that the suspect **is carrying a gun**; and
3. Reasonable grounds to believe that the suspect **might be carrying a gun**.
4. All this being said, as will be seen below, the case at bar does not hinge on which of the two standards applies. Based on my assessment of all the dynamic circumstances during the intervention on October 17th 2023, by the time the pat-down search of the man-purse was conducted by officer Laleyan, the officer had reasonable grounds to *believe* that their safety was in danger, thereby meeting the more stringent threshold.

## The case of R. v. MacDonald did not modify the applicable standard

1. In ***R.* v. *MacDonald***,[[41]](#footnote-41) the Supreme Court again dealt with the issue of preventive security searches generally. In that case, there was no detention at all. ***Mann*** powers were therefore not directly at play. Instead, the police attended the accused’s home following a noise complaint. The accused swore at the police and slammed his door. When he later reopened it, police noticed that he was holding something black and shiny in his hand. The officer therefore pushed the door in order to see if it was a weapon, which enabled him to see that it was a handgun.
2. To be sure, much of the analysis in ***MacDonald*** remains useful and generally relevant in the scrutiny of police conduct. However, more specifically, the Court appeared to introduce a requirement of an “imminent threat to officer safety” before a weapons search may be allowed.[[42]](#footnote-42)
3. However, since 2014, a body of appellate caselaw has held that the additional “imminence” requirement mentioned in ***MacDonald*** applied only in cases where the suspect was not otherwise lawfully detained. Specifically, it has been consistently held that ***MacDonald*** did not recalibrate the ***Mann*** standard for search incident to investigative detention.[[43]](#footnote-43)
4. Most recently in the case of ***R.* v. *Dhillon***, the British Columbia Court of Appeal weighed in on the issue again. After a detailed analysis of the caselaw, the Court concluded that there is no requirement of an “imminent threat to safety” for a search incident to investigative detention to be lawful.[[44]](#footnote-44)
5. In fact, in ***R.* v. *Stairs***, even the Supreme Court itself appeared to restrict the imminence requirement to unplanned security searches, absent grounds for detention, in a person’s residence where the expectation of privacy is very high.[[45]](#footnote-45) None of those variables are at play in the case at bar.

# 3- The relevance of an accused’s odd behaviour, his reaction to seeing the police and his unnatural movements tending to hide an item being carried

1. In ***R.* c. *Fadel***, the Quebec Court of Appeal stressed that we should not underestimate the importance of the perception of on-field police officers. After all, among their various functions, they are trained to detect crime. As such, when they perceive movements, peculiar body language and certain types of behaviour that attract their attention, these elements rightfully form part of the constellation of facts that the Court must consider in determining whether the reasonable suspicion standard has been met.[[46]](#footnote-46)
2. These behaviours may include signs of acute nervousness[[47]](#footnote-47), surprise or shock upon seeing the police[[48]](#footnote-48) or immediately changing one’s direction after seeing them.[[49]](#footnote-49)
3. The act of accelerating[[50]](#footnote-50) or fleeing from police officers[[51]](#footnote-51) generally tends to suggest that the suspect is involved in criminal activity. Any evasive behaviour will be relevant.[[52]](#footnote-52)
4. To be sure, merely walking away from the police does not, by itself, create a reasonable suspicion. It is something every person is perfectly entitled to do. However, in conjunction with other suspicious behaviour, it may elevate mere suspicion to reasonable suspicion.[[53]](#footnote-53)
5. When it comes to handgun possession offences, the caselaw places great weight on the fact that the observed suspect makes unnatural movements when noticing the police, including:
6. Clutching an object or a bag against his body;[[54]](#footnote-54)
7. Pinning his arm or elbow against his torso;[[55]](#footnote-55)
8. Arms not swinging naturally – or not swinging at all – while walking;[[56]](#footnote-56)
9. “Blading”, *i.e.* carefully and subtly repositioning his body so as to remove an object from the police officer’s line of sight;[[57]](#footnote-57)
10. “Self-patting”, *i.e.* subtly, sometimes subconsciously, touching the area on their body where a concealed object is located as a way to verify that it is still there;[[58]](#footnote-58)
11. Pre-emptively having a piece of identification out and ready before the police officers even ask for it;[[59]](#footnote-59)
12. More overt movements consistent with attempting to conceal something.[[60]](#footnote-60)
13. Obviously, each case depends on a unique combination of circumstances faced by the police officer, as well as his specific background, training and experience. Different cases are rarely “on all fours” with one another. Since no two cases are the same, it will therefore be impossible to find comparable caselaw that deals with identical fact patterns. Nevertheless, I find the following decisions to be particularly relevant to our assessment.
14. In ***R.* v. *McKenzie***, the Manitoba Court of Appeal held that, among other objective facts within the constellation, the police officer was entitled to rely on the following indicators in coming to his *very quick* conclusion that he had reasonable grounds to suspect that the accused was carrying a concealed firearm in his fanny pack:

* While he was jogging, for no apparent reason, the accused was seen clenching the left side of his body with his elbow. It was an unnatural movement that suggested he was trying to conceal something.
* When he noticed the police’s presence, the accused appeared startled or frightened. He then increased his cadence from a jog to a full-out sprint.[[61]](#footnote-61)

1. The Court considered that much like the case at bar, the officer had extensive training and experience with weapons offences, including the manner in which people carry weapons. He believed the accused’s mannerism was an attempt to conceal a weapon between his left arm and his body.[[62]](#footnote-62) At that point, he immediately decided to detain the accused for an investigative purpose related to a weapons offence. The Court held that it was in fact a proper application of ***Mann***,[[63]](#footnote-63) adding that weapons offences are a serious threat to peace, therefore there was significant importance in the officer taking immediate action in terms of the public good, as well as a necessity for him to interfere with the accused’s liberty.[[64]](#footnote-64)
2. In ***R.* v. *Peterkin***,[[65]](#footnote-65) the police attended a townhouse in a high-crime area after a truncated 9-1-1 call was made. When they arrived at 3:00 am, there were no signs of forced entry or violence, although no one was answering the door. While they waited for the landlord to come open the unit, they saw a young man walking on a nearby sidewalk. As they watched him, the man turned from the sidewalk, walked across the housing complex’s patio and entered the fenced backyard through the open gate. Moments later, he used his cell phone.
3. The officers approached him to see what he was doing there. He told them he was waiting for a ride and pointed to a vehicle driving towards them. The officers considered that his answers made no sense. They placed him under investigative detention in connection with the provincial *Trespass to Property Act* and Peterkin identified himself with his driver’s licence. As they awaited a confirmation of identity over the airwaves, the officers noticed the accused tap his right hip at the waist level twice. For the officers, these movements were characteristic of a person who is armed. The suspect then began “blading” away from them, *i.e.* turning his body, he avoided eye contact and he appeared increasingly nervous.
4. Once his identity was confirmed, the officers gave him back his driver’s licence, on his right side. Rather than reach out and take it with his right hand, the accused kept his elbow tucked tightly against his body and hip. He had to awkwardly turn his whole body and extend only his forearm to take his licence back.
5. Given these observations, both officers suspected that Peterkin had a firearm. They advised them they would pat him down for their safety. The accused immediately backed up, grabbed at his right waist and tried to escape. After wrestling him to the ground, the police found a loaded handgun in his waistband.
6. The Court found that these indicia amply supported the investigative detention as it pertained to the possibly of gun possession.

# 4- “Quasi-racial profiling”, judicial notice regarding who wears man-purses and the impending decision of the Court of Appeal

## No racial profiling argument was advanced

1. In the course of either officer’s testimony, not a single question was asked about the accused’s race, ethnicity, ethnic origin or cultural background.
2. The topic was not even remotely broached in cross-examination. This was clearly not an oversight. It was by design. In fact, in final argument, defence counsel explicitly expressed that he was not advancing a racial profiling argument as it related to the accused’s interception, detention, search or arrest.[[66]](#footnote-66)
3. Then again, soon after came the “however”.
4. Defence counsel contends, somewhat creatively, that there was in fact “profiling” in the case at bar, but it was the “profiling of people who carry man-purses”. Well, to a certain extent, that much is obvious, although the term “profiling” is a misnomer. Without acknowledging “profiling” of any sort, both officers indeed stated that the presence of a man-purse was worthy of their attention, as one relevant factor among many others, in accordance with their specialized training and their multiple prior field experiences.
5. In my view, with respect, this is not at all blameworthy or even problematic. Physically, by design, man-purses are particularly efficient receptacles to carry handguns. Empirically, according to the uncontradicted evidence presented at the *voir-dire*, man-purses are very often used to carry concealed illegal firearms. There is no reason to disregard this reality.
6. The Court thus asked counsel how this “profiling” was objectionable. Obviously, profiling of suspects will be unacceptable if it is based on race, ethnic origin, religion, sex, apparent sexual orientation or belonging to a marginalized social class. Having said that, these concerns simply do not apply to a category of fashion accessory. By analogy, it is useful to recall that State-sponsored discrimination will only offend s. 15 of the *Charter* if it is based on the analogous characteristics that tie to the personal traits of the individual pertaining to his dignity and identity, or to a given group, which has the effect of imposing burdens, obligations and disadvantages, assessed within the larger social, political and legal context.[[67]](#footnote-67) The category of the “people with purses” is no such class and it should not become one. They can hardly be described as a discrete and insular minority.
7. Defence counsel responds with his indirect argument: *according to him*, it is mostly “racialized”[[68]](#footnote-68) people, notably black and arabic men, who tend to wear man-purses. Thus, if police officers target man-purses, the net effect will be that racial minorities are targeted at an increased rate.
8. For reasons expressed below, the Court dismisses this argument.

## Judicial notice of fashion trends among certain ethnic groups

1. From the outset, counsel acknowledges that this is not a matter that can be the object of judicial notice. His concession is wholly appropriate in that regard. It is out of the question that this Court conclude, without supporting evidence, that it is “mostly black and arabic guys who carry man-purses”.
2. First, it cannot seriously be advanced that this claim states a notorious fact that is so obviously true that it cannot be the subject of reasonable debate, or that may be verified easily and technically by resort to readily accessible sources of indisputable accuracy.[[69]](#footnote-69)
3. Second and more fundamentally, the Court believes that claim to be plainly incorrect. Yet, counsel closely follows up by adding that in the course of his work as a defence attorney, “empirically”, he has observed that to be true. Again, I disagree. This is merely a way to disguise a judicial notice argument into something labelled differently.
4. I am fully aware, as the Supreme Court reminded us in ***R.* v. *Abdullahi***, that in certain cases, apparently mundane characteristics may in fact subtly mirror the cultural norms of racialized communities.[[70]](#footnote-70) Wearing a man-purse is not one of those features.
5. As discussed further below, the involvement of a man-purse in the equation, considered in light of the other observations as a whole (including blading and dead-arm), is unquestionably a relevant indicator for the police officers in the field. In the case at bar, the uncontradicted evidence by both police witnesses (which incidentally, the Court believes) established that among the 30 handguns they seized, 80% of them were concealed in man-purses. This is significant data. Similarly, the training course they received by the ENSALA unit was based on comprehensive statistics stemming from *all* gun seizures in the province. This exhaustive data also confirmed the prevalence of man-purses being used to conceal illegal handguns.
6. We should not discount such a strong indicator merely on account of the observed person’s race.
7. To dispel any ambiguity on the issue: police officers may – indeed must – certainly pay close attention to man-purses, together with any other factors. Beyond the specialized training received, the evidence in the case at bar convincingly demonstrates that concealed weapons are found in man-purses extremely often. The numbers are loud and clear. They show, objectively and unequivocally, that there is a high probability that a handgun might be found in such a bag. It is the hiding place of choice, far more common than belts, waistbands or ankle holsters. Given the circumstances, if a police officer ignored this very strong indicator, it would be nothing less than a sign of incompetence.
8. If young men resent the police attention that their man-purses attract, then they are free to stop wearing them. This fashion accessory is in no way connected to culture, identity of integrity of the person. Nor is it essential in everyday life. The fashion trend is relatively recent. For decades, men survived just fine without these precious man-purses. Young men need not worry: wallets will continue to exist, as will pants pockets and jacket pockets.

## The impending decision by the Court of Appeal and the comments reportedly made by one of the justices during the hearing

1. During arguments before me, defence counsel invoked judge Dalmau’s decision in the case of ***R.* v. *Chemlal***.[[71]](#footnote-71) In that matter, the judge admitted the evidence.[[72]](#footnote-72) The defence describes the case’s relevance as follows.
2. First, according to counsel, the facts in ***Chemlal*** were remarkably similar to those in the case at bar. Moreover, the same officer was involved, to wit: officer Patrick Laleyan, although he was not the one who conducted the search of the suspect.[[73]](#footnote-73)
3. Finally, according to counsel for Nimeri, Chemlal presented a similar argument before the Court of Appeal, namely the link between “man-purses and black and arabic men” and thus, the risk of indirect racial profiling. Moreover, according to him, during the hearing of the appeal, one of the honourable justices made comments that seemed to be receptive to the argument, or even arguably endorse it.
4. In my view, the ***Chemlal*** case is barely relevant in the case at bar.
5. First, the decision, which was rendered orally and spans 24 pages of transcript, reveals that the facts were distinguishable in many respects.
6. Furthermore, the fact that officer Laleyan was involved in that case too is of no consequence. Each judge is seized of the evidence before him, considered as a whole. If another judge – in another matter – ruled that a given police officer behaved properly (or improperly), this in no way binds the current judge in the case at bar, especially when the underling facts are different. It is always risky to rely on factual findings of another judge, made in another case, based on different evidence.
7. In the recent ***R.* c. *Accurso***, our Court of Appeal clearly held that you cannot import factual conclusions or credibility findings from one case to another, since this constitutes extrinsic evidence. Besides, a witness may be credible or reliable in one file, but no so in others.[[74]](#footnote-74) The rule applies in full, even where the circumstances of both cases are similar to one another.[[75]](#footnote-75) Similarly, a judge cannot consider a fact to be proven, simply because it was established by evidence in another file.[[76]](#footnote-76)
8. On another note, any judgment rendered by the Quebec Court of Appeal is obviously relevant, useful and authoritative for trial judges in the province. However, ***Chemlal*** is still under advisement at the Court of Appeal; it has been since October of 2023. The judgment is still not rendered and it is not my place to attempt to predict how the Court of Appeal will rule. Such an exercise would be presumptuous and inappropriate. For the time being, unless and until the Court of Appeal says otherwise, judge Dalmau’s decision is presumed valid. In any event, as stated above, I am not relying on the ***Chemlal*** decision.
9. Finally, regarding the remarks that one of the Court of Appeal justices may have made during the hearing, I cannot consider them here. For starters, they were paraphrased to me in very vague terms. As such, concretely speaking, I do not know exactly what the judge said. Moreover, even if we did know the exact nature of his statement(s), it is trite law that the comments made or questions asked during the hearing of an appeal do not form part of the Court’s ultimate judgment.[[77]](#footnote-77)

# 5- Application of the principles to the case at bar

1. From a purely factual standpoint, the Court entirely believes the two officers’ testimony. Each described the facts in a clear, detailed and spontaneous manner. No contradictions were raised.
2. Each officer was quite transparent about his intentions at the time of the intervention. Each also recognized that in the past, he had initiated gun-related interactions that ended up being negative (*i.e.*, he intercepted someone he reasonably suspected was armed, but the person was not, after all). On that note, both officers referred the parties to the M-IRIS database, which documents each one of these negative interactions. In that sense, these witnesses clearly had nothing to hide.
3. Finally, their testimony is uncontradicted. The accused did not testify.

## What offence was being investigated?

1. It is true that in most common applications of ***Mann***, there is already an investigation in progress regarding a given crime when the police happen to encounter the suspect. Often, as they are actively pursuing leads, they unexpectedly fall upon the accused. Sometimes, the investigation is as simple as being on the lookout after a 9-1-1 call reporting a recent incident.
2. However, that will not always be the case.
3. A pre-existing investigation or ongoing searches are not conditions precedent to the application of an investigative detention. On this point I agree with the British Columbia Court of Appeal in ***R.* v. *Wilkinson***:

Furthermore, as noted above, there is no need for the police to be investigating a specific crime, particularly when they are conducting a community patrol.[[78]](#footnote-78)

1. In the case at bar, during the officers’ cross-examinations and in final argument, defence counsel rhetorically raised the question: “what crime were they investigating” when they arrived at the intersection? Counsel implies that there was no ongoing investigation of any kind; therefore, this was not a real case of *investigative* detention.
2. The Court does not share this interpretation of the police power.
3. Instead, it is perfectly conceivable that the grounds justifying an investigative detention can materialize very quickly, even after noticing the suspect for the first time. In fact, that is precisely what occurred in ***R.* v. *McKenzie***. The police officers were conducting an unrelated, mundane traffic stop when they saw the accused suspiciously jogging in the background. Upon observing how he was awkwardly clutching his body with his elbow and noticing his startled reaction to seeing the police, the officers immediately formed reasonable grounds to suspect that he was armed. The investigative detention was found to be valid.[[79]](#footnote-79)
4. That is also what occurred in ***R.* c. *Fadel***. The officers were going about their day, patrolling on their bicycles, when they unexpectedly saw the accused whom they considered to be acting suspiciously. Within seconds of observation, they formed reasonable grounds to suspect that he was committing fraud-based offences.[[80]](#footnote-80)
5. The same scenario occurred in ***R.* c. *Hizebry***, where the police officer was not investigating anything at first. He was merely controlling traffic at a downtown intersection when he noticed the accused and, based on his observations, quickly formed the suspicion that he was possibly carrying a handgun.[[81]](#footnote-81)
6. In the case at bar, after having observed Nimeri, both officers Boivin and Laleyan suspected that there was a handgun in his man-purse. That was precisely the crime they began investigating, then and there.
7. With respect, the defence appears to be discounting that in and of itself, the possession of a handgun in a public place constitutes a crime, and a serious one at that, which deserves stern attention from the police.
8. In Canada, save for a few rare statutory exceptions, no person may carry a concealed firearm. Section 90 of the *Criminal Code* creates an overarching offence, unless the person is explicitly authorized to carry the gun under the *Firearms Act*.[[82]](#footnote-82)
9. Under s. 117.07 *C.C.*, police officers, members of the Armed Forces and police academy trainees are exempt in certain contexts. If a private citizen wishes to carry a handgun, he must obtain an authorization from the Chief Firearms Officer under ss. 20, 65-66 *F.A.* These authorizations are exceedingly rare and normally limited to:
10. Armoured car drivers who transport large amounts of cash in connection with their lawful profession;
11. Individuals working in remote wilderness and for whom guns are required for protection against wild animals; or
12. Professional trappers, as trained and licenced under provincial law.[[83]](#footnote-83)
13. In fact, concealed or not, under s. 17 *F.A.*, an individual may only possess a handgun in a dwelling house or in another place duly authorized by the Chief Firearms Officer (such as an approved firing range). No person may possess a pistol on the road.
14. Finally, if a person wishes to take a handgun to a range for target practice, s. 19 *F.A.* requires him to obtain a transport authorization. Even if he obtains such a transport certificate (to and from the firing range), according to s. 11(c) of the *Regulation*,[[84]](#footnote-84) it is mandatory that the handgun be transported in a locked container made of an opaque material that is of such strength, construction and nature that it cannot readily be broken open or into.
15. Considering the foregoing, if police officers in large metropolitan centres see what they believe to be a man carrying a firearm on the street, this may well trigger their powers of investigative detention. The possession itself is invariably a criminal offence, both capable and worthy of being seriously investigated. The public safety is very much at stake.
16. In that sense, no evidence of additional extrinsic offences is required for ***Mann*** to be invoked.
17. Both police officers in the case at bar were keenly aware of this power. They were correct to interpret it as they did.

## Did the officers have sufficient grounds to detain Mr. Nimeri?

1. The Court must not dissect each of the indicia considered by the officers in isolation.[[85]](#footnote-85) Instead, they should be assessed as a whole, giving full weight to their cumulative effect, in light of the officer’s experience and the fast-moving circumstances.
2. In ***R.* v. *Chehil***, the Supreme Court recognized that even when some indicia may seem benign on their own, they may become more significant when considered globally in light of all the officer’s observations:

While some factors, such as travelling under a false name, **or flight from the police**, may give rise to a reasonable suspicion on their own, other elements of a constellation will not support reasonable suspicion, except in combination with other factors. Generally, characteristics that apply broadly to innocent people are insufficient, as they are markers only on generalized suspicion. The same is true of factors that may “go both ways”, such as an individual’s making or failing to make eye contact. **On their own**, such factors cannot support reasonable suspicion; however, **this does not preclude reasonable suspicion arising when the same factor is simply one part of a constellation of factors**.[[86]](#footnote-86)

[emphasis added]

1. In the case at bar, the Court gives considerable weight to both officers’ extensive training and experience in detecting firearms. The training program, based on real statistical data, taught them where handguns are generally concealed on the body. Moreover, it taught them various human behavioural traits that are indicative of weapon concealment. It so happens that in the case at bar, the officers noticed two major behavioural cues, which they directly tied back to their training.
2. The importance of such specific training cannot be overestimated in the equation. In fact, that is the very reason such training is provided by police forces. If the officers are later prohibited from relying on the lessons learned, then what is the point of dispensing such training in the first place?
3. Moreover, based on the uncontested empirical data in the case before me, the training program was a smashing success. Due to the knowledge acquired from the course, officer Boivin was able to detect and seize 25 handguns. In fact, at least 80% of those were concealed in man-purses. As for officer Laleyan, out of a total of 33 gun-suspected interventions he initiated, 30 of them yielded the seizure of a concealed handgun. That is a success rate of 91%!
4. These impressive numbers should be read keeping in mind the Supreme Court’s comment in ***Mann***, by which it recognized that due to the lower threshold of reasonable *possibility*, it was inevitable that the police would, on occasion, suspect and detain persons who turned out to be innocent of any misconduct. That was a risk that the Supreme Court was expressly willing to accept.
5. In fact, in ***R.* c. *Hizebry***, Weitzman J. (as she then was) similarly attributed significant importance to the fact that the officer had followed the very same ENSALA training program as the one followed by the officers in the case before me. The officer in *Hizebry* had extensive experience with guns. Since 2006, he dispensed training to correctional officers and border guards. In 2012, he was trained in the use and maintenance of assault rifles. He had followed the ENSALA course on the detection of concealed guns. He was a firearm owner himself and he manipulated guns on a daily basis.
6. On the night of the events, the officer was on routine traffic duty near the Bell Centre following a concert. From a distance, he saw the accused walking with a leather man-purse. Based on his extensive knowledge of guns, the officer was certain that the shape of the man-purse suggested that it contained a pistol. On that basis alone, he intercepted the accused and he demanded that the open the bag.[[87]](#footnote-87) The accused immediately fled and discarded the purse during the foot pursuit. It did in fact contain a loaded 9 mm pistol.
7. The Crown conceded that the accused was detained upon their first contact, since the officer was determined not to let him leave until he checked the purse for a gun. Weitzman J. concluded that based on the officer’s training and the shape of the man-purse alone, the officer had sufficient reasonable grounds to suspect that there was in fact a gun in the bag. His suspicion was objectively grounded and it went far beyond some generalized suspicion.[[88]](#footnote-88) Moreover, given the fact that the suspected offence involved a dangerous weapon on a downtown street, it was reasonably necessary to act.[[89]](#footnote-89)
8. In ***R.* v. *Cadienhead***, the police officers had followed similar training on the detection of characteristics of an armed person. As a result of their training, they noticed the accused making two “safety pats” on his thigh, which they recognized as an indicator of someone subconsciously reconfirming that his gun is still in place, on his person. Their training also alerted them to the fact that the accused began blading as he approached the officers, thereby angling his body in such a way to make the gun side less visible.[[90]](#footnote-90)
9. The observations of officers Boivin and Laleyan are almost identical to those in ***R.* v. *Peterkin***, which were:

* Nervousness.
* Avoiding eye contact.
* Tapping his own hip twice, which was a tell-tale sign of verifying if a gun was still in place.
* He bladed his body to make his right side less visible.
* When he reached for his driver’s licence, he awkwardly moved only his forearm, making sure to keep his elbow pinned against his body.

1. In the case at bar, the police officers were confronted with a constellation of the following objectively discernible facts:
2. As soon as the accused noticed the police officers, he immediately changed direction, making a full 180° rotation in order to move farther away from them;
3. As he walked away, he pushed his man-purse forward, in such a way to make it less visible to the police officers, who were now positioned behind him;
4. The act of pushing the man-purse forward was done discretely, which suggests deception or concealment;
5. The dead-arm: although his left arm was making a normal swinging motion while walking, his right arm was pinned to his ribs, squeezing the purse to prevent it from moving;
6. Even when removing (or replacing) his phone from his pocket, the accused was careful to only let his forearm move as little as possible, which was awkward;
7. The back-checks, turning around to see if the police were still there, as he was walking away;
8. The fact that man-purses, by their size and shape, are convenient and very frequent hiding places for concealed handguns;
9. The fact that despite the man-purse, the accused kept his cell phone and his I.D. card in his pants pocket, thereby suggesting that the purse was used for something other than his day-to-day items;
10. The heightened state of nervousness when the accused saw the police car approach;
11. The pre-emptive presentation of his health card, even though no one had asked him for identification yet.
12. Obviously, the mere fact of walking away from the police upon seeing them is not incriminating in and of itself. Officer Laleyan humbly acknowledged that some people “just don’t like cops”, which is fine.
13. However, in light of all these suspicious behaviours, considered cumulatively, the Court concludes that the police officers’ suspicion that that Nimeri was possibly carrying a concealed handgun was abundantly reasonable. The seriousness of the offence being investigated and the potential risk to public safety were such that the detention was a justifiable use of police powers.

## Was the pat-down search lawful?

1. From the outset, I note that the officers’ additional observations in the short period between the detention and the search are relevant to the assessment. Those include:

* His acute nervousness;
* His state of agitation and confrontation;
* The fact that he placed his hand in his pocket despite being ordered by the police to show his hands;
* His constant looking left and right, as if he were scanning to assess his possible escape routes, in preparation to flee.

1. Defence counsel implicitly suggests that since officer Laleyan had already decided that he would conduct a pat-down search of the man-purse, that these additional elements are somehow discounted. I disagree. As the Supreme Court’s majority made clear in ***R.* v. *Clayton***:

The officers’ safety concerns also justified the searches incidental to the detention. The trial judge based his finding that Farmer’s and Clayton’s s. 8 rights were violated on his conclusion that the decision to search them was made before the officer had the objective grounds to do so. This, it seems to me, ignores the fact that the relevant time is the time of the actual search and seizure. By that time, the officers had the requisite subjective and objective grounds. Intention alone does not attract a finding of unconstitutionality. It is not until that subjective intent is accompanied by actual conduct that it becomes relevant.[[91]](#footnote-91)

1. It is not this Court’s role to place every police move under a scanning electron microscope.[[92]](#footnote-92) We must remember that they are called to exercise discretion and judgment in difficult and fluid circumstances. The reviewing court must find the right balance between the rights of suspects and the requirements of safe and effective law enforcement, without becoming a Monday morning quarterback.[[93]](#footnote-93)
2. Where the suspected offence involves the possible possession of an inherently and undeniably dangerous weapon, by logical implication, it follows that the search will generally be justified.
3. That is precisely what Weitzman J. concluded in ***R.* c. *Hizebry***, described above. Since the officer had reasonable grounds to suspect that the accused was in possession of a handgun, he was entitled to search the man-purse immediately upon detaining the accused in order to dispel the danger.[[94]](#footnote-94)
4. In ***R.* v. *Thibodeau***[[95]](#footnote-95) and ***R.* v. *Ferris***,[[96]](#footnote-96) the British Columbia Court of Appeal similarly held that when the basis of the investigative detention is the possibility that the suspect has a gun on his person, then the police will automatically be entitled to search him for weapons incident to detention.
5. In ***R.* v. *Atkins***, the Ontario Court of Appeal came to the same conclusion. In that case, police officers were patrolling in an unmarked van on New Year’s Eve when they noticed a young man walking on the sidewalk. Even though it was 7°C, he was wearing a heavy, baggy winter coat, layered over a hoodie. The officers considered him to be overdressed for the weather. The man also seemed withdrawn while others around him were in a social mood. He seemed to be hiding in the crowd and skirting the building walls, which attracted the police’s attention. When the officers approached him and called “hey buddy”, he ran away. After a 300-metre pursuit, the officers caught him and a pat-down search revealed a loaded 9 mm pistol.
6. The Court of Appeal first concluded that the officers had the requisite reasonable suspicion to detain him under ***Mann***. Then, in summary fashion, the Court also held that the pat-down search that followed detention was justified on officer safety grounds, since they reasonably suspected[[97]](#footnote-97) that the accused was in possession of a weapon.[[98]](#footnote-98)
7. Again in ***R.* v. *McGuffie***, the Ontario Court of Appeal held that the mere reasonable suspicion that the suspect is carrying a firearm will be enough to justify a cursory pat-down search, no matter how we phrase the standard. Writing for the Court, Doherty J.A. expressed:

As discussed by the dissent in *MacDonald*, the majority’s reference to “reasonable” grounds could be confusing. However, in the circumstances of this case, there is no doubt that Constable Greenwood had sufficient grounds to believe there was an imminent threat to his safety should he confront and detain the appellant on the street for investigative purposes. **That reasonable belief of an imminent threat could, in my view, be based on the reasonable suspicion that the appellant had the handgun**. A cursory pat-down search of the appellant was justified to eliminate that concern.[[99]](#footnote-99)

[emphasis added]

1. In ***R.* v. *McKenzie***, summarized above, the Manitoba Court of Appeal held that in light of the nature of the suspected offence, which involved the potential possession of a handgun in a fanny pack, the officer was justified in grabbing the accused and immediately pinning him against the wall of a house to control him.[[100]](#footnote-100) The fact that the accused attempted to flee upon detention also increased the dangerousness of the situation. In fact, the officer was also justified in immediately opening the bag’s flap in order to verify if there was in fact a weapon inside. His only objective was to ensure his safety. The threat to his safety was potentially imminent. The situation was volatile and uncertain. The accused’s weird mannerisms suggested that he was possibly armed. Moreover, the officer was still alone, awaiting the arrival of backup, and he knew of the accused’s gang-related reputation.[[101]](#footnote-101)
2. In the case at bar, despite the controversy in the caselaw regarding the threshold required to justify a search incident to investigative detention, for the sake of the analysis, I will operate on the assumption that the strict standard applies, to wit: there must be a reasonable *and probable belief* that the officers’ or the public’s safety is in peril.
3. The multiple signs already observed by the police constituted a very strong indicator that Nimeri was possibly (arguably, probably) carrying a gun. To that, we add the fact that when approached, the accused refused to respond to commands, acted aggressively and nervously started looking for flight paths to run away. These additional elements readily establish that a very real risk existed. The police officers were on a downtown public street, a few feet away from a Driver’s Licence Bureau. A shooting could break out at any second.
4. The Court concludes that not only did officers Boivin and Laleyan have the power to search Nimeri, but they had a duty to do so. They had the responsibility of protecting the lives of the public, as well as their own. After all, the law-abiding segment of the community expects the police to react swiftly and decisively to seize illegal firearms so they cannot be used in criminal activity.[[102]](#footnote-102)
5. The execution of the search was reasonable and minimally intrusive. Moreover, it was necessary to eliminate the risk. Patting down a purse only minimally impacts a person’s bodily integrity.
6. The officers conducted themselves appropriately.

# CONCLUSION

**FOR THESE REASONS**, the Court:

**DISMISSES** the application to exclude the evidence.

**RULES** that the evidence of the handgun, the ammunition and the behaviour of the accused are admissible at trial.

**APPLIES** the evidence of the *voir-dire* to the trial proper.

Exhibit VD-1 becomes exhibit P-1;

Exhibit VD-2 becomes exhibit P-2;

Exhibit VD-3 becomes exhibit P-3.

and

**FINDS** the accused Marcus Nimeri guilty of all the offences charged.

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|  | | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **D. Galiatsatos, J.C.Q.** |
| Me Geneviève Rondeau-Marchand  Counsel for the Crown | | |
| Me David Leclair | | |
| Counsel for the accused | | |
|  | | |
| Hearing date: | March 21st 2024 | |

1. Courtlog of 2024-03-21 at 9:53. [↑](#footnote-ref-1)
2. Courtlog of 2024-03-21 at 10:02, 11:14. [↑](#footnote-ref-2)
3. Courtlog of 2024-03-21 at 11:14. [↑](#footnote-ref-3)
4. Courtlog of 2024-03-21 at 10:02. [↑](#footnote-ref-4)
5. See point #1 on the aerial map (exhibit VD-1). [↑](#footnote-ref-5)
6. In fact, after the discovery of the gun in the case at bar, Boivin immediately recognized the Glock switch mechanism installed on the back of the slide, which converted the handgun to full-automatic. [↑](#footnote-ref-6)
7. Expert ballistics report, dated March 19th 2024 (exhibit VD-3). [↑](#footnote-ref-7)
8. *R.* v. *Mann*, [2004] S.C.R. 59. [↑](#footnote-ref-8)
9. *Ibid*. at para. 27. [↑](#footnote-ref-9)
10. *Ibid*. at para. 34. [↑](#footnote-ref-10)
11. *Ibid*. at para. 16. See also: *R.* v. *McKenzie* (2022), 77 C.R. (7th) 313 (Man.C.A.) at para. 13, leave to appeal denied, [2022] S.C.C.A. No. 64; *R.* v. *Nesbeth* (2008), 238 C.C.C. (3d) 567 (Ont.C.A.), leave to appeal denied, [2009] S.C.C.A. No. 10. [↑](#footnote-ref-11)
12. *R.* v. *Chehil*, [2013] 3 S.C.R. 220 at paras. 27-28. See also: *R.* v. *Molnar* (2018), 363 C.C.C. (3d) 350 (Man.C.A.) at para. 35, leave to appeal denied, [2018] S.C.C.A. No. 319; *R.* v. *Urban* (2017), 358 C.C.C. (3d) 55 (Alta.C.A.) at para. 42; *R.* v. *Greaves* (2004), 24 C.R. (6th) 15 (B.C.C.A.) at para. 41, leave to appeal denied, [2004] S.C.C.A. No. 522. [↑](#footnote-ref-12)
13. *Ibid*. at para. 35. [↑](#footnote-ref-13)
14. *Ibid*. at para. 28. [↑](#footnote-ref-14)
15. *Ibid*. at para. 29. [↑](#footnote-ref-15)
16. *Ibid*. at para. 32. [↑](#footnote-ref-16)
17. See : *R.* v. *MacKenzie*, [2013] 3 S.C.R. 250 at para. 84; *R.* v. *Williams* (2013), 297 C.R.R. (2d) 292 (Ont.C.A.) at para. 22. [↑](#footnote-ref-17)
18. *R.* v. *MacKenzie*, [2013] 3 S.C.R. 250 at paras. 73, 77, 82, 83; *R.* c. *Fadel* (2015), 22 C.R. (7th) 210 (Que.C.A.) at paras. 12, 29, 31, 38, 39; *R.* c. *Ondo-Mendame*, 2023 QCCA 107 at para. 26, leave to appeal denied, [2023] S.C.C.A. No. 163. [↑](#footnote-ref-18)
19. See: *R.* v. *Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.) at para. 54; leave to appeal denied, [1998] S.C.C.A. No. 424. [↑](#footnote-ref-19)
20. *R.* v. *Miller* (2002), 163 O.A.C. 63 (Ont.C.A.) at para. 7. [↑](#footnote-ref-20)
21. *R.* v. *Mann*, *supra*, at para. 43. [↑](#footnote-ref-21)
22. *R.* c. *Ondo-Mendame*, 2023 QCCA 107 at para. 27, leave to appeal denied, [2023] S.C.C.A. No. 163; *R.* c. *Wolfson*, 2020 QCCA 856 at paras. 54-55, leave to appeal denied, [2020] S.C.C.A. No. 316. [↑](#footnote-ref-22)
23. *R.* c. *Wolfson*, *supra*, at para. 56, citing *R.* v. *MacDonald*, *supra*, at para. 47. [↑](#footnote-ref-23)
24. *R.* v. *Mann*, *supra*, at paras. 40, 43, 45. [↑](#footnote-ref-24)
25. *R.* v. *MacDonald*, [2014] 1 S.C.R. 37 at para. 39(3). [↑](#footnote-ref-25)
26. *R**.* v. *Plummer* (2011), 272 C.C.C. (3d) 172 (Ont.C.A.) at paras. 53, 58; *R.* v. *Ellis* (2016), 132 O.R. (3d) 510 (Ont.C.A.) at paras. 27-28; *R.* v. *Webber* (2019), 377 C.C.C. (3d) 1 (B.C.C.A.) at para. 70. [↑](#footnote-ref-26)
27. *R.* v. *Ahmed* (2022), 418 C.C.C. (3d) 1 (Ont.C.A.); *R.* v. *Patrick* (2017), 344 C.C.C. (3d) 137 (B.C.C.A.) at para. 94, leave to appeal denied, [2017] S.C.C.A. No. 108. [↑](#footnote-ref-27)
28. *R.* v. *Sheck* (2015), 332 C.C.C. (3d) 199 (B.C.C.A.) at para. 54, leave to appeal denied, [2016] S.C.C.A. No. 50; *R.* v. *Thibodeau*, 2007 BCCA 489, leave to appeal denied, [2007] S.C.C.A. No. 592; *R.* v. *Lal* (1998), 56 C.R.R. (2d) 243 (B.C.C.A.), leave to appeal denied, [1999] S.C.C.A. no. 28; *R.* v. *Dymkowski* (2021), 500 C.R.R. (2d) 135 (Ont.S.C.J.). [↑](#footnote-ref-28)
29. *R.* v. *Peters* (2007), 427 A.R. 326 (Alta.C.A.). [↑](#footnote-ref-29)
30. *R.* v. *McKenzie* (2022), 77 C.R. (7th) 313 (Man.C.A.), leave to appeal denied, [2022] S.C.C.A. No. 64; *R.* v. *Sheck* (2015), 332 C.C.C. (3d) 199 (B.C.C.A.) at paras. 54-55, leave to appeal denied, [2016] S.C.C.A. No. 50. [↑](#footnote-ref-30)
31. *R.* v. *McKenzie*, *supra*; *R.* v. *Peters*, *supra*. [↑](#footnote-ref-31)
32. *R.* v. *McKenzie* (2022), 77 C.R. (7th) 313 (Man.C.A.) at para. 35, leave to appeal denied, [2022] S.C.C.A. No. 64. [↑](#footnote-ref-32)
33. *R.* v. *Clayton*, [2007] 2 S.C.R. 725 at para. 46. [↑](#footnote-ref-33)
34. *Ibid*. at para. 48. [↑](#footnote-ref-34)
35. *R.* v. *Chehil*, [2013] 3 S.C.R. 220 at para. 23. [↑](#footnote-ref-35)
36. *R.* v. *Atkins* (2013), 294 C.R.R. (2d) 33 (Ont.C.A.) at para. 15. [↑](#footnote-ref-36)
37. *R.* v. *Webber* (2019), 377 C.C.C. (3d) 1 (B.C.C.A.) at para. 58. [↑](#footnote-ref-37)
38. *R.* v. *Sheck* (2015), 332 C.C.C. (3d) 199 (B.C.C.A.) at para. 53, leave to appeal denied, [2016] S.C.C.A. No. 50. [↑](#footnote-ref-38)
39. *R.* v. *Peterkin* (2015), 319 C.C.C. (3d) 191 (Ont.C.A.) at paras. 44, 53, 54. [↑](#footnote-ref-39)
40. *R.* c. *Legoute*, 2022 QCCA 323 at para. 46. [↑](#footnote-ref-40)
41. *R.* v. *MacDonald*, [2014] 1 S.C.R. 37. [↑](#footnote-ref-41)
42. See paras. 41, 44. [↑](#footnote-ref-42)
43. *R.* v. *Smith* (2019), 383 C.C.C. (3d) 73 (Sask.C.A.) at paras. 13-15; *R.* v. *Webber* (2019), 377 C.C.C. (3d) 1 (B.C.C.A.) at paras. 53-61. In the following cases, the Court also suggested that *MacDonald* was limited to its specific context, but did not firmly decide the issue, since the police’s search met the higher standard anyway: *R.* v. *Buakasa* (2023), 426 C.C.C. (3d) 279 (Ont.C.A.) at paras. 39-43; *R.* v. *Sheck* (2015), 332 C.C.C. (3d) 199 (B.C.C.A.) at paras. 56-61, leave to appeal denied, [2016] S.C.C.A. No. 50; *R.* v. *Peterkin* (2015), 319 C.C.C. (3d) 191 (Ont.C.A.) at para. 59; *R.* v. *McKenzie* (2022), 77 C.R. (7th) 313 (Man.C.A.) at paras. 38-41, leave to appeal denied, [2022] S.C.C.A. No. 64. [↑](#footnote-ref-43)
44. *R.* v. *Dhillon* (2023), 422 C.C.C. (3d) 330 (B.C.C.A.), leave to appeal denied, [2023] S.C.C.A. No. 121. [↑](#footnote-ref-44)
45. *R.* v. *Stairs*, 2022 SCC 11 at para. 76. [↑](#footnote-ref-45)
46. *R.* c. *Fadel* (2015), 22 C.R. (7th) 210 (Que.C.A.) at para. 41. [↑](#footnote-ref-46)
47. *R.* c. *Fadel*, *supra*, at para. 10. [↑](#footnote-ref-47)
48. *R.* c. *Legoute*, 2022 QCCA 323 at para. 35; *R.* v. *Plummer* (2011), 272 C.C.C. (3d) 172 (Ont.C.A.) at paras. 5, 22-23; *R.* v. *Dhillon* (2023), 422 C.C.C. (3d) 330 (B.C.C.A.) at paras. 7, 9, leave to appeal denied, [2023] S.C.C.A. No. 121. [↑](#footnote-ref-48)
49. *R.* c. *Fadel*, *supra*, at para. 10. [↑](#footnote-ref-49)
50. *R.* c. *Legoute*, 2022 QCCA 323 at para. 36. [↑](#footnote-ref-50)
51. *R.* v. *Wilkinson* (2023), 421 C.C.C. (3d) 518 (B.C.C.A.) at para. 55; *R.* v. *Nesbeth* (2008), 238 C.C.C. (3d) 567 (Ont.C.A.) at para. 17, leave to appeal denied, [2009] S.C.C.A. No. 10; *R.* v. *Atkins* (2013), 294 C.R.R. (2d) 33 (Ont.C.A.) at paras. 4, 7, 14; *R.* v. *Williams* (2013), 297 C.R.R. (2d) 292 (Ont.C.A.) at para. 25. [↑](#footnote-ref-51)
52. *R.* v. *Dene*, 2010 ONCA 796 at para. 4; *R.* v. *Dhillon* (2023), 422 C.C.C. (3d) 330 (B.C.C.A.) at paras. 9, 10, leave to appeal denied, [2023] S.C.C.A. No. 121. [↑](#footnote-ref-52)
53. *R.* v. *Darteh*, 2016 ONCA 141 at para. 7; *R.* v. *Greaves* (2004), 24 C.R. (6th) 15 (B.C.C.A.), leave to appeal denied, [2004] S.C.C.A. No. 522; *R.* v. *Byfield* (2012), 262 C.R.R. (2d) 251 (Ont.S.C.J.) at para. 80. [↑](#footnote-ref-53)
54. *R.* v. *Nesbeth* (2008), 238 C.C.C. (3d) 567 (Ont.C.A.) at paras. 5, 18, leave to appeal denied, [2009] S.C.C.A. No. 10. [↑](#footnote-ref-54)
55. *R.* v. *Peterkin* (2015), 319 C.C.C. (3d) 191 (Ont.C.A.) at paras. 18, 28. [↑](#footnote-ref-55)
56. *R.* v. *Cadienhead*, 2014 ONSC 5816 at para. 23; *R.* v. *Byfield* (2012), 262 C.R.R. (2d) 251 (Ont.S.C.J.) at paras. 14, 19. [↑](#footnote-ref-56)
57. *R.* v. *Williams* (2013), 297 C.R.R. (2d) 292 (Ont.C.A.) at paras. 12, 31; *R.* v. *Dhillon* (2023), 422 C.C.C. (3d) 330 (B.C.C.A.) at paras. 20-21, 34, leave to appeal denied, [2023] S.C.C.A. No. 121; *R.* v. *Thibodeau*, 2007 BCCA 489, leave to appeal denied, [2007] S.C.C.A. No. 592; *R.* v. *Williams* (2018), 412 C.R.R. (2d) 32 (Ont.S.C.J.) at para. 112; *R.* v. *Peterkin* (2015), 319 C.C.C. (3d) 191 (Ont.C.A.) at paras. 17, 28; *R.* v. *Cadienhead*, 2014 ONSC 5816 at para. 27; *R.* v. *Fountain* (2015), 324 C.C.C. (3d) 425 (Ont.C.A.) at para. 31; *R.* v. *Byfield* (2012), 262 C.R.R. (2d) 251 (Ont.S.C.J.) at paras. 14, 24; *R.* v. *Dymkowski* (2021), 500 C.R.R. (2d) 135 (Ont.S.C.J.) at paras. 10, 12, 22. [↑](#footnote-ref-57)
58. *R.* v. *Peterkin* (2015), 319 C.C.C. (3d) 191 (Ont.C.A.) at paras. 17, 28; *R.* v. *Williams* (2018), 412 C.R.R. (2d) 32 (Ont.S.C.J.) at para. 112; *R.* v. *Cadienhead*, 2014 ONSC 5816 at paras. 21, 28; *R.* v. *Fountain* (2015), 324 C.C.C. (3d) 425 (Ont.C.A.) at para. 31; *R.* v. *Byfield* (2012), 262 C.R.R. (2d) 251 (Ont.S.C.J.) at paras. 14, 17; *R.* v. *Dymkowski* (2021), 500 C.R.R. (2d) 135 (Ont.S.C.J.) at para. 12. [↑](#footnote-ref-58)
59. *R.* v. *Sheck* (2015), 332 C.C.C. (3d) 199 (B.C.C.A.), leave to appeal denied, [2016] S.C.C.A. No. 50. [↑](#footnote-ref-59)
60. *R.* v. *Plummer* (2011), 272 C.C.C. (3d) 172 (Ont.C.A.) at paras. 5, 22. [↑](#footnote-ref-60)
61. *R.* v. *McKenzie* (2022), 77 C.R. (7th) 313 (Man.C.A.) at paras. 6-7, 27, leave to appeal denied, [2022] S.C.C.A. No. 64. [↑](#footnote-ref-61)
62. *Ibid*. at paras. 8, 27. [↑](#footnote-ref-62)
63. It is to be noted that in addition to the suspicious behaviour, the officer recognized the accused as a known street gang member who was known to carry a weapon. [↑](#footnote-ref-63)
64. *R.* v. *McKenzie*, *supra*, at para. 29. [↑](#footnote-ref-64)
65. *R.* v. *Peterkin* (2015), 319 C.C.C. (3d) 191 (Ont.C.A.). [↑](#footnote-ref-65)
66. Courtlog of 2024-03-21 at 14:16. [↑](#footnote-ref-66)
67. *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1332-1334; *R.* v. *Alton* (1989), 74 C.R. (3d) 124 (Ont.C.A.) at 128; *Dufour* c. *R.*, [1994] R.J.Q. 108 (C.S.) at paras. 11-13, 18; *R.* v. *Finta*, [1994] 1 S.C.R. 701; *R.* v. *Généreux*, [1992] 1 S.C.R. 259; *R.* v. *Malmo-Levine*, [2003] 3 S.C.R. 571. [↑](#footnote-ref-67)
68. He provides no definition for this term, which is as vague as can be. [↑](#footnote-ref-68)
69. *R.* v. *Spence*, [2005] 3 S.C.R. 458. [↑](#footnote-ref-69)
70. *R.* v. *Abdullahi*, 2023 SCC 19 at para. 92. [↑](#footnote-ref-70)
71. *R.* c. *Chemlal* (November 19th 2020), dist. of Montreal 500-01-192513-197 (C.Q.) [rendered orally and transcribed]. [↑](#footnote-ref-71)
72. He held that the initial investigative detention was valid. However, the subsequent incident search was unlawful. Nevertheless, he admitted the firearm under s. 24(2) of the *Charter*. [↑](#footnote-ref-72)
73. *R.* c. *Chemlal*, *supra*, at p. 4. [↑](#footnote-ref-73)
74. *R.* c. *Accurso*, 2022 QCCA 752 at para. 346. [↑](#footnote-ref-74)
75. *R.* c. *Fort-Théagène*, 2021 QCCA 637 at para. 27. [↑](#footnote-ref-75)
76. *R.* c. *Lalancette*, 2016 QCCA 1871 at para. 6; *R.* c. *Massoud*,2021 QCCA 21 at para. 46; *DPCP* c. *3095-2899 Québec Inc.*, 2021 QCCA 1222 at para. 88, leave to appeal denied, [2021] S.C.C.A. No. 355; *R.* c. *Daley*, [2007] 3 S.C.R. 523 at para. 86. [↑](#footnote-ref-76)
77. *R.* c. *Giroux*, 2007 QCCA 1670 at para. 10; *R.* c. *Bossé*, 2021 QCCA 1829 at para. 26. [↑](#footnote-ref-77)
78. *R.* v. *Wilkinson* (2023), 421 C.C.C. (3d) 518 (B.C.C.A.) at para. 55. [↑](#footnote-ref-78)
79. *R.* v. *McKenzie* (2022), 77 C.R. (7th) 313 (Man.C.A.), leave to appeal denied, [2022] S.C.C.A. No. 64. [↑](#footnote-ref-79)
80. *R.* c. *Fadel* (2015), 22 C.R. (7th) 210 (Que.C.A.). [↑](#footnote-ref-80)
81. *R.* c. *Hizebry*, 2023 QCCQ 2957. [↑](#footnote-ref-81)
82. L.C. 1995, c. 39. [↑](#footnote-ref-82)
83. *Authorizations to Carry Restricted Firearms and Certain Handguns Regulations*, SOR/98-207, s. 3. [↑](#footnote-ref-83)
84. *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*, SOR/98-209, s. 11(c). [↑](#footnote-ref-84)
85. *R.* c. *Fadel* (2015), 22 C.R. (7th) 210 (Que.C.A.) at para. 29. [↑](#footnote-ref-85)
86. *R.* v. *Chehil*, *supra*, at para. 31. See also: *R.* v. *Darteh*, 2016 ONCA 141 at para. 7. [↑](#footnote-ref-86)
87. *R.* c. *Hizebry*, 2023 QCCQ 2957 at paras. 4-10. [↑](#footnote-ref-87)
88. *Ibid*. at paras. 29-37. [↑](#footnote-ref-88)
89. *Ibid*. at para. 36. [↑](#footnote-ref-89)
90. *R.* v. *Cadienhead*, 2014 ONSC 5816. [↑](#footnote-ref-90)
91. *R.* v. *Clayton*, [2007] 2 S.C.R. 725 at para. 48. See also: *R.* c. *Desbiens*, [1996] J.Q. no. 4036 (Que.C.A.) at paras. 17-18; *R.* v. *Ha* (2018), 48 C.R. (7th) 297 (Alta.C.A.) at para. 72. [↑](#footnote-ref-91)
92. *R.* v. *MacKenzie*, [2013] 3 S.C.R. 50 at para. 65. [↑](#footnote-ref-92)
93. *R.* v. *McKenzie*, *supra*, citing *R.* v. *Cornell*, [2010] 2 S.C.R. 142 at para. 24; *R.* v. *Crocker* (2009), 247 C.C.C. (3d) 193 (B.C.C.A.). [↑](#footnote-ref-93)
94. *R.* c .*Hizebry*, 2023 QCCQ 2957 at para. 43. [↑](#footnote-ref-94)
95. *R.* v. *Thibodeau*, 2007 BCCA 489, leave to appeal denied, [2007] S.C.C.A. No. 592. [↑](#footnote-ref-95)
96. *R.* v. *Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.) at para. 54; leave to appeal denied, [1998] S.C.C.A. No. 424, later cited with approval in *R.* v. *Patrick* (2017), 344 C.C.C. (3d) 137 (B.C.C.A.) at para. 87, leave to appeal denied, [2017] S.C.C.A. No. 108. [↑](#footnote-ref-96)
97. The reader will notice that the standard applied by the Ontario Court of Appeal for the search, *i.e.* step two, was still reasonable suspicion as to the possibility of a gun, as opposed to the more stringent reasonable grounds to believe. [↑](#footnote-ref-97)
98. *R.* v. *Atkins* (2013), 294 C.R.R. (2d) 33 (Ont.C.A.) at para. 15. [↑](#footnote-ref-98)
99. *R.* v. *McGuffie* (2016), 131 O.R. (3d) 643 (Ont.C.A.) at para. 52. [↑](#footnote-ref-99)
100. *R.* v. *McKenzie*, *supra*, at para. 29. [↑](#footnote-ref-100)
101. *Ibid*. at paras. 43 ff. [↑](#footnote-ref-101)
102. *R.* v. *Clayton*, [2007] 2 S.C.R. 725 at paras. 36, 43-48. [↑](#footnote-ref-102)