

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Simpson, 2015 SCC 40, [2015] 2 S.C.R. 827 | **Date:** 20150730  **Docket:** 35971 |

Between:

Her Majesty The Queen

Appellant

and

Andrew Simpson and Kizzy-Ann Farrell

Respondents

- and -

City of Montréal

Intervener

**Coram:** Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

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| **Reasons for Judgment:**  (paras. 1 to 55) | Moldaver J. (Rothstein, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ. concurring) |

R. *v.* Simpson, 2015 SCC 40, [2015] 2 S.C.R. 827

Her Majesty The Queen Appellant

v.

Andrew Simpson and

Kizzy‑Ann Farrell Respondents

and

City of Montréal Intervener

**Indexed as: R. *v.* Simpson**

2015 SCC 40

File No.: 35971.

2015: February 12; 2015: July 30.

Present: Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

on appeal from the court of appeal for quebec

*Criminal law — Defences — Colour of right — Evidence — Co-accused occupying commercial space unlawfully — Trial judge entered acquittals for various breaking and entering, assault, and drug offences — Trial judge referred to evidence that, in her view, supported existence of colour of right to occupy space — Whether trial judge erred in finding air of reality to colour of right defence — If so, whether trial judge’s error in assessing this issue had material bearing on verdicts.*

S and F, after having been lawfully evicted from their upstairs apartment, took up residence in the vacant commercial space on the ground floor of the same building in contravention of municipal bylaws. On February 1, 2011, the Chief Municipal Inspector, joined by three police officers as a safety measure, decided to inspect the premises. During the municipal building inspection, S and F attacked the police. They were both arrested for assault. Police searched S incident to his arrest and discovered methamphetamine and ecstasy pills. S and F were charged with breaking and entering and assaulting a police officer. In addition, S was charged with one count of assault with a weapon and two counts of drug possession. On February 18, inspectors realized that S and F were again occupying the ground floor, despite an order prohibiting its use. S and F were arrested a second time, and again charged with breaking and entering. The trial judge acquitted S and F of all charges. She held that S and F’s s. 8 *Charter* rights were violated and excluded all evidence of what occurred inside the commercial space. The trial judge also found that there was an air of reality to S and F’s asserted colour of right defence, and that the Crown had failed to disprove it beyond a reasonable doubt. A majority of the Court of Appeal upheld the acquittals.

*Held*: The appeal should be allowed, the acquittals set aside, and a new trial ordered on all charges.

The term “colour of right” denotes an honest belief in a state of facts which, if true, would at law justify or excuse the act done. An accused bears the onus of showing that there is an “air of reality” to the asserted defence — i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right.

Here, the trial judge’s finding that there was an air of reality to the colour of right defence in relation to the February 1 breaking and entering charges was tainted by her improper reliance on certain evidence that did not, in fact, support the existence of a colour of right. In particular, the trial judge erred in relying on the landlord’s acknowledgment on cross-examination that it is possible that his father, who once had control of the building, had a verbal agreement with S and F for the use of the commercial space, and had given them the keys to the space. A proposition put to a witness during cross-examination does not constitute evidence of the proposition, unless the witness adopts it as true. The landlord’s inability to reject the suggestions put to him does not shed any light on whether those suggestions are true or not. His testimony cannot be used in assessing whether the asserted colour of right defence passes the air of reality threshold. The trial judge’s error in factoring this evidence into the air of reality assessment might reasonably be thought to have had a material bearing on the overall colour of right issue, and thus on the resulting acquittals in respect of the February 1 breaking and entering charges.

With respect to F’s charge of assaulting a police officer, the trial judge acquitted her on the basis of self-defence. The acquittal turns on the trial judge’s finding that F honestly believed it was unlawful for the police officers to restrain S and place him under arrest for having attacked them inside the commercial space. Implicit in this finding is an additional one: that F honestly believed that she and S had a right to occupy the commercial space and, by extension, a right to repel the police. Absent a colour of right defence, there could be no basis for S and F’s purported belief that they had a right to repel the police. The trial judge’s error on colour of right tainted her finding that F acted in self-defence, and might reasonably be thought to have had a material bearing on F’s acquittal on the assault charge.

The trial judge’s error on the colour of right issue also tainted the acquittals on S’s assault and drug possession charges. The basis for these acquittals was the trial judge’s finding that S and F’s s. 8 rights were violated, and the resulting exclusion of evidence. Section 8 of the *Charter* only confers protection against unreasonable searches and seizures to the extent that an individual establishes a reasonable expectation of privacy, on a balance of probabilities. On the facts of this case, the trial judge’s error on the colour of right issue brings into doubt whether there was a subjective expectation of privacy, much less a reasonable one. To the extent that s. 8 of the *Charter* was not properly engaged, the trial judge was not in a position to exclude any evidence. Accordingly, the trial judge’s error might reasonably be thought to have had a material bearing on S’s acquittals for the assault and drug possession charges.

Neither the trial judge nor the Court of Appeal distinguished between the first and second set of breaking and entering charges. The February 18 breaking and entering charges should have been analyzed separately from those of February 1. In light of the undisputed evidence, it is difficult to conceive that S and F had an honest belief in their right to occupy the commercial space on February 18. However, because the Crown did not request an alternate remedy, the February 18 breaking and entering charges should be sent back for a new trial along with the remaining charges.

**Cases Cited**

**Referred to:** *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369; *R. v. Adgey*, [1975] 2 S.C.R. 426; *R. v. Charters*, 2007 NBCA 66, 319 N.B.R. (2d) 179; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Skedden*, 2013 ONCA 49; *R. v. Zebedee* (2006), 81 O.R. (3d) 583; *R. v. M.B.M.*, 2002 MBCA 154, 170 Man. R. (2d) 131; *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Lauda*, [1998] 2 S.C.R. 683; *R. v. Belnavis*, [1997] 3 S.C.R. 341.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 8, 24.

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 267(*a*), 270(1)(*a*), 322, 348(1)(*b*), (*e*), 677, 693(1)(*a*).

APPEAL from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Thibault and Dalphond JJ.A.), 2014 QCCA 1143, [2014] AZ‑51079184, [2014] Q.J. No. 5425 (QL), 2014 CarswellQue 5384 (WL Can.), affirming the acquittals of the respondents. Appeal allowed.

*Dennis Galiatsatos* and *Christian Jarry*, for the appellant.

*Andrew Simpson*, on his own behalf.

*Kizzy‑Ann Farrell*, on her own behalf.

*Walid Hijazi*, as *amicus curiae*.

*Éric Couture*, for the intervener.

The judgment of the Court was delivered by

1. Moldaver J. — This is an appeal as of right from a judgment of the Quebec Court of Appeal upholding the acquittals at trial of the respondents, Mr. Andrew Simpson and Ms. Kizzy-Ann Farrell, on various breaking and entering, assault, and drug offences. Like Thibault J.A., dissenting in the Court of Appeal, but for the more detailed reasons that follow, I would allow the appeal, set aside the acquittals, and order a new trial on all charges.
2. Facts
3. The bulk of the charges in this case arise from a municipal building inspection carried out on February 1, 2011. The building, located in the borough of Lachine in Montréal, had two apartments upstairs and three vacant commercial units on the main floor. The owner, Marius Arcand, was elderly and in declining health. A mandate in case of incapacity was sanctioned in April 2010, giving his son, Jean-Marc Arcand, authority over the management of the property.
4. Mr. Simpson and Ms. Farrell had a lease for an apartment on the second floor of the building. However, on November 10, 2010, an eviction order was granted against them for non-payment of rent. A month later, on December 6, Jean-Marc Arcand went to the building accompanied by a locksmith and found that the respondents had vacated the apartment. However, he believed that they had relocated to the commercial units on the ground floor.
5. Suspecting that the respondents had taken up residence in the commercial space, Jean-Marc Arcand contacted Pierre Dubois, the Chief Municipal Inspector for the borough of Lachine, to inform him of the situation. Inspector Dubois inquired about the ground floor units to determine whether they were equipped to serve as a residence. He concluded that, if the ground floor was being used as a residence, this would be in contravention of municipal bylaws. He therefore decided to inspect the premises with the permission and cooperation of Jean-Marc Arcand.
6. The inspection took place during the day on February 1, 2011. Inspector Dubois and four junior inspectors were present. They were joined by three police officers, Sergeant Pierre Barbeau and Officers Andre Troke and Sandra Fournier. Inspector Dubois had requested the presence of the police as a safety measure, since he had previously encountered aggressive behaviour from the respondents.
7. The doors on the ground floor of the building were locked and the windows were covered with dark sheets. Inspector Dubois knocked several times, but there was no response.
8. A locksmith was called to open the rear door. Sergeant Barbeau and Officer Troke entered the building first to verify whether anyone was inside. They repeatedly shouted “police” so as to make their presence known.
9. Inspector Dubois, Officer Fournier, and the junior inspectors remained outside. Shortly after Sergeant Barbeau and Officer Troke entered the building, Ms. Farrell exited through another door. She approached Inspector Dubois and instructed him to leave. The inspector stated that he had to inspect the premises and attempted to show her a copy of the relevant bylaw dealing with safety and sanitation standards for residences. Ms. Farrell refused to look at it and re-entered the building.
10. Inside, Sergeant Barbeau and Officer Troke continued with their search of the commercial space. After climbing up a set of stairs, Sergeant Barbeau pushed open a door and observed a shadow moving in front of him, which turned out to be Mr. Simpson. Mr. Simpson yelled at the officers, telling them that they had no business being there and to “get out”: A.R., vol. V, at p. 24. Sergeant Barbeau shouted back at Mr. Simpson and instructed him to “get down on the ground”: *ibid.*
11. Within seconds, Mr. Simpson started banging on the wall of the staircase with an object. The object — what appeared to be a wooden two-by-four — broke through the wall and came within an inch of Sergeant Barbeau’s face. In response, Officer Troke shot pepper spray in Mr. Simpson’s direction.
12. The officers then saw a nearby door open, from which Mr. Simpson exited the building. Officer Troke ran after him, and tackled him to the ground. As Mr. Simpson was resisting arrest, Sergeant Barbeau came to Officer Troke’s aid and the two officers tried to restrain him.
13. At that point, Ms. Farrell jumped on to Sergeant Barbeau’s back and hit him on the head. He pushed her away and ordered her to back off. Ms. Farrell did not comply and charged toward him again. Sergeant Barbeau responded by giving her a blow to the neck, bringing her to the ground, and handcuffing her.
14. The respondents were both arrested for assault. Officer Troke searched Mr. Simpson incident to his arrest and discovered 14 methamphetamine and ecstasy pills.
15. Charges were laid against Mr. Simpson and Ms. Farrell as a result of the events of February 1. They consisted of one count each of breaking and entering and committing mischief contrary to s. 348(1)(*b*) and (*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”),and one count each of assaulting a police officer contrary to s. 270(1)(*a*) of the *Code*. In addition, Mr. Simpson was charged with one count of assault with a weapon contrary to s. 267(*a*) of the *Code* and two counts of drug possession under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
16. On February 9, 2011, Inspector Dubois issued an order prohibiting the use of the ground floor of the building because it was dangerous and unsanitary. Non-occupation notices were plastered on every door, clearly indicating the prohibition.
17. On February 18, inspectors realized that the notices had been removed from the building and that the respondents were again occupying the ground floor. They informed Inspector Dubois, who immediately contacted the police. The respondents were arrested a second time. On this occasion, they were charged with one count each of breaking and entering and committing mischief contrary to s. 348(1)(*b*) and (*e*) of the *Code*.
18. Judgments Below
    1. Court of Quebec (Ouimet J.; Oral Reasons for Judgment)
19. The respondents dismissed their lawyers after the first day of trial and were self-represented thereafter. Crown counsel called evidence and the respondents chose not to testify. However, they brought various motions alleging abuses by the City, the police, the prosecution, and their former landlord, which the trial judge interpreted as motions under ss. 7, 8, and 24 of the *Canadian Charter of Rights and Freedoms*.
20. The trial judge gave oral reasons for judgment. After laying out the relevant facts, she addressed the s. 8 *Charter* motion in relation to the events of February 1. She concluded that the police officers’ forced entry into the commercial space constituted a violation of the respondents’ right to be free from unreasonable search or seizure.
21. Applying s. 24(2) of the *Charter*, the trial judge held that this “is certainly a case for me to exclude the evidence that was obtained following the violation”: A.R., vol. I, at p. 14. Specifically, she excluded “all that was seen by the police officers after their entering the place”, including the fact that Mr. Simpson had attacked Sergeant Barbeau: *ibid.* She further excluded the drugs that were found on Mr. Simpson after he was arrested. Accordingly, she acquitted him on the drug possession counts as well as the charges of assault with a weapon and assault of a police officer.
22. On Ms. Farrell’s charge of assaulting a police officer, the trial judge found that Ms. Farrell had reacted to protect Mr. Simpson from being unlawfully assaulted by the police. This was sufficient, in her view, to raise a reasonable doubt that Ms. Farrell was acting in lawful self-defence when she hit Sergeant Barbeau. Accordingly, she acquitted Ms. Farrell on this charge.
23. With respect to the breaking and entering counts, the trial judge’s analysis is, at best, unclear. For one thing, she did not distinguish between the breaking and entering charges stemming from the February 1 arrest and those stemming from the subsequent arrest on February 18. Rather, she appears to have assumed that the same analysis was applicable to both dates, even though the circumstances surrounding the February 1 and February 18 offences were markedly different.
24. The trial judge’s analysis is also remarkably short. She simply identified two pieces of evidence, which I will address in due course, suggesting that the respondents “reasonably thought” that they had a right to be in the commercial space: A.R., vol. I, at p. 18. Given that they had at least “an appearance of right”, she acquitted them on the breaking and entering charges for both February 1 and February 18.
    1. Quebec Court of Appeal (Duval Hesler C.J. and Dalphond J.A.; Thibault J.A., Dissenting)
25. The Court of Appeal’s reasons are exceedingly brief. They are set out in full below:

It was the Crown’s burden to establish beyond a reasonable doubt that the Respondents had no colour of right to occupy the premises. The trial judge concluded that it had failed to do so. In the opinion of the majority, the Appellant fails to demonstrate any reviewable error in the verdicts of acquittal on all charges and the appeal must be dismissed.

For her part, Justice Thibault, in dissent, would have allowed the appeal and ordered a new trial, on the basis that the absence of a right of occupation had been demonstrated beyond a reasonable doubt and that the inspector’s visit accompanied by policemen was legal ([*Chabotar*] *c. Ville de Laval*, [2004] J.Q. 149).

(2014 QCCA 1143, at paras. 1-2 (CanLII))

1. Issues on Appeal
2. This appeal comes to us as of right as a result of the dissent of Thibault J.A. The respondents appeared in person. Mr. Walid Hijazi was appointed *amicus curiae* to assist the Court, and we are grateful to him for his assistance.
3. In considering and addressing the issues in this appeal, unfortunately this Court does not have the benefit of more fulsome reasons from either the majority or the dissent in the Court of Appeal. More complete reasons would, of course, have been useful, particularly here, where the matter comes to us as of right. Section 677 of the *Code* provides that, where an appellate judge dissents from the judgment of the court, he or she “shall specify any grounds in law on which the dissent, in whole or in part, is based”. This Court is greatly assisted when the dissenting judge clearly and explicitly specifies these grounds in law and provides sufficient reasons explaining the basis of the dissent. Reasons explaining the position of the majority are equally helpful. In this case, the brevity of the judgment below has left us with the task of having to deduce the precise questions of law that are properly before us, as well as having to infer the reasons in support of the dissent.
4. Pursuant to s. 693(1)(*a*) of the *Code*, the Crown’s right of appeal is limited to the questions of law on which Thibault J.A. dissented. Here, it would appear that she disagreed with the majority on two points. First, she concluded that “the absence of a right of occupation had been demonstrated beyond a reasonable doubt”. Second, she held that “the inspector’s visit accompanied by policemen was legal”. Accordingly, she would have allowed the appeal and ordered a new trial on all charges.
5. While there may be some ambiguity as to the precise question of law that arises from Thibault J.A.’s first point, the Crown submits that she was referring to the colour of right defence — in particular, whether that defence had a sufficient evidential foundation in the record to pass the air of reality test. Neither the respondents nor the *amicus curiae* contested this framing of the issue. Having considered the matter, I am satisfied that the first question of law properly before this Court is whether there was an air of reality to the colour of right defence and whether the trial judge’s error or errors (if any) in assessing this issue had a material bearing on the verdicts such that a new trial should be ordered.
6. Justice Thibault’s second point of disagreement relates to the lawfulness of the entry into the commercial space by the inspector and police officers. This is a question of law that is also properly before the Court. However, in view of my conclusion on the colour of right issue, I believe this matter is best left for the trial judge conducting the new trial, should the Crown choose to proceed again.
7. Analysis
   1. Colour of Right Defence Relating to the February 1 Breaking and Entering Charges
8. The trial judge found that there was an air of reality to the respondents’ colour of right defence, and that the Crown had failed to disprove it. Accordingly, she acquitted Mr. Simpson and Ms. Farrell on the breaking and entering charges stemming from the initial arrest on February 1. A majority of the Court of Appeal saw no basis for interfering with the trial judge’s finding that the Crown had failed to disprove the colour of right defence. Thibault J.A. disagreed.
9. As I will explain, the trial judge’s finding that there was an air of reality to the colour of right defence is tainted by her improper reliance on certain evidence that did not, in fact, support the existence of a colour of right. In the absence of that evidence, it is uncertain whether she would have come to the same conclusion. It follows that I respectfully disagree with the majority of the Court of Appeal’s conclusion that there was no reviewable error in the trial judge’s colour of right analysis. While Thibault J.A. did not provide any detailed explanations, I agree with her implicit conclusion that the trial judge erred in her assessment as to whether there was an air of reality to the colour of right defence, and that this error tainted her findings with respect to all of the charges.
10. The colour of right defence is most commonly invoked in relation to the offence of theft under s. 322 of the *Code*, which prohibits the taking of an object or its conversion “fraudulently and without colour of right”. In *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.), at p. 372, Martin J.A. described the term “colour of right” in that section as follows:

The term “colour of right” generally, although not exclusively, refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject-matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act “without colour of right”, even though it may be unfounded in law or in fact . . . . The term “colour of right” is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done . . . . The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact. [Citations omitted.]

The colour of right defence would also appear to apply to other property-related offences, including breaking and entering: *R. v. Adgey*, [1975] 2 S.C.R. 426, at pp. 432-33; *R. v. Charters*, 2007 NBCA 66, 319 N.B.R. (2d) 179, at para. 12.

1. To put the defence of colour of right into play, an accused bears the onus of showing that there is an “air of reality” to the asserted defence — i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 49-53 and 83. Once this hurdle is met, the burden falls on the Crown to disprove the defence beyond a reasonable doubt. Applying these principles here, the respondents bore the burden of pointing to some evidence upon which a trier of fact could be left in a state of reasonable doubt about the respondents’ asserted claim of a colour of right to occupy the commercial space.
2. The respondents did not testify at trial. Therefore, the record does not contain any direct evidence of their subjective belief. That said, the trial judge referred to two pieces of evidence that, in her view, supported the existence of a colour of right. The first is Jean-Marc Arcand’s acknowledgment on cross-examination that it is possible that his father, Marius, had a verbal agreement with the respondents for the use of the commercial space, and that it is possible that Marius had given them the keys to the space. The second piece of evidence is a small claims court application filed by the respondents on January 14, 2011, against Jean-Marc and Marius Arcand, alleging that they had been “lur[ed] into an agreement of business . . . under false pretenses”: A.R., vol. XI, at p. 21. Although the precise nature of the allegations is difficult to discern, certain statements in the application imply that there might have been a lease agreement with the respondents for the commercial space.
3. Before this Court, the *amicus curiae* put forward a third piece of evidence arising from Sergeant Barbeau’s testimony, specifically, a mention in the sergeant’s notes of the possible existence of a lease entered into by the respondents for the commercial premises. The trial judge did not consider this evidence on the issue of colour of right, nor does it seem she was asked to. Whatever the case, there is nothing to suggest that the respondents were aware of or relied on these notes as of February 1 or February 18, and, as evidence of the truth of their contents, they were classic hearsay and inadmissible for that purpose. As such, they do not assist the respondents.
4. I now turn to the two pieces of evidence upon which the trial judge relied in assessing the defence of colour of right.
   * 1. Jean-Marc Arcand’s Testimony
5. During cross-examination, on at least two occasions, the trial judge intervened and asked Jean-Marc Arcand whether it was “possible” that his father had entered into a verbal agreement with the respondents regarding the commercial space. The trial judge further inquired into whether it was “possible” that Marius Arcand had given the respondents keys to the space during the summer of 2010. Jean-Marc Arcand acknowledged that it was possible that an agreement was concluded by his father and that keys were handed over to the respondents. However, at no point in his testimony did he accept that these events had actually occurred. He was simply unable to reject the suggestions put to him, since Marius’s interactions with Mr. Simpson and Ms. Farrell were not within his personal knowledge.
6. The trial judge relied on Jean-Marc Arcand’s answers as evidence of a colour of right. With respect, she erred in doing so. As the Crown rightly observes, a proposition put to a witness during cross-examination does not constitute evidence of the proposition, unless the witness adopts it as true: see *R. v. Skedden*, 2013 ONCA 49, at para. 12; *R. v. Zebedee* (2006), 81 O.R. (3d) 583 (C.A.), at para. 114; *R. v. M.B.M.*, 2002 MBCA 154, 170 Man. R. (2d) 131, at paras. 25-27. This rule applies even where the proposition was put to the witness by the trial judge.
7. Jean-Marc Arcand’s inability to reject the suggestions put to him does not shed any light on whether those suggestions are true or not. Without more, all that his answers convey is that he was not personally aware of the specific interactions, if any, that his father may have had with the respondents. To rely on his answers as evidence of something further — for example, that the respondents may have reached an agreement with Marius Arcand — was not open to the trial judge. As a result, Jean-Marc Arcand’s testimony cannot be used in assessing whether the asserted colour of right defence passes the air of reality threshold. With respect, the trial judge erred in law in concluding otherwise.
   * 1. Small Claims Court Application
8. On January 14, 2011, the respondents filed an application in small claims court seeking damages from Jean-Marc and Marius Arcand in the amount of $7,000 (“the application”). In the application, the respondents alleged, among other things, that the Arcands lured them into a business agreement on false pretences and that Jean-Marc “willfully and knowingly allowed . . . Marius, to continue to rent out residential and commercial spaces, in full knowledge that [he was] not in a mental position to handle such legal obligations”: A.R., vol. XI, at p. 17. The respondents also claimed that the Arcands failed “to render the property into proper functioning order as required by the law and according to health regulations” and “[t]o replace . . . goods and products” that sustained water damage: *ibid.* They sought compensation for losses “incurred to the business” as well as for “emotional distress and stress”: *ibid.*
9. The allegations are sparse in terms of detail. They do not disclose the type of business arrangement that the respondents claim to have made with the Arcands. They also do not specify the nature of any purported agreement relating to the downstairs commercial units. However, the trial judge relied on the statements in the application as evidence that the respondents honestly believed they had a right to occupy the commercial space based on a verbal agreement with Marius Arcand.
10. Out-of-court statements made by an accused and adduced for their exculpatory value are subject to the general exclusionary rule against hearsay: see *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111, at paras. 36-37. They are typically inadmissible for the truth of their contents because they are regarded as self-serving and lacking in probative value: *ibid.* In this case, however, it was the Crown, and not the respondents, who introduced the small claims application into evidence, and following *Rojas*, both the Crown and the respondents could rely on it for the truth of its contents.
11. Here, in determining that the requisite evidential foundation for the colour of right defence had been met, the trial judge relied on two pieces of evidence. One of these — Jean-Marc Arcand’s lack of knowledge of what his father may have done — was clearly of no value and should not have been considered. The trial judge erred in law in doing so. The trial judge’s error in factoring Jean-Marc Arcand’s evidence into the air of reality assessment might reasonably be thought to have had a material bearing on the overall colour of right issue, and thus on the resulting acquittals in respect of the February 1 breaking and entering charges: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14. Accordingly, the Crown has met its burden of establishing that a new trial on these charges is warranted. I therefore agree with Thibault J.A.’s conclusion on this point.
    1. Ms. Farrell’s February 1 Charge of Assaulting a Police Officer
12. The trial judge held that Ms. Farrell was acting in lawful self-defence when she hit Sergeant Barbeau. Regrettably, her discussion on this point is cursory. She did not refer to any of the self-defence provisions in the *Criminal Code*, nor offer any detailed analysis. Despite the lack of analysis, it is evident that the trial judge’s conclusion hinges on her finding that Ms. Farrell “reacted in order to protect Mr. Simpson” whom “she felt . . . had been unlawfully assaulted by the police officer”: A.R., vol. I, at p. 19. The Court of Appeal’s reasons make no mention of this finding. However, Thibault J.A. concluded that a new trial should be ordered on all charges, and I agree. As I will explain, the trial judge’s error on the colour of right issue carries over and taints Ms. Farrell’s acquittal on the charge of assaulting a police officer.
13. The acquittal on Ms. Farrell’s assault charge turns on the finding that she honestly believed Mr. Simpson was being unlawfully assaulted. According to the trial judge, Ms. Farrell felt that it was unlawful for the police officers to restrain Mr. Simpson and place him under arrest for having attacked them inside the commercial space, and this prompted her to hit Sergeant Barbeau. Implicit in this finding is an additional one: that Ms. Farrell honestly believed that she and Mr. Simpson had a right to occupy the commercial space and, by extension, a right to repel the police — and that when Mr. Simpson attacked Sergeant Barbeau and later resisted arrest, he was within his rights to do so. However, as I have discussed, it is questionable whether the colour of right finding can be sustained on the evidence that was properly before the trial judge.[[1]](#footnote-1)
14. Suffice it to say that, in the context of this case, the colour of right finding was inextricably linked to the finding that Ms. Farrell acted in self-defence. Absent a colour of right defence, there could be no basis for the respondents’ purported belief that they had a right to repel the police. It follows that, at a minimum, the trial judge’s error on colour of right taints her finding that Ms. Farrell acted in self-defence. As this error might reasonably be thought to have had a material bearing on Ms. Farrell’s acquittal on the assault charge, I would order a new trial on that charge as well.
    1. Mr. Simpson’s February 1 Assault and Drug Possession Charges
15. The trial judge held that the respondents’ s. 8 rights were violated. She excluded all evidence of what occurred inside the commercial space, including the fact that Mr. Simpson attacked Sergeant Barbeau. She also excluded the evidence of the drugs in his possession. This led her to acquit Mr. Simpson on the charges of assault with a weapon, assault of a police officer, and the two drug possession counts. The Court of Appeal did not explicitly address the s. 8 issue. Given that the majority upheld the acquittals on these charges, I take it to have concluded that the trial judge did not err in her s. 8 finding or in the resulting exclusion of evidence. With respect, I disagree. I am satisfied that the trial judge’s error on the colour of right issue again taints Mr. Simpson’s acquittals on the assault and drug possession charges and requires, as Thibault J.A. concluded, that a new trial be directed on these charges as well.
16. Section 8 of the *Charter* only confers protection against unreasonable searches and seizures to the extent that an individual establishes a reasonable expectation of privacy: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 159. It is the claimant who bears the burden of demonstrating this expectation on a balance of probabilities: *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45. In determining whether this burden has been met, the court must assess the totality of the circumstances, with particular emphasis on the existence of a subjective expectation of privacy and the objective reasonableness of that expectation: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432,at para. 19; *Edwards*, at para. 45.
17. The trial judge did not carry out a full s. 8 analysis. Notably, she did not discuss whether the respondents had a reasonable expectation of privacy in the commercial space, thereby engaging the protection of s. 8. Rather, in finding a s. 8 violation, she appears to have assumed that s. 8 was properly engaged. The Court of Appeal seemingly agreed, but Thibault J.A. can be taken to have disagreed on this point.
18. The lack of analysis in the courts below has left this Court in the difficult position of examining, for the first time, the basis for the trial judge’s conclusion that s. 8 was engaged. While I am loath to speculate on the trial judge’s reasoning, it would appear that her implicit finding of a reasonable expectation of privacy was influenced by her colour of right analysis. As noted, in the course of that brief analysis, the trial judge stated that the respondents had at least “an appearance of right” or “reasonably thought” they had a right to be in the commercial space. However, as I have explained, that finding is questionable in light of the trial judge’s erroneous reliance on Jean-Marc Arcand’s testimony. To the extent that the evidential foundation for the colour of right defence is put into question, any implicit finding of a reasonable expectation of privacy is also suspect.
19. I should further emphasize that, even if the trial judge was left in a state of reasonable doubt as to the existence of a colour of right, it does not follow that the respondents discharged their burden of demonstrating, on a balance of probabilities, that they had a reasonable expectation of privacy in the commercial space. This is because the evidential burden of showing an air of reality on colour of right is lower than the persuasive burden of establishing that s. 8 is engaged. Furthermore, a finding that the respondents had a colour of right could only assist them in advancing the position that they had a *subjective* expectation of privacy. To engage s. 8, the respondents had to go one step further — they had to show that this expectation was *objectively reasonable*.
20. Although an individual need not show a proprietary or possessory interest in a place in order to establish a reasonable expectation of privacy, this Court has held that the fact that the accused is a trespasser or otherwise has a tenuous connection to the place in question may, when considered in the totality of the circumstances, significantly undermine any reasonable expectation of privacy: *Edwards*, at para. 43; *R. v. Lauda*, [1998] 2 S.C.R. 683, at para. 1; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at paras. 20-22.
21. For present purposes, I need not come to a final conclusion as to whether a reasonable expectation of privacy was established here. As I have stated, the trial judge’s error on the colour of right issue brings into doubt whether there was a subjective expectation of privacy, much less a reasonable one, on the facts of this case. To the extent that s. 8 was not properly engaged, the trial judge was not in a position to exclude any evidence. Accordingly, the trial judge’s error might reasonably be thought to have had a material bearing on the acquittals, and I would order a new trial on Mr. Simpson’s assault and drug possession charges.
22. In these circumstances, I consider it prudent to leave for a new trial the issue of whether the inspector was lawfully entitled to enter the premises under the authority of municipal bylaws and whether the police were lawfully entitled to accompany the inspector and conduct a search of the premises. That important legal issue was not fully addressed by the trial judge or the Court of Appeal, and it is one that should be assessed on a proper record after full legal argument and analysis.
    1. Colour of Right Defence Relating to the February 18 Breaking and Entering Charges
23. As noted, neither the trial judge nor the Court of Appeal distinguished between the first and second set of breaking and entering charges. However, given that Thibault J.A. would have ordered a new trial on all charges, I will address the February 18 breaking and entering charges specifically. In my respectful view, the trial judge should have analyzed the events of February 18 separately from those of February 1. I find it difficult to conceive that the respondents had an honest belief in their right to occupy the commercial space on February 18. The undisputed evidence shows that, on February 9, non-occupation notices were plastered on the entrances to the commercial space. These notices clearly indicated that no one was to enter the premises. In spite of this, the respondents returned to the ground floor of the building and began residing in it once again. However, because the Crown did not request an alternate remedy, I would send the February 18 breaking and entering charges back for a new trial along with the remaining charges.
24. Conclusion
25. I would allow the appeal, set aside the acquittals, and order a new trial on all charges.

*Appeal allowed.*

Solicitor for the appellant: Director of Criminal and Penal Prosecutions of Quebec, Montréal.

*Andrew Simpson, on his own behalf.*

*Kizzy‑Ann Farrell, on her own behalf.*

Solicitors appointed by the Court as amicus curiae: Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Solicitors for the intervener: Dagenais Gagnier Biron, Montréal.

1. As an aside, I question whether “colour of right” could provide a basis in law for self-defence if the police officers were lawfully entitled to enter and search the premises. That matter is best left for the new trial, should it be raised. [↑](#footnote-ref-1)