Stopping Vehicles on a Downhill Slope: R. v. Nolet

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The law need not stay the same. The Court has indicated its clear willingness to change the law to accommodate changing social conditions, or in other circumstances. However, when the law does change, it is better for all if that happens clearly: when it is apparent that the old approach no longer governs and it is clear what the new approach will be. In this regard, more could have been hoped for from *Nolet.* The case raises questions about the proper approach to search issues and to detentions involving vehicle stops and seems inconsistent with previous case law in both these areas.

The Search

The Court's reasoning around why the initial search in this case does not violate section 8 of the *Charter* is puzzling, or perhaps merely puzzlingly expressed. The normal approach involves asking first whether the accused has a reasonable expectation of privacy. If there was no reasonable expectation of privacy, then what occurred was not a search, and so section 8 could not have been violated. However, if there was a reasonable expectation of privacy, then the analysis must go further and consider whether the search was an unreasonable one. In engaging with that question, the *Collins* analysis — was the search authorised by law, is the law itself reasonable, and was the search carried out in a reasonable manner — is used.\(^2\)

At times, the Court appears to be reasoning in this fashion. They conclude that the accused did have a reasonable expectation of privacy, though it was doubly reduced, since the cab of a truck is both a vehicle and a place of business. It was therefore necessary to use the *Collins* analysis (quoted by the Court in *Nolet* at para. 46) to decide whether the search was reasonable. The bulk of the Court’s reasoning — looking to the terms of the provincial search power, considering whether the grounds for that search were satisfied or were nullified by other factors, deciding whether the search incident to arrest power was in play, and so
The puzzling point, therefore, is in the way the Court concludes that reasoning. They conclude not that the search was reasonable, but that the actions of the officers did not “invade” or “infringe” the accused’s reasonable expectation of privacy. This sounds much more like saying that the actions of the officers were not a search at all. It seems an odd way to conclude that the search was reasonable because it passed the Collins analysis.

One would not feel inclined to suggest, for example, that a person who was strip searched in accordance with the criteria set out in Golden did not have their reasonable expectation of privacy infringed: we would say that that interest was infringed but legitimately so, because of a countervailing state interest which outweighed it. The same, really, is true of any section 8 analysis which advances to the Collins stage. To be sure, where there is a reduced expectation of privacy the countervailing state interest need not be as strong, but that does not change the fundamental approach.

Presumably the Court here is not intending to change the fundamental two-step analysis to section 8 which has been applied for many years.

The Detention

It is also not entirely easy to understand the Court’s reasoning with regard to the “predominant purpose” test and the way in which it affects the analysis of whether the traffic stop power was properly used. The trial judge in the case had found that the officer had used a highway traffic power primarily in order to pursue a criminal investigation. Relying on the predominant purpose test from Jarvis, he had concluded that this was a misuse of that power and therefore a violation of the Charter. The Court here is reasonably clear that judges should not use the predominant purpose test in this fashion, but the decision does not provide very clear guidance as to what trial judges should do. Further, the Court’s conclusion seems to contradict what they have said previously about vehicle stops.

It is perhaps easiest to think of a gradation of purposes in this context, since the issue relates to regulatory and criminal purposes. At one end of the scale, an officer might use a non-criminal stop and search power purely for regulatory

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3 Nolet, paras. 43 and 45, and then para. 41, respectively.
purposes. At the other end of the scale, an officer might use that non-criminal stop and search power purely for criminal law purposes. Neither end of the scale creates any real difficulty: the former is obviously acceptable, and the latter equally obviously unacceptable. Nolet does not change that and affirms that traffic stops cannot be used as a pretext. The Court concludes that “it is important not to encourage the establishment of checkstops where a nominally lawful aim is but a plausible facade for an unlawful aim.”

The problem area is with those cases that do not lie at either end of the scale: that is to say, most of them. The trial judge had concluded that that the purpose of searching for evidence of a crime had become predominant in the officer’s mind at a point when he was still purporting to rely on a regulatory search power: on that basis, he found a misuse of the power. The trial judge felt that once the criminal investigation purpose outweighed the regulatory investigation purpose (at the midpoint on the scale, essentially) it would be improper to continue to use the regulatory powers. That approach is consistent with the Supreme Court’s “crossing the Rubicon” analysis in Jarvis.

In this case, however, the Court rejects this approach. First, they specifically reject the analogy to Jarvis, holding that that case dealt with the use of powers aimed at assessing civil liability: here, they said, there was no issue of “‘crossing the Rubicon’ from a civil dispute into penal remedies.” Both the traffic offences and the criminal offences involved penal liability, and so, apparently, the Charter analysis does not differ between them. That is somewhat surprising. Other courts, including courts of appeal, had taken the Jarvis reasoning to be applicable more broadly and to apply in any case where there is a regulatory scheme with powers of inspection and audit which might also lead to investigations for an offence. Kooktook, for example, holds that:

83 The Jarvis case concerned regulatory activities in the field of income tax. In that field the demarcation between inspection and prosecution is much clearer because there is an audit branch and a special investigation branch. But there is no reason why the principles enunciated in that case would not apply to any regulatory scheme with broad powers of inspection, such as the Fisheries Act where the functions of inspection and investigation can both be carried out by the same official. This was clearly contemplated, in my view, when the Supreme Court in Jarvis, after enumerating several factors relevant to the income tax context for the purpose of determining if an adversarial

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7 Ibid., para 45.
relationship has arisen as between the state and the individual, said (at para. 94):

It should also be noted that in this case we are dealing with the CCRA. However, there may well be other provincial or federal governmental departments or agencies that have different organizational settings which in turn may mean that the above factors, as well as others, will have to be applied in those particular contexts.⁸

Perhaps more importantly, though, the Supreme Court in Nolet rejects adopting an approach that is analogous to Jarvis. They conclude that regulatory powers remain available “[a]s long as there is a continuing regulatory purpose on which to ground the exercise of the regulatory power.”⁹ That is, where the officer has both purposes in mind, it apparently does not matter that the primary reason for searching is a criminal one: as long as a regulatory purpose is still in play, the power is available.

There is some room for argument within this test still. It might be claimed that the point at which a traffic stop becomes a mere pretext is reached before the scale is at “0% regulatory/100% criminal.” Perhaps it becomes a pretext at 99% criminal, or 95% criminal. Perhaps not, though, since even in these cases there will be a “continuing regulatory purpose,” however minor. Even if this wiggle room does exist, it seems clear that the Court’s approach will allow the use of regulatory powers for predominantly criminal purposes in many cases where the “predominant purpose” test (49% regulatory/51% criminal) would not have.

On the one hand, this has the advantage of simplicity. It is unrealistic to think one could decide exactly what percentage of interest should be attributed to either purpose in every case, and no doubt difficult in some cases to decide which purpose is predominant. Not having to do so makes trial judges’ jobs easier.

On the other hand, trial judges are already required to undertake the Jarvis analysis in some contexts, so it cannot be impossible to do. Further, it is not entirely clear what trial judges ought to do now instead in this context.

The Court says:

[39] Police power, whether conferred by statute or at common law, is abused when it is exercised in a manner that violates the Charter rights of an accused. This is a better framework of analysis, in my opinion, than the “predominant purpose” test applied here by the trial judge. If the Charter is vio-

⁹Nolet, para. 41.
lated, it makes little difference, I think, that the police had in mind multiple purposes.\textsuperscript{10}

This seems to state that instead of applying the predominant purpose test, courts should ask whether there is a Charter violation. The difficulty is that that is exactly what the predominant purpose test was: a method of determining whether there was a Charter violation. With it gone, what would make the search violate the Charter?

\textit{Jarvis} itself was primarily a section 7 case concerning self-incrimination, rather than section 8. If it were applied in the context of the \textit{Collins} analysis, then one might find that a search was not authorised by law because the predominant purpose was not a proper one and so a search power was used where it was not meant to be available. Alternatively, one might have found the search was authorised by law and the law was reasonable, but that the manner of search was not reasonable because of the improper predominant purpose: this is the approach implied by paragraph 39 of \textit{Nolet}, quoted above. Either way, the point is that asking about the predominant purpose and asking about whether the search violates the Charter are not different questions. It therefore provides no guidance to say “do the latter instead of the former”: the former was the way of doing the latter.

At least implicitly the Court does seem to have adopted a new test, which is that as long as there is any regulatory purpose in an officer’s mind, no matter how minor, the regulatory powers are available. That approach is unfortunate. The Court refers to, and seemingly adopts, words from the Ontario Court of Appeal decision in \textit{Brown v. Durham Regional Police Force}:

> While I can find no sound reason for invalidating an otherwise proper stop because the police used the opportunity afforded by that stop to further some other legitimate interest, I do see strong policy reasons for invalidating a stop where the police have an additional improper purpose. Highway safety concerns are important, but they should not provide the police with a means to pursue objects which are themselves an abuse of the police power or are otherwise improper.\textsuperscript{11}

This approach seems to mean that police are allowed to use powers to pursue a purpose which those powers were not intended to be used for, provided the purpose is not in itself objectionable: that the officer is not engaging in racial profiling, for example. That makes the fact that an officer has not used his or her power for its intended purpose essentially irrelevant: if the purpose is improper

\textsuperscript{10}\textit{Ibid.}, para. 39.

in itself, it will certainly be objectionable on other Charter grounds. But if that is the case, then limits on the use of powers to confine them to their proper sphere — exactly the concern that motivated the Court in Jarvis — will no longer exist.

The Court here notes its own earlier admonition from Mellenthin that a check-stop should not become “an unfounded general inquisition or an unreasonable search.” It would have been advisable to take account as well of the immediately preceding sentences in Mellenthin concerning vehicle stops:

The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims.

Permitting traffic stop powers still to be used when an officer’s primary purpose is to investigate a possible criminal offence flies in the face of this approach.

It seems likely that more will need to be said on this subject in future cases.

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13 Ibid.