S.C.C. File No. 38616

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

-and-

JUSTIN JAMES

Respondent

(Respondent)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. This is an error-correcting appeal. It comes before this Court as of right based on a dissent in the Ontario Court of Appeal. It concerns the application of the test for whether evidence in an information to obtain a search warrant ("ITO") is too stale-dated to ground the issuance of a warrant, and raises questions about the balancing of interests under s. 24(2) of the *Charter*.

2. The case arose out of a large-scale police investigation into firearms and cocaine trafficking called "Project Kirby". The investigation's main target was Franco Marentette-Derose (called "MD" in the judgments below). MD told a paid police agent that his cocaine supplier was a man named "Primo", who police determined to be the respondent. The ITO contained numerous references to the drug-dealing relationship between MD and Primo: MD told the police agent that Primo was "my guy" and that sometimes he would buy "a nino" from Primo which was "like an ounce of …pure dust but the rest is bomb". On December 18, 2015, MD told the agent that he was out of cocaine but Primo was not coming until the next day. On February 3, 2016, MD told the agent he was meeting with Primo to buy a kilogram of cocaine and would buy some for the agent as well; when MD returned from his meeting with Primo, he gave the agent a quantity of cocaine.

Appendix A to ITO, paras. 56, 87-88 (Appellant's Record ["AR"], Tab 9E)

3. Project Kirby investigators determined on February 24, 2016 that the investigation would be concluded. On February 25, 2016, police sought warrants to search the respondent's residence and a vehicle associated to him. The warrants authorized police to search for cocaine, packaging materials, identified cell phones, and debt lists. The search warrants were issued in the early morning hours of February 26, 2016. When police searched the respondent's vehicle later that day they found a handgun, ammunition, and over 100 grams of cocaine.

Appendix A to ITO, para. 94 (AR, Tab 9E)
Crown's Factum on *Charter* Application, para. 57 (AR, Tab 12)

4. The respondent challenged the search warrant pertaining to his vehicle. The trial judge found that the 23 days between February 3, 2016 (the date of the most recent information about Primo that appeared in the ITO) and February 26, 2016 (the date the warrants were issued) rendered the

information too stale to provide reasonable grounds to believe that "contraband", in the trial judge's phrasing, would be found at the time of the search. He quashed the search warrant and excluded the evidence.

Charter Ruling, pp. 8-9, 14 (AR, Tab 1)

5. The Crown appealed to the Ontario Court of Appeal. The majority upheld the trial judge's finding that the information was stale-dated and upheld his decision to exclude the evidence. In dissent, Nordheimer JA found that the evidence in the ITO of the respondent's drug trafficking was not stale after a "scant" three weeks, and that the fruits of the search of his car ought to have been admitted under s. 24(2) in any event.

R. v. James, 2019 ONCA 288, *per* Pardu JA [Majority Reasons] and *per* Nordheimer JA [Dissenting Reasons] (AR, Tab 3)

6. With respect, the appellant submits that the majority of the Court of Appeal erred by upholding the trial judge's finding that the information was stale, and by upholding his decision to exclude the evidence.

7. The trial judge's conclusion that the information was too stale to provide reasonable grounds to believe the search would afford evidence was based on two material errors that warranted appellate intervention: (i) the trial judge improperly narrowed his inquiry into whether the ITO established grounds to believe that *drugs* would be found in the vehicle, when in fact the search warrant also authorized a search for packaging material, identified cell phones and debt lists; and (ii) the trial judge erred in concluding the ITO did not demonstrate a pattern of drug dealing, by failing to consider relevant evidence that was presented in the ITO.

8. Regarding the decision to exclude the evidence through s. 24(2) of the Charter, the appellant asks this Court to follow Nordheimer JA's holding that any Charter breach was on the less-serious end of the fault spectrum. While the impact of the search on the respondent was significant, his reasonable expectation of privacy in the vehicle was not high. On the other hand, society has a strong interest in adjudication of this case on the merits. The handgun, ammunition, and cocaine were reliable evidence critical to the Crown's case. Recognition must be given to the distinctive feature of illegal handguns which are used solely to threaten and kill people. On a fresh *Grant* analysis, the repute of the administration of justice is best served by admitting the evidence.

B. FACTS

(a) The Project Kirby Investigation

9. The respondent was charged with numerous drug and firearms offences as a result of Project Kirby, an investigation conducted by the Ontario Provincial Police. The main target of the investigation was MD – who, the police believed, was involved in trafficking firearms and cocaine. Project Kirby involved the use of investigative tactics including a paid agent, undercover police operatives, judicially authorized body pack recording devices, and judicially authorized telephone intercepts. As a result of the investigation police learned that MD used a cocaine supplier he called "Primo." The police came to believe that Primo was the respondent.

Appendix A to ITO, paras. 16, 55, 56(d) and (o), 74-80 (AR, Tab 9E)
Appendix J to ITO, para. 4 (AR, Tab 9F)

10. On December 18, 2015, the police agent spoke to MD about three ounces of cocaine which MD owed him. MD advised that Primo, his supplier, was not coming until the next day and that there was no "chalupa" (cocaine) until then. The police agent's body back captured another conversation with MD that day in which MD said: "My guy Primo is an idiot, bro…I cussed him this morning, I said listen fucking sometimes I'll buy fucking a nino off of him and there's like an ounce of fucking pure dust but the rest is bomb…I said listen bro I said I don't want no dust."

Appendix J to ITO, para. 4(d) (AR, Tab 9F)

11. The police agent arranged to buy nine ounces of cocaine from MD on February 1, 2016. MD said he had to text his supplier because "all my shit is done up." The next day MD told the agent he planned to see Primo to pick up more cocaine and that he pays Primo $15,000 for nine ounces. The transaction for the agent's cocaine took place on February 3, 2016. MD showed the agent $50,000 in his trunk and said he was buying a kilogram from Primo. The agent gave MD the money for his nine ounces and waited with MD for the cocaine to arrive. MD was texting back and forth with Primo and eventually advised the agent: "Primo's going to be here in 30 minutes. I'll take, I'll take Bubba with me cause I'd rather go meet Primo around the corner at the Wal Mart and then I'll just…come right back." MD left to go meet Primo and when he later met with the police agent again, he gave him the quantity of cocaine.

Appendix A to ITO, paras. 74-75, 77, 88 (AR, Tab 9E)

12. Following MD's cocaine purchase from Primo on February 3, 2016, police continued to investigate MD for firearms trafficking until February 24, 2016, when Project Kirby investigators determined that this portion of the investigation would conclude. On February 25, 2016, police sought warrants to search various places associated with numerous targets of the investigation. The warrants to search the respondent's residence and a vehicle associated to him were issued at 12:40 am on February 26, 2016. The warrants authorized police to search for cocaine, packaging materials, identified cell phones, and debt lists – all items that the affiant, an experienced drug investigator, believed are used by persons who traffic in cocaine.

> Search Warrants dated February 26, 2016 (AR, Tabs C and D)
> Appendix A to ITO, para. 94 (AR, Tab 9E)
> Appendix J to ITO, para. 5 (AR, Tab 9F)

13. The respondent was arrested on February 26, 2016 while operating the vehicle for which the police had a warrant to search. No evidence was tendered as to what occurred during the arrest, but at trial both parties agreed the traffic stop was "dynamic" (which term was not further explained). When police searched the vehicle, they found a Glock 9 mm handgun with a high-capacity magazine, a sock holding 15 rounds of ammunition suitable for use in the handgun, and over 100 grams of cocaine. The respondent was subsequently charged with a series of firearms offences under the *Criminal Code* and trafficking cocaine under the *CDSA*.

> Defence Factum on *Charter* Application, para. 20 (AR, Tab 10)
> Crown's Notice of Response to *Charter* Application, para. 4 (AR, Tab 11)
> Crown's Factum on *Charter* Application, para. 57 (AR, Tab 12)

(b) The Trial Judge's *Charter* Ruling

14. The respondent brought a pre-trial s. 8 *Charter* application challenging the validity of the warrant to search his vehicle (he did not challenge the warrant to search his residence) and seeking to exclude the resulting evidence. His application was allowed.

15. The trial judge accepted that the ITO sufficiently established that Primo was the respondent. However, he found that the information about Primo in the ITO was too stale-dated to provide reasonable grounds to believe "contraband" would be found at the time of the search. He stated:

> I fail to see how there could be reasonable grounds to believe on February 25th and 26th, 2016 that he was carrying contraband when he was only mentioned in the ITO in respect of dates of December 18th, 2015 and February 3rd, 2016. To hold

> otherwise would allow the authorities to obtain warrants based on a person's reputation, in this case as a drug dealer, as opposed to credibly based evidence of probability.
> …
> As was pointed out in argument, a drug dealer makes no profit in holding his inventory. He must sell it. Drugs are transitory and there was no pattern demonstrated in the ITO.
>
> *Charter* Ruling, pp. 7-8, 10 (AR, Tab 1)

16. Having found a s. 8 *Charter* breach, the trial judge conducted a *Grant* analysis and excluded the evidence pursuant to s. 24(2). While noting that the search involved a vehicle in which the respondent had a "lesser" expectation of privacy, he concluded that the first two branches of the inquiry favoured exclusion. He held that the *Charter* violation was serious because the police had made a deliberate choice to sacrifice the respondent's s. 8 rights for the sake of the larger investigation, and because, as the trial judge saw it: "[the respondent] was detained in public. I am only told that this detention was dynamic. From my experience I therefore assume that he was forced to the ground and handcuffed during the arrest. This was in public." In the trial judge's view, "If [police] were after the bigger fish with respect to the firearms they should have left Mr. James alone until they could achieve their purpose and go after him on the evidence that they had at the time."

Charter Ruling, pp. 9, 11-12 (AR, Tab 1)

17. The trial judge found the impact on the respondent's *Charter*-protected rights was also serious. He was concerned that "reliance on stale dated evidence raises the apparition that a search warrant could be granted on the basis of the personal reputation of the accused". He then introduced the subject of racism (not raised by either party) and stated that the inclusion of racial slurs in some verbatim quotes in the ITO "possibly amplifies the effect on Mr. James of the breach of his *Charter* rights." He found that the evidence identifying the respondent as Primo was "weak" and that an omission in the ITO of the fact that the respondent's 2012 drug charges had been stayed was not deliberate or a result of any ill-intent, but was material and misleading.

Charter Ruling, pp. 12-13 (AR, Tab 1)

18. Citing a decision of the Ontario Court of Appeal, *R. v. McGuffie*, the trial judge concluded that while the charge was serious and the evidence crucial to the Crown's case, the "philosophy of s. 24(2)" favoured exclusion of the evidence.

Charter Ruling, pp. 13-14 (AR, Tab 1)
R. v. McGuffie, 2016 ONCA 365

(c) The Court of Appeal for Ontario – Split Decision

i) The majority

19. The Court of Appeal for Ontario released a split decision. Writing for the majority, Pardu JA upheld the trial judge's finding that the warrant was invalid and that the evidence should be excluded. She found that while the ITO established a basis to believe the respondent was involved in drug transactions on December 18, 2015 and February 3, 2016, there was insufficient information to allow a justice to find a pattern of drug dealing or to establish reasonable and probable grounds that evidence would be found in the respondent's vehicle at the time of the search. She further found that when the trial judge stated the ITO did not establish grounds to believe "contraband" would be discovered, he was not ignoring that the warrant was also to search for packaging materials, identified cell phones, and debt lists, but instead was simply using "contraband" as a compendious term to refer to all of the things listed in the warrant.

Court of Appeal Majority Reasons, paras. 21, 25 (AR, Tab 3)

20. Affirming the trial judge's decision to exclude the evidence, Pardu JA concluded that seeking a search warrant did not "in itself" demonstrate good faith; the missing information about the stay of the 2012 drug charges was significant; and it was within the trial judge's purview to interpret the "dynamic" arrest as meaning the respondent was forced to the ground. In her view, the 23-day delay in police applying for the warrant reflected a failure to comply with the statutory requirements, and there was no evidence demonstrating that the delay was due to investigative necessity. Though she found the trial judge was wrong to criticize the inclusion of verbatim quotations in the ITO, she considered that the trial judge's criticism was collateral to his s. 24(2) ruling. Ultimately, Pardu JA found there was no basis for appellate intervention.

Court of Appeal Majority Reasons, paras. 39-40, 42-43 (AR, Tab 3)

ii) The dissent

21. In dissent, Nordheimer JA held the warrant was valid, and in the alternative that the trial judge erred in excluding the evidence if the warrant was invalid. In his view, the trial judge misapplied the test for reviewing the search warrant by improperly weighing the evidence afresh, and by narrowing his inquiry to whether the ITO established grounds to believe that drugs, and not the rest of the things enumerated in the warrant, would be found in the respondent's vehicle. Further, he held that "most importantly, the trial judge erred in concluding that the information in support of the search warrant was stale dated"; the activities of large-scale drug dealers are not transitory, the evidence here established a pattern of drug dealing and there was no common sense foundation for the suggestion that in the 23 days following February 3, 2016, the respondent became disassociated from the drug trade.

Court of Appeal Dissenting Reasons, paras. 52-57, 66 (AR, Tab 3)

22. Assuming a breach of s. 8, Nordheimer JA would not have excluded the evidence. Any breach was not serious: police sought a warrant in good faith and could not be faulted for believing the information they had would not be considered stale, and the risk of jeopardizing the large investigation by searching earlier provided a compelling reason for police to delay executing a search of the respondent's vehicle. Nordheimer JA saw no basis for the trial judge's finding that the police had "sacrificed" the respondent's rights for a "greater cause." In addition, it was improper for the trial judge to speculate about the specifics of the "dynamic" arrest, especially for the purpose of elevating his view of the seriousness of the breach. With respect to the second *Grant* factor, Nordheimer JA acknowledged the lower expectation of privacy in one's vehicle, but accepted that the impact on the respondent's rights was serious and that this factor favoured exclusion. He noted that the trial judge's entire discussion regarding racism and the use of offensive language in the ITO "had no place in the trial judge's reasons or in his analysis." The third branch of the *Grant* test "strongly" favoured admission of the evidence. On the overall balance, it was "clear" to Nordheimer JA that even if the respondent's s. 8 *Charter* rights had been breached, the evidence should not have been excluded.

Court of Appeal Dissenting Reasons, paras. 77-80, 85, 89-90 (AR, Tab 3)

PART II – QUESTIONS IN ISSUE

ISSUE 1: Did the majority of the Court of Appeal for Ontario err in law by deciding the respondent's section 8 *Charter* rights were violated by reason of the insufficiency of grounds to support a *CDSA* search warrant?

ISSUE 2: Did the majority of the Court of Appeal for Ontario err in law by excluding the evidence pursuant to section 24(2) of the *Charter*?

23. It is the appellant's position that the majority of the Court of Appeal erred by upholding the trial judge's finding that the information in the ITO was too stale to provide reasonable grounds to believe that the listed things (cocaine; packaging materials; identified cell phones; debt lists) would be found in the respondent's vehicle at the time of the search. The majority further erred by upholding the decision to exclude the evidence under s. 24(2).

PART III – BRIEF OF ARGUMENT

ISSUE 1: THE INFORMATION IN THE ITO WAS NOT STALE AND THE WARRANT COULD HAVE ISSUED

A. TEST FOR REVIEWING THE SUFFICIENCY OF A WARRANT APPLICATION

24. The standard for the issuance of a warrant is "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search". The question for a reviewing court is "not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence" to permit an issuing justice to authorize the warrant. The accused bears the burden of demonstrating that the ITO is insufficient.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 168 [Quoted]
R. v. Morelli, [2010] 1 S.C.R. 253, at paras. 40-41, 131
R. v. Campbell, [2011] 2 S.C.R. 549, at para. 14

B. TEST FOR STALENESS OF INFORMATION IN AN ITO

25. There is no fixed rule about how recent information must be in order to provide grounds for belief in an ITO. A "staleness" analysis considers whether, in the totality of the circumstances, the information in the ITO is current enough to support reasonable grounds to believe that the things to be searched for will be at the target location. In some situations a gap in time between the information and the issuance of the authorization would make it less reasonable to believe the things would be still found in the place to be searched. In other cases, however, a gap in time will not undermine the grounds for issuing the warrant. This may be particularly so in cases of drug trafficking. Inevitably, it depends on the specific information and its context in a particular case.

R. v. Dionisi, 2012 ABCA 20, at para. 22
R. v. Lucas, 2014 ONCA 561, at para. 140
R. v. Porter, 2016 ONSC 5589, at para. 58

26. Merely because information is "dated" does not mean it is "stale." This passage from the American case *Andresen v. State* is often cited in Canadian jurisprudence: "The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason.

The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock".

R. v. Ballendine, 2011 BCCA 221, at para. 54
Andresen v. State, 331 A. 2d 78 at 106 (Md.Ct. Spec. App. 1975), aff'd 427 U.S. 463 (1976)

(a) The Nature of the Things to be Seized

27. One such variable is the nature of the things to be seized. If the things to be seized are consumable, information about the likely location of those things is likely to get stale faster. Although common sense dictates that drugs themselves are consumable, a common-sense inference can also be made that the tools of the drug trade – packing materials and debt lists, for example – are more permanent. In *R. v. Boyer*, a case which arose from an undercover investigation into cocaine trafficking, a warrant authorised police to search for debt lists and telephone lists 70 days after the ITO's most recent information about the target's drug dealing. The trial judge found the information was stale and that the warrant could not have issued. The Ontario Court of Appeal disagreed, overturning the trial judge's finding and upholding the search warrant.

R. v. Burke, 2013 ONCA 424, at para. 32
R. v. Boyer, [1992] O.J. No. 3320 (C.A.), referring to unreported endorsement (court file C6830), and unreported trial judgment of West J. (January 21, 1991)

(b) A Pattern of Ongoing Behaviour

28. Another important factor in the staleness analysis is whether the information forms part of a pattern of ongoing behaviour. Courts have repeatedly found that information which is the latest example of a pattern of behaviour is less likely to be stale after a gap in time between the information and the warrant.

R. v. Lucas, 2014 ONCA 561, *supra*, 140-41
R. v. Fleming, 2015 ONSC 7325, at paras. 55, 82-83
R. v. Breton (1994), 93 C.C.C. (3d) 171, 74 O.A.C. 99, at para. 47
R. v. Sparks, 2015 NSSC 233, at paras. 23-25

29. There is a wealth of American jurisprudence which holds that gaps in time are acceptable if there is evidence of an ongoing drug operation. For example:

- In the oft-cited case of *United States v. Angulo-Lopez*, the Court held:

> A search warrant is not stale where "there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." …With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity.

- In *United States v. Santiago*, the Court noted: "[e]vidence supporting a warrant is less likely to be stale when it demonstrates a pattern of drug trafficking activity."

- And in *United States v. Ortiz*, the Court stated:

  > Moreover, when the supporting facts "present a picture of continuing conduct or an ongoing activity, … the passage of time between the last described act and the presentation of the application becomes less significant." *Martino*, 664 F.2d at 867. Thus, we have held that in investigations of ongoing narcotics operations, "intervals of weeks or months between the last described act and the application for a warrant did not necessarily make the information stale." *Rivera v. United States*, 928 F.2d 592, 602 (2d Cir. 1991).

  United States v. Angulo-Lopez, 791 F.2d 1394 (9th Cir. Or. June 17, 1986), at p. 1399
  United States v. Santiago, 950 F. Supp. 2d 361 (D.R.I. June 18, 2013), at p. 366
  United States v. Ortiz, 143 F.3d 728 (2d Cir. Conn. May 8, 1998), at pp. 732-33

30. American cases have also explicitly found that an ongoing pattern of behaviour is often inherent in drug trafficking operations. As the Court put it in *United States v. Feola*: "Narcotics conspiracies are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness." Drug trafficking is typically not a crime consisting of a single transaction, but rather involves a continuing pattern of criminal conduct.

> *United States v. Feola*, 651 F. Supp. 1068, 1090 (S.D.N.Y. 1987), aff'd mem., 875 F.2d 857 (2d Cir.), cert. denied, 493 U.S. 834, 110 S. Ct. 110, 107 L. Ed. 2d 72 (1989)
> *United States v. Tehfe*, 722 F.2d 1114 (3d Cir. N.J. December 6, 1983), at p. 1119

31. A target's relevant criminal record can form part of a pattern of behaviour. Prior criminal activity – especially prior involvement in the drug trade – is a relevant factor in determining whether there are reasonable and probable grounds for a search for drug-related evidence. As the Ontario Court of Appeal remarked in *Beauchamp*, in the proper circumstances it will be open to a justice of the peace to "infer current criminality from past criminality".

> *R. v. Beauchamp*, 2015 ONCA 260, at paras. 110-15
> *R. v. Pasian*, 2017 ONCA 451, at para. 6
> *R. v. Fleming*, 2015 ONSC 7325, at paras. 82-83
> *R. v. Lucas*, 2014 ONCA 561, at para. 140

(c) A Flexible Rule is Required

32. Courts have long recognized that staleness cannot be determined by a bright-line rule but rather must be a matter of judgment. In his dissent, Nordheimer JA set out the reasons why the flexible and case-specific nature of the staleness assessment is necessary to address the practical reality of large-scale police investigations:

> As numerous large-scale police investigations have demonstrated, such investigations take time. During the course of those investigations, different individuals committing different offences may be identified at different times. It is common practice to address all such individuals, and all such offences, at the time that the broader investigation is completed – the so-called "take-down day". This is done as a practical matter to avoid undermining the broader investigation. This necessary approach does not, of course, remove the need for the police to have the requisite grounds for the authorization at the time that they obtain it.
>
> If the thrust of the trial judge's decision here is, as I fear, that the police must either move immediately, when each of those offenders and offences is identified, or otherwise walk away from the prosecution of such persons, the result will seriously undermine the effectiveness, indeed the viability, of these types of investigations. The police will be left with the insolvable dilemma of either moving on the more peripheral but still serious offences immediately, and thus risk disrupting the larger investigation that often reflects more widespread and ongoing offences, or complete their investigation and walk away from the earlier offences revealed. Neither of those results is palatable in terms of public safety or proper law enforcement. With respect, no evidence is required to take into account such common sense real-world considerations.
>
> Further, any suggestion that the police should act on such offences and just hope that doing so will not jeopardize the larger investigation, imposes on the police a requirement to assume an unacceptable risk. It also potentially involves placing any police agents and undercover officers who might be involved in the investigation, as was the case here, at risk for their safety. No proper interpretation of s. 8 *Charter* rights compels such intolerable choices.
>
> Court of Appeal Dissenting Reasons, paras.72-74 (AR, Tab 3)

C. THE INFORMATION IN THE ITO WAS NOT STALE IN THIS CASE

33. The Court of Appeal majority erred in upholding the trial judge's conclusion that the information in the ITO was too stale to establish reasonable grounds to believe the listed things would be found at the time of the search. The appellant argues that two material errors led to the trial judge's erroneous conclusion: (a) the trial judge erred by narrowing his inquiry to whether the ITO established grounds to believe police would find *drugs* in the respondent's vehicle, when the search warrant also authorized a search for packaging material, identified cell phones, and debt lists; and (b) the trial judge further erred by concluding there was no evidence in the ITO to establish that the respondent was engaged in a pattern of drug trafficking. Both errors required appellate intervention.

(a) The Trial Judge's Inquiry Failed to Consider that the Warrants Authorized a Search for More than Just Drugs

34. The test for review of the search warrant was not in dispute. The question before the trial judge was whether there was a sufficient basis in the ITO upon which the issuing justice could, not would, have issued the authorization. The trial judge concluded the information in the ITO was too stale to establish grounds that the respondent would be "carrying contraband" on the date of the search. On appeal, the Crown argued that the trial judge erred by focusing on whether there were grounds to believe only that *drugs* – rather than cocaine, packaging materials, identified cell phones, and debt lists – would be found at the time and place of the search. The Court of Appeal majority was not persuaded the trial judge had confined his analysis to the probability that drugs would be found, "given his reference to the need under s. 11 of the *CDSA* to establish that 'evidence' would be found." The majority concluded that the trial judge had used the word "contraband" in a compendious fashion to refer to all the evidence of drug trafficking.

Charter Ruling, pp. 7-8 (AR, Tab 1)
Court of Appeal Majority Reasons, para. 25 (AR, Tab 3)

i) The trial judge used "contraband" to refer to drugs

35. With respect, the majority misconstrued the context of the trial judge's reference to the *CDSA*. The trial judge referred to s. 11 of the *CDSA* in the context of setting out the temporal requirement between the information in the ITO and the date of the search. He stated: "The words in both Section 11 of the *C.D.S.A.* and s. 487 of the *Criminal Code* are essentially the same. In s.

11 of the *C.D.S.A.* the words are, 'evidence to be found which is in a place' and in s. 487 of the *Criminal Code*, 'is in a building, receptacle or place'. **The words imply the present tense**." The trial judge was not focussed on the need to establish that *evidence* would be found; he was focussed on the need to establish that the things to be searched for would be found *at the time of the search*. The fact that the trial judge recited the word "evidence" does not cure the fact that his analysis made no reference to the potentiality of finding packaging materials, identified cell phones, and debt lists, or that he twice stated there were insufficient grounds to believe the respondent would have "contraband".

Charter Ruling, p. 7 (AR, Tab 1) [Emphasis added]

36. The majority also failed to consider the trial judge's comment that: "[t]he next challenge to the warrant is that the information was stale dated and showed no reasonable grounds to believe that **an offence was, or would be committed on February 26th, 2016**, the day that Mr. James was arrested" – a further example of the trial judge's improper concentration on the search for drugs. There was no requirement that the ITO establish grounds to believe the respondent would be *committing an offence* at the time of the search; rather, the warrant was properly issued based on reasonable grounds to believe that *things affording evidence in respect of an offence* would be found. In focusing on whether there were grounds to believe an offence would be committed at the time of the search, the trial judge revealed his focus to be whether there were grounds to believe the respondent would be found in possession of drugs. Possessing the other things listed in the warrant – packaging materials, identified cell phones, debt lists – is not inherently criminal. Cocaine is "contraband"; the rest of the items are not. As Nordheimer JA noted in his dissent, "it is apparent from a fair review of the trial judge's reasons that he was using the term "contraband" to refer to drugs. That was not the proper inquiry."

Charter Ruling, p. 6 (AR, Tab 1) [Emphasis added]
Court of Appeal Dissenting Reasons, paras.72-74 (AR, Tab 3)

ii) The narrowed inquiry into a search for "contraband" was a material error

37. The trial judge's narrowed inquiry into grounds that cocaine, and not all the listed things, would be found was a significant error because it focused the trial judge on the transient nature of drugs alone. The trial judge concluded that "[d]rugs are transitory" without adverting to the fact that packaging materials, identified cell phones, and debt lists are less transitory than drugs

themselves. While drugs are consumable and drug dealers profit by selling their inventory, the tools of the drug trade are inherently more permanent. Although the appellant's position is that the ITO established grounds to believe that cocaine itself would be found, even if cocaine was too transient to expect it would still be in the respondent's vehicle after three weeks, the same is not true for the other things listed in the warrant: packaging materials, identified cell phones, and debt lists. The trial judge erred by failing to consider the differing natures of the different things to be seized.

Charter Ruling, p. 10 (AR, Tab 1)

38. At the Court of Appeal, the respondent argued that the appellant was prohibited from raising this "new" argument on appeal because the Crown had only focused on drugs, and not the other listed things, at the *voir dire* in the trial court. The appellant disagrees with this characterization. It was the respondent's burden to convince the trial judge that the warrant could not have issued because there were no reasonable grounds to believe that any of the listed things would be found in the respondent's vehicle at the time of the search. Accordingly, defence counsel argued that the information in the ITO was so dated that it was insufficient to support a search for any evidence of drug trafficking, including cocaine, packaging material, cell phones, or debt lists. The Crown responded at trial by arguing that the information in the ITO was not too dated, especially since there was evidence of a pattern of drug dealing. Moreover, the trial Crown's response materials make it clear that the Crown was not focusing solely on drugs, but rather on the pertinent issue of whether the ITO provided "objectively reasonable grounds to believe the Applicant's vehicle would afford **evidence of offences** as contemplated in s. 11 of the CDSA." The appellant is not raising a new issue on appeal or changing its theory of liability; the question on review has always been whether it was open to the issuing justice to find the ITO established reasonable grounds to believe that cocaine, packaging materials, identified cell phones, or debt lists would be found in the respondent's vehicle. This is the question the trial judge failed to answer, the question that was before the Court of Appeal, and the question now squarely before this Court.

Defence Submissions on *Charter* Application, transcript pp. 21, 28, 30 (AR, Tab 13)
Crown's Submissions on *Charter* Application, transcript pp. 74-76 (AR, Tab 13)
Crown's Factum on *Charter* Application, paras. 24-29 (AR, Tab 12) [Emphasis added]

(b) The ITO Contained Ample Evidence to Establish that the Respondent was Involved in a Pattern of Drug Trafficking

39. The trial judge erred in finding there was "no pattern demonstrated in the ITO" and the Court of Appeal majority erred in agreeing with him. The ITO set out more than sufficient evidence of a pattern of drug dealing to establish reasonable grounds to believe that cocaine, packaging materials, identified cell phones, and debt lists would be found in the respondent's vehicle. The search warrants were not issued based on "evidence of a propensity of a general type of offender" as the majority feared. Rather, they were based on evidence that established the respondent was MD's ongoing cocaine supplier, that their drug trafficking relationship was already in place by December 18, 2015, that the respondent was a large-scale drug trafficker rather than a street-level dealer, and that the respondent's sale of cocaine to MD was part of his long history of drug trafficking.

> *Charter* Ruling, p. 10 (AR, Tab 1)
> Court of Appeal Majority Reasons, para. 21 (AR, Tab 3)

40. In considering whether the ITO established that the respondent was engaged in a pattern of drug dealing, both the trial judge and Court of Appeal majority erred by only considering the December 18, 2015 and February 3, 2016 transactions. As the majority put it:

> Information in the ITO establishes that the respondent might have been involved in a drug transaction on December 18, 2015 and provides a reasonable basis to believe that he delivered drugs to MD on February 3, 2016. **However, I agree with the trial judge that this information is insufficient to allow a justice to find a pattern of drug dealing** or to support the conclusion that there was sufficient credible and reliable evidence to establish reasonable and probable grounds to believe that evidence, drugs or paraphernalia would be found in the car at the time of the search on February 26, 2016.
>
> Court of Appeal Majority Reasons, para. 21 (AR, Tab 3) [Emphasis added]

41. The ITO contains relevant information beyond just those two transactions, however. Appendix A of the ITO indicates that on December 18, 2015 MD was recorded stating "My guy Primo is an idiot, bro" and that "sometimes I'll buy fucking a nino [9 ounces of cocaine] off of him and there's like an ounce of fucking pure dust but the rest is bomb". MD's reference to Primo as "my guy" and the fact he "sometimes" buys 9 ounces of cocaine from him supports the inference that MD and Primo had an ongoing drug trafficking relationship and that it pre-existed the

December 18, 2015 drug transaction. MD again referred to Primo as "his guy" to a police agent on February 3, 2016, and advised he had go to see Primo to pick up more cocaine.

Appendix A to ITO, paras. 56(o), 77(d) and (f), 88(d) (AR, Tab 9E)

42. In addition to MD's numerous references to the respondent ("Primo") as his cocaine supplier, the scale of the respondent's drug trafficking also supports the inference that he was involved in an ongoing operation. MD told the police agent that he was going to buy a kilogram of cocaine from Primo. Courts have found that people who traffic drugs at the kilogram level are high-level dealers. As Nordeheimer JA noted: "[t]he information from the investigation showed that Primo was not some low level drug dealer operating in small quantities that might be sold on a street corner or in a back alley." Nordheimer JA further remarked that "[t]he activities of large scale drug dealers are not transitory", a view that is supported by numerous American cases which have held that protracted and continuous activity is inherent in large scale illegal drug operations. The scale of the respondent's drug trafficking supports the conclusion that evidence of drug dealing would still be found in his vehicle at the time of the search. The trial Crown put it this way: "it's not like he's selling his television and he only has one of them and once he has sold that tv, he's out of the tv business. It's like the difference between selling your car privately and being a car dealer."

R. v. Grant, 2009 MBCA 9, at para. 106
R. v. Wawrykiewicz, 2017 ONSC 3527, at para. 33
R. v. Yakimishyn, 2009 ABQB 162, at paras. 5, 8
See *Commonwealth v Matias*, 440 Mass 787, (Mass Jan 30, 2004) at p. 793; *United States v. Tehfe*, *supra*, at p. 1119; *United States v. Harris*, 482 F.2d 1115 (3d Cir. 1973), at p. 1119
Court of Appeal Dissenting Reasons, para. 55 (AR, Tab 3)
Crown's Submissions on *Charter* Application, transcript p. 75 (AR, Tab 13)

43. The respondent's criminal record also supports the inference that he was engaged in a pattern of drug trafficking. Although somewhat dated, the respondent has a criminal record which spans from May 2003 to February 2007 and includes convictions for possession of a Schedule I substance for the purpose of trafficking, possession of a Schedule II substance, possession of a loaded prohibited or restricted firearm, and a number of other offences. The respondent's prior involvement in the drug trade situates him in the drug subculture and supports the inference that the drug transactions on December 18, 2015 and February 3, 2016 were not two isolated incidents, but rather were the most recent in a long history of drug trafficking behaviour.

Appendix A to ITO, para. 103 (AR, Tab 9E)

44. Regarding the place to be searched, the ITO established reasonable grounds to believe that drugs would be found in the vehicle that is identified in the search warrant – a Lexus with licence plate BVAK567. The respondent used that Lexus to drive from London to Windsor to deliver drugs to MD.[1] While the Lexus was not in the respondent's own name (it was registered in his girlfriend's name), the respondent had been connected to the same Lexus at least two other times since 2015: the Lexus was pulled over by police on February 13, 2015 and April 21, 2015 and both times the respondent was driving. Further, in an intercepted communication, MD referred to his supplier, Primo, as driving a Lexus. The issuing justice was entitled to accept that the affiant had reasonable grounds to believe that searching the Lexus would afford evidence of the respondent's drug trafficking.

Appendix A to ITO, paras.78(e), 81(b), 88(g)(i) (AR, Tab 9E)

45. When the information in the ITO is considered in totality, it readily supports the inference that the respondent was in the drug dealing business. As Nordheimer JA pointed out, "[i]n that context, there was every reason to believe that Primo would be in possession of evidence of his drug activities a scant three weeks later when the search warrant was executed." To conclude otherwise would be to suggest that "three weeks after the respondent was observed driving from London to Windsor in order to deliver a significant quantity of cocaine to MD, he became

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[1] The ITO contained the following details: On February 3, 2016, investigators were advised that Primo would be attending Windsor to deliver cocaine to MD. That morning, officers located the Lexus in the parking lot of a residence in London. At 2:20 pm, officers observed the respondent walk to the Lexus carrying a bag and sit in the driver's seat. They followed him as he drove the Lexus onto the 401 highway at 2:46 pm, heading westbound towards Windsor (a two-hour drive). The police agent waited with MD in Windsor for Primo to arrive. MD was texting Primo while they waited and told the agent: "Primo's going to be here in 30 minutes" and that he would "go meet Primo around the corner". At 4:34 pm MD spoke to the agent and advised that the drugs had been delivered. Investigators concluded Primo had driven from London to Windsor in the Lexus to deliver drugs to MD. (Appendix A to ITO, paras. 87-89)

disassociated from, and unconnected with, drug trafficking"; a suggestion which has "no common sense foundation".

Court of Appeal Dissenting Reasons, paras. 56, 66 (AR, Tab 3)

46. On a proper review of the whole of the evidence, it was open to the issuing justice to find that the ITO had established reasonable grounds to believe a search of the respondent's vehicle would yield evidence of the respondent's drug trafficking. There was therefore a sufficient basis on which the search warrant could issue. The trial judge erred in holding otherwise, and the majority in the Court of Appeal erred by deferring to the trial judge when it was the issuing justice instead whose decision deserved deference.

ISSUE TWO: DID THE COURT OF APPEAL ERR IN UPHOLDING THE EXCLUSIONARY ORDER?

47. In the alternative, even if the warrant could not reasonably have issued, the majority of the Court of Appeal erred in upholding the trial judge's order to exclude the evidence. Appellate intervention was warranted in this case given the multiple errors committed by the trial judge in his s. 24(2) analysis. The trial judge failed to consider relevant factors, considered improper factors, and relied on speculation. In short, the reasons given by the trial judge for excluding the evidence do not withstand scrutiny. It is the appellant's position that a fresh *Grant* analysis should result in the admission of the evidence.

A. THE S. 24(2) FRAMEWORK AND WHEN APPELLATE INTERVENTION IS WARRANTED

48. The applicant seeking exclusion bears the onus of establishing that the admission of evidence would bring the administration of justice into disrepute having regard to all the circumstances. This issue is to be determined by the framework outlined in *R. v. Grant*, which requires the balancing of three inquiries:

(1) the seriousness of the *Charter*-infringing conduct;

(2) the impact of the breach on the *Charter*-protected interests of the accused; and

(3) society's interest in the adjudication of the case on its merits.

R. v. Grant, [2009] 2 S.C.R. 353, at paras. 67-86 [*Grant*]
R. v. Sandhu, 2011 ONCA 124, at paras. 41-47

49. The strength of a claim for exclusion will be equal to the sum of the first two lines of inquiry under *Grant*. The third line of inquiry under *Grant* typically pulls in the opposite direction – that is, towards the admission of the evidence. This pull is particularly strong when the evidence is reliable and crucial to the prosecution's case. When the first two inquiries, taken together, make a strong case for exclusion, "the third inquiry will seldom if ever tip the balance in favour of admissibility." Conversely, when the first two inquiries demonstrate a weaker case for exclusion, "the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence."

R. v. McGuffie, *supra*, at paras. 62-63
R. v. Paterson, [2017] 1 S.C.R. 202, at paras. 54-56
R. v. Le, 2019 SCC 34, at paras. 141-142, per Brown and Martin JJ [*Le*]

50. The decision to admit or exclude evidence pursuant to s. 24(2) is a question of law. If a trial judge has considered the proper factors and has not made any unreasonable findings, his or her decision to exclude evidence under s. 24(2) of the *Charter* is owed considerable deference on appellate review. However, if relevant factors have been overlooked or disregarded, a fresh *Grant* analysis is both necessary and appropriate. Appellate intervention will be warranted when a trial judge's conclusions are tainted by "clear and determinative error."

R. v. Buhay, [2003] 1 S.C.R. 631, at para. 42
R. v. Côté, [2011] 3 S.C.R. 215, at para. 44
R. v. Cole, [2012] 3 S.C.R. 34, at paras. 82, 90 [*Cole*]
R. v. Strauss, 2017 ONCA 628, at para. 38

B. APPLICATION OF THE FRAMEWORK TO THIS CASE: THE EVIDENCE SHOULD HAVE BEEN ADMITTED

(a) The First *Grant* Factor: The Police Conduct was on the Lower End of the Spectrum

51. *Charter*-infringing violations vary in seriousness, from inadvertent or minor violations to willful or reckless disregard of rights. The less severe or deliberate the police conduct that led to the *Charter* violation, the less need there is for the court to disassociate itself from the conduct through exclusion. In this case, both the trial judge and the majority of the Court of Appeal unreasonably characterized the *Charter* violation as serious.

Grant, *supra* at para. 74
R. v. Harrison, [2009] 2 S.C.R. 494, at para. 22 [*Harrison*]

i) The significance of obtaining a warrant: the proper approach

52. In the circumstances of this case, the fact that the police obtained a warrant was a significant factor that should have weighed in favour of admitting the evidence. The trial judge concluded otherwise by ignoring relevant factors and focusing on improper ones. The appellant accepts that obtaining a warrant does not "in itself" demonstrate good faith. The proper approach for assessing the seriousness of a breach in a context where a warrant was obtained was well-summarized by Rosenberg JA in the decision of the Ontario Court of Appeal in *R. v. Rocha*. In *Rocha*, Rosenberg JA recognized that obtaining a warrant from an independent judicial officer is "the antithesis of wilful disregard of *Charter* rights." He explained that when the police get a warrant, this fact will therefore generally favour the admission of the evidence unless it can be shown that the warrant "was obtained through use of false or deliberately misleading information, or the drafting of the ITO in some way subverted the warrant process." The trial judge did not follow this approach.

> Court of Appeal Majority Reasons, para. 39 (AR, Tab 3)
> *R. v. Rocha*, 2012 ONCA 707, at paras. 28-37 [*Rocha*]
> Also see *R. v. Bacon*, 2012 BCCA 323, at para. 29; *R. v. Szilagyi*, 2018 ONCA 695, at para. 54; and contrast *R. v. Cole*, *supra* at paras. 89-90

ii) The failure to mention the stay of the respondent's 2012 drug charges did not make the breach serious

53. The one misleading aspect of the ITO highlighted by the trial judge related to the affiant's failure to mention that the respondent's 2012 drug charges had been stayed. It should be noted, however, that the trial judge did not find this omission to be intentional or the result of bad faith. Moreover, as emphasized by Nordheimer JA, it should be recognized that the charges were stayed, not dismissed. Objectively, the failure of the affiant to mention that the 2012 charges had been stayed was a minor error which "certainly would not have unduly influenced the Justice of the Peace in terms of whether or not to issue the search warrant." This is particularly so given that the ITO specifically stated that the respondent had no outstanding charges and that his criminal record spanned between 2003 and 2007. It would have therefore been entirely clear to the issuing justice that the 2012 charge had neither resulted in a conviction, nor was outstanding.

> *Charter* Ruling, pp. 5-6, 13 (AR, Tab 1)
> Court of Appeal Dissenting Reasons, paras. 59-60 (AR, Tab 3)
> Appendix A to ITO, para. 103 (AR, Tab 9E)
> Crown's submissions on *Charter* Application, transcript pp. 80-83 (AR, Tab 13)

iii) There was no evidence the police deliberately sacrificed the respondent's rights

54. The trial judge's finding that the police deliberately sacrificed the respondent's rights was unreasonable. There was no basis for this finding. The trial judge seems to have accepted that the evidence before him showed that the police delayed seeking a warrant in order to preserve their broader investigation. He went on, however, to negatively characterize this conduct with language suggesting there had been a willful disregard for the respondent's rights. This conclusion simply did not follow from the evidence. On the contrary, the information in the ITO revealed that "there was a legitimate broader picture to be considered in the particular circumstances of this case." The trial judge's negative portrayal of the police's conduct as a "deliberate choice" to "sacrifice" the respondent's rights is similar to the type of error identified by Rosenberg JA in *Rocha*. In that case, Rosenberg JA rejected an approach which would favour the exclusion of evidence simply because a breach was the product of a deliberative warrant process.

> Court of Appeal Dissenting Reasons, para. 80 (AR, Tab 3)
> *Rocha*, *supra* at paras. 10-15, 27-29

iv) If the ITO fell short, it did not miss by much

55. The trial judge ignored significant information in the ITO and as a result he formed the impression that the ITO was weaker than it really was. As set out above, the trial judge narrowly focussed his review on the likelihood that "contraband" would be discovered, and ignored significant information showing that the respondent was involved in a pattern of drug dealing.

> *Charter* Ruling, pp. 7-8 (AR, Tab 1)

56. If the grounds for the warrant in this case fell short of the requisite standard, it was only to a small degree. Contrary to the trial judge's finding, the ITO was not based merely on general reputation evidence. Rather, it contained information that the respondent was a recent cocaine supplier for MD and, specifically, that the respondent had utilized his vehicle (the same vehicle that police later searched) to transport a large quantity of drugs 23 days before the warrant was granted. Undoubtedly, for some period of time following that transaction there was a reasonable likelihood that at least drug-related items would be discovered in the vehicle. Drawing the line where that likelihood became unreasonable is no simple task. As Nordheimer JA put it: "[t]he

police cannot be faulted for believing that information that was only three weeks old would not be considered stale for the purpose of the ITO."

R. v. Mckenzie, 2011 ONCA 42, at para. 10 [*Mckenzie*]
Charter Ruling, p. 12 (AR, Tab 1)
Court of Appeal Dissenting Reasons, para. 81 (AR, Tab 3)

v) Conclusion: the first branch of the Grant test favoured admitting the evidence

57. In *R. v. Le*, a majority of this Court emphasized that a "good faith" error on the part of the police must be reasonable and is not demonstrated by mere negligence of *Charter* standards. As this Court indicated in *R. v. Harrison*, however, what is important is the proper placement of the police conduct along the fault line, "not the legal label attached to the conduct." In *R. v. Aucoin*, this Court upheld a finding of "good faith" in circumstances where an officer was "manifestly" mistaken about his authority. The Court found that the seriousness of the breach was attenuated by the fact that the officer neither intended to misuse his powers nor chose to ignore the accused's rights. More recently, in *R. v. Omar*, this Court allowed a Crown appeal, restoring a conviction in a case where the trial judge found the breach to "not fall on the more serious end of the spectrum" in circumstances where the police subjectively believed they had grounds to detain the accused, and their conduct was neither abusive nor a deliberate breach of the accused's rights.

Le, supra, at para. 143, *per* Brown and Martin JJ, and para. 285, *per* Moldaver J, dissenting.
Harrison, supra, at para. 23, quoting *R. v. Kitaitchik* (2002), 161 O.A.C. 169, at para. 41
R. v. Omar, 2018 ONCA 975, at paras. 69-71, 98-101, *per* Brown JA, dissenting, rev'd 2019 SCC 32 ("substantially for the reasons of Brown JA")
R. v. Aucoin, [2012] 3 SCR 408, at paras. 45-50

58. In this case, the undisputed evidence simply does not support a finding that the police's conduct was a serious breach of the *Charter*. Far from showing a willful disregard for *Charter* rights, the police sought a warrant as part of a large-scale investigation in which they had obtained several judicial authorizations. The warrant was not obtained through intentionally misleading information. Nor was the ITO drafted in a manner that subverted the warrant process. The failure to mention the stay of the respondent's 2012 drug charges can only reasonably be characterized as a minor error; other facts disclosed in the ITO clearly showed that the respondent was not convicted of the 2012 charges and had no charges outstanding. There was no basis for a finding that the police deliberately sacrificed the respondent's rights; on the contrary, the evidence revealed that the police

had a compelling reason to delay seeking a warrant. Finally, a consideration of all the relevant information in the ITO leads to the conclusion that if there was a breach, it was a close call as to whether the reasonable grounds threshold had been satisfied. The infringement in this case fell on the less serious end of the spectrum. The first *Grant* factor favoured admission of the evidence.

Cole, *supra*, at para. 90
Appendix A to ITO, paras. 25-34 (AR, Tab 9E)
Mckenzie, *supra*, at para. 10

(b) The Second *Grant* Factor: The Impact of the Breach was Significant but not Profound

59. This line of inquiry focuses on the seriousness of the impact of the *Charter* breach on the accused's *Charter*-protected interests. The impact of a breach may "range from fleeting and technical to profoundly intrusive." Courts are required to consider the interests engaged by the right infringed and examine the degree to which the breach impacted those interests. In cases involving a s. 8 breach, the protected interests involved are privacy and, more broadly, human dignity. "An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not."

Grant, *supra*, at paras. 76-78

60. If there was a breach in this case, the appellant does not dispute that it had a significant impact on the respondent's rights. The appellant submits, however, that the trial judge's perception of the impact of the breach was tainted by his reliance on speculation and his consideration of improper factors. As a result, the trial judge was left with the erroneous impression that the impact of the breach on the respondent's rights was greater than it was.

i) The trial judge's speculation regarding the circumstances of the respondent's detention

61. The trial judge correctly noted that the respondent was detained in public. But having only been told by the parties that the stop of the respondent's vehicle had been "dynamic", the trial judge "assumed" that the respondent had been forced to the ground and handcuffed while in public. This finding was purely speculative. The trial judge had been presented with no evidence relating to the specifics of the respondent's arrest. Absent such evidence, the trial judge erred by assuming facts

based on "his experience" for the purposes of "elevating his view of the seriousness of the breach of the respondent's rights."[2]

> *Charter* Application Proceedings, transcript pp. 48-51, 111 (AR, Tab 13)
> *Charter* Ruling, p. 11 (AR, Tab 1)
> Court of Appeal Dissenting Reasons, para. 79 (AR, Tab 3)

62. The trial judge's approach was particularly problematic given the context in which the word "dynamic" was raised during oral submissions. The respondent's *Charter* motion contained an argument regarding the manner in which the search warrant was executed, but this complaint had nothing to do with the level of force used by the police; the complaint was a technical one related to the location in which the search of the vehicle was done. It was only when defence counsel raised the technical argument in oral submissions that the trial judge inquired as to whether there was a "dynamic takedown". Defence counsel responded in the affirmative but then explained the substance of her argument as follows:

> …I know that when we're talking about manner of execution very often we're talking about just what Your Honour mentioned, as a dynamic entry into a residence or the use of the tactical unit and those kind of things. **That's not my issue** in the sense that it's the - in short form the warrant was executed at a place where it wasn't authorized to be executed, according to the warrant itself,…

The only other time the word "dynamic" was raised was during the trial Crown's s. 24(2) submissions relating to the impact of the search on the respondent's privacy rights. The trial judge and the trial Crown had the following brief exchange:

> THE COURT: But it was a dynamic search.
>
> MR. PRATT: Well, it was a dynamic stop certainly.
>
> Defence Submissions on *Charter* Application, transcript pp. 48-51 (AR, Tab 13) [Emphasis added]
> Crown's Submissions on *Charter* Application, transcript p. 111 (AR, Tab 13)

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[2] The trial judge's discussion of this issue took place while he was discussing the first *Grant* factor. Notwithstanding this, it would seem that his remarks should more appropriately be analysed through the lens of the second *Grant* factor. See for example: *McKenzie*, *supra* at para. 11.

63. The context in which the respondent's "dynamic" stop was mentioned during the *voir dire* highlights the unfairness with the trial judge's use of his own "experience" to ground a finding which he used as an aggravating factor favouring exclusion. Not only was this finding not based on evidence, the Crown was not given an opportunity to respond to the trial judge's concerns. The evidence on the *voir dire* was already concluded, and the Crown had no warning that the trial judge was concerned about whether the accused had been taken to the ground during the arrest – something not even alleged by defence counsel.

64. Furthermore, the description of a detention as "dynamic" is not universally or even consistently used in the jurisprudence to indicate that the detainee was taken to the ground. It was thus inappropriate for the trial judge to take judicial notice of what "dynamic" meant. "Dynamic" is often used to refer to the risk associated with an arrest, rather than to any particular action taken by police or to the use of any force. For example, in *R. v. Manoharan*, the "dynamic" take-down involved police "boxing in" a vehicle, opening the driver's side door, assisting the driver in getting out, handcuffing her, and walking her to the sidewalk. And in *R. v. Woychyshyn*, the "dynamic nature of the detention" consisted of police pulling over a car to investigate a possible impaired driver, speaking to the driver from outside the car, asking the driver to come into the police cruiser, and placing her in the cruiser's back seat. A "dynamic" arrest or detention is not a term so generally known and accepted that judicial notice can be taken of its meaning. It was an error for the trial judge to decide an important adjudicative fact based on the passing mention of the arrest as being "dynamic" without any evidence of what the arrest actually entailed.

R. v. Manoharan, 2016 ONSC 2655, at paras. 180, 210
R. v. Woychyshyn, 2017 ONCJ 663, at paras. 9-16, 76

ii) The trial judge's unwarranted remarks about racism

65. In the course of his analysis of the second *Grant* factor, the trial judge, of his own motion, and without any notice to the parties, embarked in a discussion about the impact of racism in our society. The trial judge expressed concern that the respondent, "as a black man", must have confidence in the equal application of the *Charter* and that the respondent's community must be confident it will not be judged "on its stereotypical reputations." The trial judge's remarks appear to be in response to the presence of one excerpt from an intercepted communication contained in the ITO which included a racially pejorative word. Though the trial judge did not say specifically

what portion of the ITO he had in mind, he was presumably referring to paragraph 88(i) of Appendix A.

Charter Ruling, pp. 12-13 (AR, Tab 1)
Court of Appeal Dissenting Reasons, para. 83 (AR, Tab 3)
Appendix A to ITO, para. 88(i) (AR, Tab 9E)

66. It bears emphasizing that the offensive language used in the ITO was a verbatim quotation of MD's words, not the words of any police officer. There was absolutely no evidence before the trial judge supporting the view that the affiant had included this quotation for a nefarious purpose. Both the majority and the dissent in the Court of Appeal agreed that the trial judge's criticism of the affiant was unwarranted given the affiant's duty to provide the most accurate evidence before the issuing justice. They disagreed, however, about the significance of this error. With respect, the majority's characterization of this error as "collateral" to the trial judge's s. 24(2) ruling is not compelling. The inescapable inference from the trial judge's remarks is that he believed the police had acted improperly – in a very serious way. It would be difficult to view this erroneous belief as not influencing his decision. It is submitted that Nordheimer JA was correct in finding the trial judge's discussion on this issue raised concerns about the "objectivity of the trial judge's analysis of the evidence."

Court of Appeal Majority Reasons, para. 43 (AR, Tab 3)
Court of Appeal Dissenting Reasons, para. 84 (AR, Tab 3)

iii) The strength of the grounds relating to identification evidence was irrelevant

67. In his analysis of the second *Grant* factor, the trial judge also improperly considered that, in his view, the evidence identifying the respondent as "Primo" was "weak". As Nordheimer JA correctly observed in his dissenting judgment, once police meet the reasonable grounds threshold on a given point, there is no further relevance to how strong their grounds were on that point.

Charter Ruling, p. 11 (AR, Tab 1)
Court of Appeal Dissenting Reasons, para. 50 (AR, Tab 3)

iv) The expectation of privacy in a vehicle is not high

68. The *Charter* breach in this case related to the search of a vehicle, where, as the trial judge acknowledged, the respondent had a "lessened expectation of privacy." The jurisprudence has consistently held that the expectation of privacy in a vehicle is not high. This may be particularly

so in cases such as this one where it does not appear that the respondent was the registered owner of the vehicle.

> *Charter* Ruling, p. 11 (AR, Tab 1)
> *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 38; see also *R. v. Wise*, [1992] 1 S.C.R. 527, at para. 11; *Grant*, *supra*, at para. 113; *Harrison*, *supra*, at paras. 30-31
> *R. v. Alkins*, 2007 ONCA 264, at para. 40
> *R. v. Buckley*, 2015 ONCA 364, at para. 5
> Appendix A to ITO, para. 83 (AR, Tab 9E)
> Crown's Submissions on *Charter* Application, transcript p. 110 (AR, Tab 13)
> Court of Appeal Dissenting Reasons, para. 82 (AR, Tab 3)

v) Conclusion on the second branch of the Grant analysis

69. The breach had a significant but not serious impact on the respondent's rights. The respondent's expectation of privacy in the vehicle, while not trivial, was low. The trial judge's findings, which suggested a greater impact of the breach on the respondent's rights, were tainted by errors. If the second branch favours exclusion it does not do so strongly.

(c) The Third *Grant* Factor: Society's Interest in Adjudication on the Merits is High

70. The third factor generally pulls in favour of admitting the evidence. Here, that pull is particularly strong since the evidence was reliable and critical to the prosecution's case. The charges were also very serious.

71. In *Grant* this Court affirmed that the seriousness of the offences remains a relevant consideration under the third line of inquiry, albeit one capable of cutting both ways. In this case the charges involved large quantities of cocaine and possession of a handgun with readily accessible ammunition. The distinctive nature of these charges should be recognized in assessing society's interest in an adjudication on the merits. In *Omar*, this Court substantially adopted the dissenting reasons of Brown JA of the Ontario Court of Appeal, who had made this point in the judgment below:

> [T]o fail to give some recognition to the distinctive feature of illegal handguns – which are used to kill people or threaten them with physical harm, nothing else – and, instead, to treat them as fungible with any other piece of evidence risks distorting the *Charter's* s. 24(2) analysis by wrenching it out of the real-world context in which it must operate.

In *R. v. Chan*, the Alberta Court of Appeal expressed a similar view when it stated: "we consider society's interest in the adjudication of the merits to be greater where the offence is one that so literally involves the safety of the community."

> *Grant*, *supra*, at para. 84
> *Omar*, *supra*, at para. 123, *per* Brown JA (reasons substantially adopted by this Court)
> *R. v. Chan*, 2013 ABCA 385, at para. 49
> *Le*, *supra*, at para. 301, per Moldaver J, dissenting.

72. The third line of inquiry strongly favours the admission of the evidence.

(d) Balancing: The Evidence Should be Admitted

73. When the proper factors are considered, it becomes clear that the repute of the administration of justice would be better maintained by the admission of the evidence. Any *Charter*-infringing conduct fell on the low end of the spectrum and society's interest in an adjudication on the merits is high. The impact of the breach on the respondent was significant, but not profound. The first and third lines of inquiry favour admitting the evidence. The second inquiry may favour exclusion, but not to the extent that it overwhelms the other factors. The evidence should be admitted.

PART IV – SUBMISSIONS RESPECTING COSTS

74. The appellant makes no submission as to costs.

PART V – NATURE OF ORDER SOUGHT

75. The appellant requests that the appeal be allowed and a new trial be ordered.

PART VI – IMPACT OF ANY ORDER, RESTRICTION OR BAN

76. Not applicable. This matter is not subject to any sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file.

ALL of which is respectfully submitted this 3rd day of July, 2019.

Matthew Asma **Joseph Hanna** **Jennifer Epstein**

Counsel for the Appellant, the Attorney General of Ontario

PART VII - TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

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