

THE UNIVERSITY OF BRITISH COLUMBIA  
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – DECEMBER 2020

LAW 507.001  
Evidence Law

Professor Cunliffe

**EXAM PASSWORD: L6xdvH**  
RESUME CODE: ABB4E4

**TOTAL MARKS: 50**

(8:50 AM PST) **PREPARATION TIME ALLOWED:** 10 minutes

(9:00 AM PST) **WRITING (INCLUSIVE OF READING) TIME ALLOWED:** 2 hours 15 minutes

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MARKS35 1. **Admissibility of evidence: *voir dire***

You are the trial judge sitting without a jury in the case of *R v Abdirahim Ali*. The accused person, Mr Ali, is a Black Canadian man who was 22 years old at the time of the events that led to this trial.

Mr Ali has been charged with theft of property under \$5,000. You are presiding over a *voir dire* in which Mr Ali's counsel has sought the exclusion of a laptop and smart phone seized by police on 23 October 2019. These items form the basis of the charge against Mr Ali. Defence counsel's application has been made pursuant to s. 24(2) of the *Charter* and your court is a court of competent jurisdiction for this purpose.

In the *voir dire*, you have heard testimony from Mr Ali and two Vancouver police officers. You have also received copies of CCTV footage that captures some of the relevant events. Mr Ali's counsel seeks to call an expert witness, Dr Ingrid Webster. The Crown objects to the admissibility of Dr Webster's evidence and so you must rule on that objection before proceeding with the *voir dire*. After deciding admissibility of Dr Webster's evidence, you will also have to rule on the s. 24(2) application.

**Here is a summary of the facts you have already found:**

The relevant events took place in the library at the SFU Harbor Centre, downtown Vancouver campus, on 23 October 2019. The police witnesses, Constable Smith and Constable Jones, have testified that they were patrolling that building, including the library, several times a day during the relevant period. Their goal was to supply a visible police presence in light of a series of thefts of high-value electronics, clothing and other personal items that had been experienced by SFU students in and around that building.

The CCTV footage (which is time stamped) shows the following:

- At 11:35 am, Mr Ali walks into the portion of the library that is captured on the video and sits at a study carrel. Placing a backpack on the ground beside him, he sets up a laptop and puts headphones on. He places his smart phone on the desk, fiddles with the phone, and then appears to work steadily.

- At 12:10pm, Constable Jones walks along the corridor from left to right of the camera shot. He appears to hesitate briefly near Mr Ali, before continuing past and walking off camera.
- At 12:12pm, Constable Jones and Constable Smith walk into the camera shot together. Constable Smith stops in front of Mr Ali's carrel and Constable Jones stands behind Mr Ali's chair. It is evident to you that, at this point, Mr Ali could not have stood up or walked away without bumping against Constable Jones.

You have concluded that an investigative detention arose at this point. Constable Smith and Constable Jones did not inform Mr Ali of his right to silence or right to legal counsel, and you have found that there was no reasonable basis for the investigative detention. Accordingly, the police officers had breached several rights by this point in the interaction.

The video footage depicts a brief discussion between Mr Ali and the two police officers, with Mr Ali initially appearing calm, if somewhat irritated. After around three minutes, Mr Ali appears to be speaking heatedly, and the two police officers move closer to Mr Ali. Constable Smith picks up Mr Ali's laptop and smart phone, and carries these items off camera, while Constable Jones continues to stand by Mr Ali's chair. Constable Smith returns about eight minutes later.

- Mr Ali was placed under arrest at 12:24pm. The arrest is captured on camera and shows Mr Ali was cooperative with being handcuffed, but plainly upset.

Constable Jones testified that when he initially saw Mr Ali, he noticed that Mr Ali's backpack, laptop and smart phone looked expensive and up-to-date, while Mr Ali did not appear particularly well dressed. (The CCTV footage shows Mr Ali wearing an Adidas zip-up jacket, jeans, and high top sneakers.) For this reason, and because he felt that Mr Ali's manner of dress did not seem to fit with the usual visitors to the library, he concluded that it was appropriate to investigate Mr Ali's presence in the library. When he first walked off camera, he went to Constable Smith, pointed out his concerns, and they agreed a strategy for approaching Mr Ali. On cross-examination, Constable Jones denied that Mr Ali stood out to him as suspicious because he was Black, and also denied that he targeted Mr Ali for closer scrutiny based on an implicit belief that Black people were more likely to be criminals than SFU students. Constable Jones expressed anger at the latter question.

When the police first approached Mr Ali, Constable Smith asked him if he was an SFU student. After Mr Ali responded affirmatively, Constable Smith asked to see his

student ID. Mr Ali said he would not show the ID requested. (You have found that it is settled law that Mr Ali had no legal obligation to show ID in this circumstance.) After some back and forth on this matter, Constable Smith seized the laptop and smart phone and took them elsewhere in the library so he could call the Vancouver Police Department to check their serial numbers. Both serial numbers had been reported as stolen items. You have found that Constable Smith had no reasonable basis to search the laptop and smart phone, and so a breach of s. 8 of the *Charter* arose when he took these items away from Mr Ali.

Constable Smith returned to Mr Ali to ask him about the stolen items. Mr Ali said that this was the first he'd heard that they were stolen. He said that he had purchased both items in early September 2019 from someone he had met after they posted the items for sale on a student bulletin board.

In his testimony, Mr Ali has provided a similar account. He testified to being irritated when police interrupted his studies because "they're always hassling you when you look like me." He knew that he didn't need to hand over his ID because he had followed the public discussion about the police practice of carding. Mr Ali explained that his irritation turned to acute embarrassment when the questioning became more intense, his items were seized, and he was arrested in front of several people he knew from his classes at SFU. Since the arrest, he has been too embarrassed to return to classes that other students who witnessed his arrest also attend.

### **The expert evidence**

Defence counsel seeks to call Dr Ingrid Webster to testify to police practices of racial profiling, its relationship to carding, and the general phenomenon of systemic racism within Canadian policing. Dr Webster is a professor of sociology at SFU and has disclosed that Mr Ali was her student in a second-year sociology course on race and the Canadian state. However, he was one of 200 students enrolled in that course, and she testifies that he did not particularly stand out in any respect and that she has no relationship with him beyond that semester's work.

Dr Webster's research and publications focus on Indigenous people's interactions with Canadian state actors including police, public schools and health authorities. She has written extensively about the phenomenon of systemic racism and interviewed more than 500 Indigenous people about their experiences of racism with state agencies in BC. She has also conducted surveys of similar matters, with more than 2,500 respondents in total. She has published extensively on Indigenous people's experiences of racism, including 3 books and 28 peer-reviewed articles.

During cross-examination, Dr Webster agreed that her research does not focus on anti-Black racism. However, she stated that she stays current with Canadian research in that field as it is closely related to her own research.

If permitted to testify, Dr Webster will testify to Canadian studies of racial profiling that suggest that “lack of fit” is a common basis for police targeting racialized people in the absence of suspicious activity. During cross-examination, Dr Webster agreed that, to the extent they consider Black Canadians, these studies were conducted in Toronto, Halifax and Edmonton with respect to different police forces, and have not been conducted in Vancouver. However, she also testified that her own research and that of colleagues into interactions between Indigenous people and police in Vancouver reach very similar conclusions, and that she considers that these findings read in combination are sufficiently well-established that they can reasonably be applied to provide context to an interaction between a Black person and a Vancouver police officer.

In cross-examination, Dr Webster agreed that she had read and was concerned by press reporting suggested that racial profiling was actively occurring on SFU’s campus. Some of these news stories described Mr Ali’s arrest. She agreed that as a faculty member who works on race and racialization, and actively seeks to cultivate anti-racist practices, she did not wish to see SFU associated with such practices. However, she explained that she understood her responsibility to provide independent expert advice to the court, and stated that she believed she was able to be impartial and to equip the court to reach its own conclusions about whether racial profiling had occurred here.

The Crown objects to the admissibility of Dr Webster’s evidence on the basis that:

- (a) her pre-existing relationship with Mr Ali as his teacher, coupled with her anti-racist advocacy, mean that she lacks independence and will be unable to assist the court in accordance with her duty as an expert witness; and
- (b) her own research and that on which she has relied in this case are insufficiently connected to the factual matrix of a non-Indigenous Canadian being investigated by Vancouver police, and that it would be dangerous to draw inferences from that research base to this interaction.

The defence contends that Dr Webster has demonstrated that she understands and will abide by her duty of independence, and argues that it will rarely if ever be the case

that the research basis for a qualitative expert fits precisely with the facts of a case. In this case, the defence argues, the quality and limitations of the research base are clear and form the basis from which you, as trial judge, can draw appropriate inferences about the likely reliability and applicability of this research in this context.

- (a) **Write your ruling on the admissibility of Dr Webster's evidence (20 marks)**
  
- (b) **Write your ruling on the s. 24(2) application for exclusion of the computer and smart phone (15 marks)**

15    2.    **Admissibility of evidence: trial**

Assume that you have ruled that the evidence against Mr Ali should be admitted, and the trial is now proceeding on its merits. Mr Ali's counsel has indicated that they will appeal the s. 24(2) ruling, but they must proceed for now.

When questioned at the police station on 23 October 2019, Mr Ali provided a description of the person who sold him his laptop and smart phone: they appeared to be a white male in his early to mid 20s, approximately 5'10", slender build, with brown hair. The person mentioned that he was a graduate student at SFU, but didn't say which program. He introduced himself as Peter, but did not provide a last name. Mr Ali said that they met at Harbor Centre after making arrangements by text message, but he hadn't seen the person again after making his purchase. Mr Ali said that he paid \$850 cash for the used HP laptop with Microsoft software installed, and \$600 cash for the Google Pixel 3 smart phone. He did not receive a receipt.

Mr Ali has given similar evidence before you.

Defence counsel now seeks to introduce a written statement given to Vancouver police in January 2019 by Mr Rahul Mohan. Defence counsel obtained a copy of this statement from the Crown when preparing for this trial, and it had not previously been seen by Mr Ali. Mr Mohan was an SFU student who had purchased a laptop after reading a notice offering used laptops and smart phones for sale at a good price. This notice was posted on a student bulletin board at SFU Harbor Centre.

Mr Mohan paid \$750 for a used Dell laptop, with Microsoft software installed. The laptop initially worked quite well but less than a week after making the purchase, the



computer displayed a comment on its screen: “This laptop is stolen and has been remotely wiped. It has been locked and cannot be unlocked except by the original owner.” Mr Mohan took the laptop to a computer repair store, who was unable to repair the computer and advised him to contact police. This police statement resulted from that interaction.

Mr Mohan supplied a description of the person with whom he dealt when making the purchase. According to Mr Mohan, he was approximately 5’11” tall, slim build, appeared Caucasian and appeared to be in his mid-20s. The person said they were studying computer science at SFU, and that he was selling the used computers from a company where he had completed an internship. He gave the first name Peter. Mr Mohan – who was also enrolled in computer science courses – had not seen him on campus at SFU, before or since.

Mr Mohan signed the police statement, which included in prominent text: “NOTICE: By signing this statement, you are attesting to the truth of its contents and acknowledging that you have been warned that giving a false statement to police may carry significant legal consequences, including criminal penalties.”

Mr Mohan completed his studies in December 2019 and has now returned to his home country of India. He is unavailable to testify in this hearing. Accordingly, Mr Ali’s counsel now applies to have Mr Mohan’s statement introduced to help establish the truth of Mr Ali’s account of how he acquired his laptop and phone.

In answering this question, you should assume that the provenance of Mr Mohan’s statement is agreed (i.e. although the Crown contests admissibility, it concedes that the statement is a true record of a statement given by Mr Mohan to the Vancouver Police in January 2019).

**Write your ruling on the admissibility of Mr Mohan’s statement (15 marks)**

END OF EXAMINATION