SCC No.: 39531

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

LIAM REILLY

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This Court has recognized that a trial judge is owed considerable deference to their assessment under s. 24(2) of the *Canadian Charter of Rights and Freedoms* in determining whether the exclusion of evidence will bring the administration of justice into disrepute. Equally well-established by this Court is that no overarching rule governs how the balancing exercise of the applicable s. 24(2) factors is to be struck. This appeal provides this Court the opportunity to affirm these principles.

2. On this appeal, the majority of the Court of Appeal for British Columbia ("BCCA") did not defer to a trial judge's s. 24(2) determination even though the trial judge's analysis was conducted in accordance with well-settled principles enunciated by this Court. The majority exceeded the bounds of appellate intervention by re-characterizing the evidence in a way they would have preferred to suit their preferred outcome.

3. Additionally, the majority of the BCCA suggest that evidence obtained pursuant to a search warrant could rarely if ever be admitted when there was an earlier warrantless entry into a residence for the purpose of arresting a suspect, no matter how attenuating the circumstances, no matter that there is no causal connection between the breach and the obtaining of the evidence. This Court has recognized that the lack of causal connection between a breach and the obtaining of evidence is a relevant factor favouring admission of the evidence and has the opportunity to reaffirm this principle in this appeal.

4. This is a Crown appeal as of right based on the dissent of the Honourable Mr. Justice Willcock on a question of law with respect to whether the trial judge erred in his analysis under s. 24(2) of the *Charter* admitting evidence obtained pursuant to a lawfully issued search warrant. Willcock J.A. properly deferred to the trial judge's s. 24(2) assessment. He was satisfied that the trial judge did not err in his analysis.

5. The majority (*per* the Honourable Madam Justice Griffin, concurred in by the Honourable Madam Justice Fenlon) did not defer to the trial judge's s. 24(2) assessment, concluding that the trial judge made two legal errors. The majority, therefore, engaged in a fresh s. 24(2) analysis. The majority excluded the evidence obtained from a lawfully obtained search warrant because of a

Charter breach arising from a brief unplanned warrantless entry into the respondent's residence to arrest him. The arrest occurred the day before the search warrant was issued. The majority excluded the evidence even though the police misconduct did not amount to bad faith, and the breach was not systemic or continuous, and had no causal connection to the evidence obtained upon execution of the search warrant.

6. The respondent was found guilty of six counts involving two armed robberies: (i) of a store selling e-cigarettes and (ii) several days later of a convenience store. He invited the judge to convict following a *voir dire* in which he unsuccessfully applied under s. 24(2) of the *Charter* for the exclusion of evidence seized in his residence pursuant to a lawfully obtained search warrant.

7. The evidence obtained from the search was strong evidence linking the respondent to the two robberies. The respondent argued at trial and on appeal that the warrant was facially invalid. The trial judge was satisfied that the warrant was valid after excising from the information to obtain ("ITO") information relating to the breach. The BCCA unanimously agreed. The remaining information in the ITO was gathered prior to and was unconnected to the breach, which explains why there was no causal connection between the breach and the issuance of the search warrant.

8. The breach arose when police officers attended the respondent's residence a day after the second robbery to arrest him for the two armed robberies. The authorized plan was to arrest the respondent outside his residence. The plan did not contemplate entry into the residence, thus the police did not contemplate obtaining a *Feeney* warrant. The respondent did not respond when the police knocked and announced their presence. One of the attending officers, Cst. Sinclair, without consulting his colleagues or seeking direction from his superiors, deviated from the authorized plan. He entered through an unlocked door into what he believed was a common area. He walked directly to the door that he believed accessed the respondent's suite, knocked on the door and announced "police". The respondent opened the door and was arrested for robbery. Officers who were with Cst. Sinclair conducted a ten-minute cursory search of the residence incidental to the arrest with the sole intention of seeing whether anyone else was there who may have had access to firearms. In the clearing process, the police observed a couple items connected to the robberies but did not seize anything until a warrant was obtained on the following day.

9. The trial judge described Cst. Sinclair's actions as opportunistic but not part of a systemic pattern of constitutional abuse, and found it did not amount to bad faith. He was satisfied that the

officers who entered the residence with Cst. Sinclair acted professionally, and that it was necessary for them to enter the residence to provide protection for Cst. Sinclair.

10. The respondent argued on the *voir dire*, and the Crown agreed, that: (i) the police breached the respondent's s. 8 *Charter* rights by entering the residence and arresting him without judicial authorization; and, (ii) any evidence of observations made in the residence during a clearing search had to be excised from the ITO filed in support of the subsequently obtained search warrant.

11. The respondent argued on appeal that the trial judge made three errors in his s. 24(2) analysis. The majority of the BCCA concluded that the judge made two errors (the court was unanimous that the trial judge did not make the third alleged error). First, the majority concluded that the judge erred by considering the *Charter*-compliant conduct of the police officers who accompanied Cst. Sinclair to the residence as mitigating the seriousness of the breaches. Second, they concluded that the judge improperly weighed the factors set out in *R. v. Grant*[1] by assessing the effect on the administration of justice at each stage of the *Grant* analysis, and thus overly compartmentalized what is meant to be a broad analysis.

12. Willcock J.A. disagreed. First, he concluded that the *Charter*-compliant conduct of the other police officers was a proper factor for the trial judge to address in this case given the respondent's submission on the *voir dire* that the conduct of the other officers aggravated Cst. Sinclair's serious *Charter* breach. He said that the majority was reading too much into the trial judge's reasons to say that the trial judge treated the *Charter*-compliant conduct as mitigating. Second, Willcock J.A. concluded that it is not an error to consider the extent to which the administration of justice may be brought into disrepute by the admission of evidence at each stage when considering the three *Grant* factors sequentially. He was satisfied that what the trial judge said in his reasons was sufficient to establish that he undertook the broad inquiry mandated by s. 24(2).

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[1] 2009 SCC 32. As stated in *Grant*, there are three lines of inquiry on a s. 24(2) assessment: (i) the seriousness of the state conduct; (ii) the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused; and (iii) society's interest in an adjudication on the merits - whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence.

13. The majority erred in law to conclude that the *Charter*-compliant conduct of the officers who followed Cst. Sinclair into the residence was an improper factor for the trial judge to consider in assessing the seriousness of the breach. The law is settled that the more serious the state-infringing conduct, the stronger the pull for exclusion. The trial judge was right to consider the conduct of the police on a scale of culpability. This was a particularly relevant consideration as the defence took issue, not just with Cst. Sinclair's conduct, but with the conduct of the other officers. Significantly, the trial judge never said that the conduct of the other officers mitigated the seriousness of the breach.

14. The majority also erred in law to conclude that by considering the effect on the administration of justice of each *Grant* factor independently, rather than considering all three of the factors collectively**,** the trial judge overly compartmentalized what is meant to be a broad analysis. Ultimately it does not matter where in their reasons a trial judge makes findings applicable to balancing the effect of admitting the evidence on society's confidence in the justice system. What matters is that the judge properly applied the s. 24(2) framework. When the trial judge's reasons are read as a whole, it is clear he did so, and is owed appellate deference. While the majority may have preferred a different outcome, this is no basis on which to ground a fresh s. 24(2) analysis.

15. Finally, the majority erred not just because they conducted a fresh s. 24(2) analysis at all since the trial judge did not err in his s. 24(2) analysis. The majority also erred in their fresh s. 24(2) analysis. They wrongly attributed no weight to a factor that favours admission of the evidence: that the evidence linking the respondent to the robberies was obtained by a lawfully issued search warrant; and there was no causal connection between the *Charter* breach and the issuance of the search warrant. This is a significant factor as the search was not tainted by the breach which preceded the issuance of the warrant.

B. The evidence at trial

The respondent committed armed robbery of two stores

16. Set out below is a summary of the agreed facts upon which the respondent invited the trial judge to convict on the six counts relating to the two robberies after the trial judge admitted most of the evidence seized by the police at the respondent's residence.[2]

17. The first robbery occurred on November 3, 2017. Four masked men entered a store known as Boss Vapes in Burnaby, B.C. The respondent brandished a silver revolver. When he entered the store he yelled, "Down, down". He pointed the gun at the store owner, and said, "Where is the safe?" The owner said they did not have a safe and that he could open the till. The respondent then asked, "Where is the rest of the money?" The owner told him they had just made a deposit and did not have any money. The respondent then said, "Okay, give us your wallets?" The robbers took $1,554 in cash from the till, more than $2,000 worth of product from the store, a laptop computer and phones from each of the people in the store.[3]

18. The second robbery occurred thirteen days later. On November 16, 2017 the respondent entered Deer Lake Market in Burnaby and approached the clerk, pointed a gun at him and said, "Open the register." The clerk obeyed and gave the respondent approximately $400. The respondent then said, "cigarettes". The clerk asked, "Which one?" The respondent replied, "Belmonts". The clerk gave him several packets of Belmont cigarettes, and the respondent exited the store.[4]

By November 17 the police had information to arrest the respondent and search his residence

19. The day following the Deer Lake Market robbery, the police had gathered enough information to arrest the respondent for both robberies and to search his residence. This information is set out in the ITO filed in support of the search warrant issued on November 18 to search the respondent's residence.[5] The ITO included the following:

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[2] Appellant's Record [A.R.], Vol. III, p. 186(5-9).
[3] A.R., Vol. II, p. 121.
[4] A.R., Vol. II, p. 122.
[5] A.R., Vol. II, pp. 38-79.

(i) Video surveillance established the perpetrator of the Deer Lake Market robbery as one of the perpetrators of the Boss Vapes robbery

20. Video surveillance from the November 3, 2017 Boss Vapes robbery shows three suspects entering the store. One of the suspects is a male wearing a black Under Armour hoody with logos on the chest and hood, a black half face mask with white skeleton/skull, black gloves with a white logo, grey sweat pants, and grey Nike shoes with white soles and a Nike Swoosh emblem on the side. That suspect was brandishing a silver revolver handgun, pointing it at the occupants of the stores. Money, cell phones and several vapour products were taken. Bear spray was sprayed into the store and the suspects departed.[6]

21. Video surveillance footage from the November 16, 2017 Deer Lake Market robbery depicts a single suspect enter the store wearing a black Under Armour hoody with logos on the chest and hood, a black half face mask with a white skeleton, black gloves with a white logo, black pants, light coloured shoes and a black semi-automatic handgun. An eyewitness identified the suspect as wearing a black mask with a white skull in the front, black gloves and black hoody. The suspect departed with an unknown amount of cash and six packs of Belmont cigarettes.[7]

22. Having compared the footage from both robberies, a police officer formed the opinion that the male with the handgun in both robberies was the same person, based on the matching clothing with unique identifiers and the matching slim nature of the person.[8]

(ii) The respondent is identified as a perpetrator of the Boss Vapes robbery

23. One of the perpetrators of the Boss Vapes robbery was identified as Timothe Duliepre. He was arrested on November 17, 2017. He gave a warned statement concerning the Boss Vapes robbery.[9] Duliepre stated:[10]

- He was a party to the robbery with Liam Reilly [the respondent], Mouayad Alhomsi, a male named Vyizigiro and an unknown male.

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[6] A.R., Vol. II, p. 42, ¶5; pp. 44-46, ¶16(c)-(i).
[7] A.R., Vol II, pp. 42-43, ¶8; pp. 63-66, ¶¶35-37.
[8] A.R., Vol. II, p. 66, ¶37(xv).
[9] A.R., Vol. II, pp. 66-69, ¶¶39-40.
[10] A.R., Vol. II, pp. 69-71, ¶41.

- He knows the respondent by the nickname “Steve Savage”.
- One of the perpetrators, Alhomsi, decided to rob the vape store. He passed a silver handgun to the respondent to use during the robbery**.** Duliepre knew the gun was loaded during the robbery.
- Duliepre knew that Alhomsi and the respondent had several guns of their own.
- Duliepre and the other perpetrators were part of an organized group called “Beeze” with ties to other gangs in Vancouver and Montreal.
- In the course of the robbery the unknown male used bear spray.
- “They” bought gloves and other items to do the robbery in a store near 6th St. in Burnaby.
- Duliepre did not get any money or stolen items from the robbery but the others did. The others resold the stolen items to people they know.

(iii) The respondent resided at 7375 Canada Way

24. Duliepre identified a Burnaby duplex on the south side of Canada Way, near 18th avenue as the house where the respondent lived. Duliepre said that the respondent’s residence was located at the rear of the duplex on the east side. Duliepre had been to the respondent’s residence and provided a description, adding that the respondent had a white chihuahua. Using the zoom function on Google Map depicting the residence and its address of 7375 Canada Way, Duliepre stated he was sure the image depicted the respondent’s residence.[12]

[12] A.R., Vol. II, pp. 72-73, ¶42(d)-(f).

The police arrested the respondent at his residence

25. The respondent was subject to a court-ordered bail curfew. The order provided that the respondent was to present himself at the doorway of his residence to a peace officer, correction officer or bail supervisor for the purpose of maintaining compliance with the curfew.[13]

26. Shortly after Duliepre identified the respondent as one of the co-perpetrators of the Boss Vapes robbery, the police convened a briefing in the afternoon of November 17. At the briefing it was determined that the respondent was arrestable for both robberies, and a plan for his arrest was developed. The plan as authorized at the briefing was for Cst. Sinclair and Cst. Adzijaj to perform a "knock and announce" curfew check on the respondent. It was the expectation that the respondent would come to the door of his residence and Cst. Adzijaj would be able to identify him from prior dealings. The respondent would then be arrested for the two robberies.[14] In other words, the investigative tactic was to execute a lawful arrest. A *Feeney* warrant was not considered as the police went to the respondent's residence with the preconceived notion that the respondent would present himself outside the door of his residence as he was bound to do by the court ordered curfew.[15]

27. Various police members were tasked to establish surveillance at the Canada Way residence. Cst. Sinclair and Cst. Adzijaj were tasked to go to the rear door located at the southwest corner of the residence, as it was believed that that door was connected to the respondent's suite.[16]

28. The police attended the residence to carry out that plan. The police knocked and announced their presence. Music was coming from the inside, along with the barking from a dog. There was no response to the knock. Consequently, Cst. Sinclair, without consulting any of his colleagues including Cst. Adzijaj who was with him outside the residence, or without seeking directions from his superiors, deviated from the authorized plan. He tried a sliding glass patio door, and discovered it was not secure. Cst. Sinclair slid the door open and entered the residence. He believed he was entering into a common area of the residence.[17] He walked directly to the door that he believed

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[13] A.R., Vol. II, p. 80, ¶1(c).
[14] A.R., Vol. I, p. 8, ¶¶22-23.
[15] A.R., Vol. III, pp. 28(32)-29(16).
[16] BCPC Reasons, A.R., Vol. I, p. 8, ¶¶22-23.
[17] A.R., Vol. III, pp. 53(36)-54(23); pp. 62(28)-63(24); p. 79(22-26).

accessed the respondent's suite, knocked on the door and announced "police". The respondent opened the door. Cst. Sinclair entered the respondent's suite, advising him that he was under arrest for robbery. Then he, " ...kind of wrapped him up" because he did not want him reaching for any guns or weapons.[18] Cst. Sinclair was aware of information that the respondent would be willing to shoot a police officer if he was challenged.[19]

29. Cst. Adzijaj testified that he would have warned Cst. Sinclair against entering the residence if Cst. Sinclair had discussed this option with him.[20] Cst. Adzijaj felt it necessary to follow Cst. Sinclair into the residence. The trial judge found that this made sense as Cst. Adzijaj would be able to provide protection for Cst. Sinclair and himself "if things went awry".[21]

30. Officers who followed Cst. Sinclair into the residence conducted a cursory search of the residence incidental to arrest with the "sole intention" of seeing whether anyone else was there who may have had access to firearms.[22] Cst. Adzijaj had information that the respondent had access to firearms inside his residence.[23] The trial judge concluded that Cst. Sinclair's unlawful entry into the residence and unlawful arrest of the respondent made the clearing search necessary.[24] Significantly. the cursory search was not done for the purpose of looking for items connected to the robberies.[25] During the search the police observed a cardboard flat containing what he believed to be vape juice that is used for e-cigarettes, and a black mask. Nothing was seized from the residence at that time. The police located a male who was not associated with the respondent in the upper portion of the residence.[26] The trial judge concluded from the evidence that the police were in the residence for approximately 10 minutes.[27]

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[18] BCPC Reasons, A.R., Vol. I, pp. 7-10, ¶¶15-34; A.R., Vol. III, pp. 54(33)-55(4).
[19] A.R., Vol. III, p. 52(27-38).
[20] A.R., Vol. III, p. 39(1-13).
[21] BCPC Reasons, A.R., Vol. I, p. 9, ¶28.
[22] BCPC Reasons, A.R., Vol. I, p. 10, ¶35.
[23] A.R., Vol. III, p. 10(32-46).
[24] BCPC Reasons, A.R., Vol. I, p. 22, ¶93.
[25] Cst. Pare took part in the cursory search to make sure there was no other occupants in the residence. He was made aware at a briefing that if an arrest was made, they should keep a "lookout" for a black mask with a skeleton on it: BCPC Reasons, A.R., Vol. I, p. 12, ¶¶42-47.
[26] BCPC Reasons, A.R., Vol. I, pp. 10-13, ¶35-48.
[27] BCPC Reasons, A.R., Vol. I, p. 22, ¶94.

The police obtained a search warrant to search the respondent's residence

31. There was a discussion at the police briefing referred to in paragraph 26 above about obtaining a search warrant to search the respondent's residence, but the record is unclear as to when the decision was made to apply for the warrant.[28]

32. The search warrant was issued on November 18, 2017 by a Judicial Justice of the Peace with respect to the investigation of two robberies. Included in the ITO was the information summarized above at paragraphs 19-24. As required for full and frank disclosure of the materials facts,[29] the police also included in the ITO information about the warrantless entry into the respondent's residence, his arrest, and the items the police observed in the residence during the cursory search.[30]

33. The BCCA states that the police "targeted the warrant to the evidence they saw in the home".[31] This is not a finding made by the trial judge, nor is there any evidence to support this finding. To the contrary, the warrant was sought to search for various items linked to the robberies which the police had identified during their investigation prior to the respondent's arrest. This included the black mask which the police had observed in the residence as well as the Nike shoes the respondent was wearing when he was arrested which were removed from him to search his socks.[32] However, the police already knew prior to attending the respondent's residence that the robber who they believed was the respondent had been wearing these items. [33]

34. During the execution of the search warrant at the respondent's residence on November 18, the police located and seized a number of items from the respondent's residence linking the respondent to the robberies including clothing matching the robber's clothing, the mask with a skeleton logo, various vaping products and several packages of Belmont cigarettes.[34]

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[28] A.R., Vol. III, pp. 102(23)-103(28).
[29] *R. v. Araujo*, 2000 SCC 65, at ¶46.
[30] A.R., Vol. II, pp. 41-42, ¶4(a); p. 43, ¶10; pp. 73-76, ¶¶43-44.
[31] BCCA Reasons, A.R., Vol. I, p. 88, ¶82.
[32] A.R., Vol. II, pp. 78-79, ¶48.
[33] A.R., Vol. II, p. 42, ¶5; pp. 45-46, ¶16; pp. 59-60, ¶30; pp. 62-63, ¶35.
[34] BCPC Reasons, A.R., Vol. I, pp. 4-5, ¶¶6-7; A.R., Vol. II, pp. 80-84

Position of the parties

35. The respondent applied to exclude evidence obtained as a result of his arrest and search of his residence pursuant to s. 8 and s. 24(2) of the *Charter*. The respondent challenged the search warrant on the basis of facial validity, arguing that (i) the warrantless entry and his arrest inside his residence was contrary to s. 8; (ii) there was no link between the evidence sought to be seized and the residence; and (iii) after excising this information from the ITO there was insufficient reliable information upon which the authorizing justice could have properly issued the warrant. He argued that anything obtained as a result of the search and arrest ought to have been excluded under s. 24(2).[35]

36. With respect to the seriousness of the breach, the respondent attacked Cst. Sinclair's conduct, arguing that he had a causal attitude to the *Charter*.[36] But the respondent also attacked the conduct of the other officers who followed Cst. Sinclair into the residence.

37. This attack was made in the context of arguing that the warrantless search of the respondent's residence incidental to arrest was a very serious breach. The respondent's counsel argued that when the police entered the residence and unlawfully arrested the respondent, they then "double down…on their unconstitutional conduct, and they search the home incident to the unlawful arrest."[37] She then argued: [38]

> In my submission there was simply no need for them to search the residence for officer safety. They had information that the other tenants were law abiding citizens that were not involved in Mr. Reilly's alleged activities. Corporal Chen was very candid on this point. He testified once Mr. Reilly was in custody there was no officer safety concerns. And that, in my submission, is true, because Reilly apparently is the threat to officer safety.

38. Counsel argued that the manner by which the police conducted the cursory search aggravated the breach: [40]

> And basically I say they used it as an opportunity to look for clothing, because they knew that clothing was important. And they've been told, at least some of them, at a briefing,

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[35] A.R., Vol. III, pp. 123(39)-124(24); pp. 130(31-47); BCPC Reasons, A.R., Vol. I, p. 5, ¶8.
[36] A.R., Vol. III, p. 139(7-19).
[37] A.R., Vol. III, p. 140(9-15).
[38] A.R., Vol. III, p. 140(21-30).
[40] A.R., Vol. III, p. 141(18-28).

> be on the lookout for a skull mask. They'd also possibly been told be on the lookout for shoes, and that's exactly what they find during the course of this 22-minute search. So all of that to say the manner in which the search was carried out in my submission makes the breach that much more aggravated.

39. As will be argued below, it is the basis of this submission that the trial judge, in assessing the seriousness of the breach, properly considered the *Charter*-compliant conduct of the police officers who followed Cst. Sinclair into the residence.

40. The Crown admitted: (i) there were breaches of the respondent's s. 8 *Charter* rights when he was arrested without a warrant in his residence; and (ii) anything relating to the arrest of the respondent should be excised from the ITO. However, the Crown argued that the information remaining in the ITO was sufficient such that the issuing justice could have issued the warrant. Therefore, it was unnecessary for the trial judge to consider s. 24(2). However, the Crown argued that the evidence from the search ought to have been admitted if the trial judge embarked on a s. 24(2) analysis.[42]

Trial judge's reasons for admitting the evidence

41. The trial judge found that the issuing justice could have issued the warrant to search the respondent's residence for the items contained in the warrant except for some property not at issue on this appeal.[43]

42. Although the trial judge found that the issuing justice could have issued the warrant, he nevertheless considered whether the evidence obtained from the search was admissible under s. 24(2). He considered s. 24(2) because of the uncontested *Charter* breaches arising on the day before the search, when the police arrested the respondent inside his residence. The trial judge found three breaches arsing from the conduct of the police: (i) entering the residence; (ii) entering the respondent's bedroom to arrest him; and (iii) conducting a clearing search following the arrest. The trial judge considered the three *Grant* factors for determining whether the evidence ought to be excluded under s. 24(2). He found that each of the three factors favoured inclusion, and in balancing these factors found that the evidence obtained from the search was admissible.[44] More

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[42] A.R., Vol. III, p. 157(4-6); A.R., BCPC Reasons, A.R., Vol. I, pp. 5-6, ¶¶10-11.
[43] BCPC Reasons, A.R., Vol. I, pp. 18-22, ¶69-90.
[44] BCPC Reasons, A.R., Vol. I, pp. 15-17, ¶¶58-66; pp. 22-27, ¶¶91-120.

details of the trial judge's reasons applicable to the issues raised on this appeal will be set out in Part III.

BCCA Reasons

43. The BCCA unanimously agreed that the trial judge did not err in concluding the search warrant was facially valid, and that there was a temporal and contextual connection between the admitted *Charter* violations and the seized evidence.[45] The BCCA also unanimously agreed on the principles to be applied in a s. 24(2) analysis and the standard of review on appeal.[46] They disagreed on whether the trial judge erred in law in his s. 24(2) analysis.

44. The majority allowed the appeal, excluded the evidence, and ordered a new trial. The majority held that the trial judge erred in admitting the search warrant evidence in light of the earlier *Charter* breaches. In the course of their analysis, the majority made several findings.

45. The BCCA unanimously noted that although there was no causal connection between the *Charter* breaches and the evidence, the subsequent search was "tainted" because "[t]he sequence of police conduct was temporally and contextually linked to the obtaining of the evidence."[47] The court held that "the trial judge implicitly found the required threshold connection between the *Charter* breaches and the evidence."[48]

46. The BCCA unanimously held that the trial judge properly considered the conduct of the other police officers, who the respondent argued acquiesced in Cst. Sinclair's *Charter*-infringing conduct, in assessing the seriousness of the *Charter* violations.[49] However, the majority held that the trial judge made two errors in principle in the course of his *Grant* analysis.

47. First, the majority found the trial judge erred by "treating the *Charter*-compliant conduct of other officers as attenuating the seriousness" of the *Charter*-infringing conduct.[50] The majority

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[45] BCCA Reasons, A.R., Vol. I, p. 88, ¶84; p. 102, ¶154(b).
[46] BCCA Reasons, A.R., Vol. I, pp.84--85, ¶62-65
[47] BCCA Reasons, A.R., Vol. I, p. 88, ¶¶82-84.
[48] BCCA Reasons, A.R., Vol. I, p. 87, ¶81.
[49] BCCA Reasons, A.R., Vol. I, pp. 91-92 , ¶¶103-108; p. 102, ¶154(b).
[50] BCCA Reasons, A.R., Vol. I, p. 91, ¶102.

was critical of the trial judge's comments that he had to assess the totality of the police conduct and his finding that the other police officers acted professionally.[51]

48. The majority found that the trial judge made a second error in principle by compartmentalizing the overall assessment of whether the administration of justice would be brought into disrepute by admission of the evidence.[52] The majority held that an assessment of the effect of the admission of the evidence on the administration of justice completed at each stage of the *Grant* analysis "cannot replace the overall weighing and balancing exercise at the end of all three s. 24(2) inquiries."[53]

49. The majority then found that had the trial judge not compartmentalized his assessment in this way, he: [54]

> …would have realized that the seriousness of the breaches and their impact on the *Charter*-protected rights of the appellant [respondent] outweighed society's interest in the adjudication of the case on its merits.

50. On the basis of these two errors in principle, the majority found that the trial judge's conclusion on the admissibility of the evidence was not owed deference.[56] The majority undertook a fresh s. 24(2) analysis, finding that the seriousness of the of the *Charter* violations, and the impact on the respondent's *Charter*-protected interests pulled towards exclusion of the evidence.[57]

51. Although the majority found that society's interest in the adjudication of the case on its merits pulled towards admission of the evidence, they held that the overall balancing required exclusion:

> [t]he police misconduct was wilful and so serious that it is necessary to exclude the evidence obtained in order to disassociate the justice system from the police misconduct and preserve the reputation of the administration of justice.[58]

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[51] BCCA Reasons, A.R., Vol. I, pp. 90-91, ¶¶95-99.
[52] BCCA Reasons, A.R., Vol. I, pp. 93-94, ¶115-116.
[53] BCCA Reasons, A.R., Vol. I, p. 94, ¶115.
[54] BCCA Reasons, A.R., Vol. I, pp. 94-95, ¶115-118.
[56] BCCA Reasons, A.R., Vol. I, p. 95, ¶120-121.
[57] BCCA Reasons, A.R., Vol. I, p. 96, ¶126; p. 98, ¶134; p.100, ¶144.
[58] BCCA Reasons, A.R., Vol. I, p. 100, ¶145; p. 101, ¶149; p. 102, ¶152.

52. Willcock J.A., in dissent, would have deferred to the trial judge's s. 24(2) assessment and dismissed the appeal. He held that the trial judge did not err in law in his s. 24(2) analysis and therefore, a fresh s. 24(2) analysis was not justified.[59]

53. In Willcock J.A.'s view, the trial judge's reasons, when read as a whole, show that he applied the appropriate factors and did not overly compartmentalize the assessment of the *Grant* factors or consider *Charter*-compliant conduct of the police as mitigating.[60]

54. First, Willcock J.A. agreed with the majority that treating *Charter*-compliant conduct of other officers as attenuating the seriousness of the *Charter*-infringing conduct constitutes an error in principle. However, he noted that at trial the respondent's counsel alleged a systemic disregard of the respondent's rights and that it "was in the context of that assertion that we must read the trial judge's assessment of the police conduct."[61]

55. Second, Willcock J.A. agreed with the majority that assessing the effect on the administration of justice at each stage of the *Grant* analysis cannot replace the overall balancing required at the end of all three s. 24(2) inquiries.[62] However, he noted that the trial judge "closely followed the analysis in the leading cases in his assessment of the three enumerated factors" and struck a balance in light of all the factors at paragraph 120 of his ruling on the voir dire.[63] Willcock J.A. held that "it is not an error to consider the extent to which the administration of justice may be brought into disrepute by the admission of evidence at each stage."[64]

56. Willcock J.A. noted that the trial judge's statement on the balancing stage of the *Grant* analysis was "terse", but that "it is no argument to say the judge's reasons could have been more comprehensive."[65] In Willcock J.A.'s view the Court of Appeal's "…own assessment of the right outcome of the careful balancing process described in Paterson should not affect the assessment of whether the trial judge has erred in law."[66]

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[59] BCCA Reasons, A.R., Vol. I, pp. 102-103, ¶155-156.
[60] BCCA Reasons, A.R., Vol. I, p. 104, ¶160.
[61] BCCA Reasons, A.R., Vol. I, pp. 104-105, ¶163-165.
[62] BCCA Reasons, A.R., Vol. I, pp. 105-106, ¶169.
[63] BCCA Reasons, A.R., Vol. I, p. 107, ¶178-179.
[64] BCCA Reasons, A.R., Vol. I, pp. 105-106, ¶169.
[65] BCCA Reasons, A.R., Vol. I, p. 107, ¶180.
[66] BCCA Reasons, A.R., Vol. I, p. 108, ¶181.

PART II – QUESTIONS IN ISSUE

57. The majority of the BCCA erred in concluding that the trial judge erred in law by considering some *Charter*-compliant police conduct to be mitigating.

58. The majority of the BCCA erred in concluding that the trial judge erred in law in his s. 24(2) assessment by improperly weighing the factors considered in that assessment.

59. The majority erred by conducting a fresh s. 24(2) analysis, as they ought to have deferred to the trial judge's assessment under s. 24(2). They also erred in their fresh s. 24(2) analysis by attributing no weight to the fact that the evidence linking the respondent to the robberies was obtained by a lawfully issued search warrant, and there was no causal connection between the *Charter* breaches and the issuance of the search warrant.

PART III – STATEMENT OF ARGUMENT

A. A deferential standard of review is to be applied to a s. 24(2) determination

60. A deferential standard is applied to a review of a trial judge's s. 24(2) determination. The standard was summarized by Cromwell J. in *R. v. Côté:* [67]

> The standard of review of a trial judge's s. 24(2) determination of what would bring the administration of justice into disrepute having regard to all of the circumstances is not controversial. It was set out by this Court in *Grant* and recently affirmed in *R. v. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248. Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review (*Grant*, at para. 86, and *Beaulieu*, at para. 5).

B. Issue # 1 – The trial judge did not err in law in his assessment under s. 24(2) of the *Charter* by considering the totality of the police conduct

61. The first issue on this appeal raises the question whether the trial judge erred in law in assessing the seriousness of the breach by considering the *Charter*-compliant conduct of the police officers who followed Cst. Sinclair into the residence. The trial judge found that Cst. Sinclair's conduct resulted in a serious violation of the respondent's s. 8 *Charter* rights. However, he said that he had to assess the totality of the police conduct. Having done so, he concluded that Cst. Sinclair's conduct was not at the serious end of the spectrum.[68]

62. The majority posed the issue as follows:

> The question is really whether, when the judge commented on the totality of other police conduct, the judge was simply commenting on the absence of aggravating factors or was taking into account the presence of mitigating factors.[69]

63. Willcock J.A. framed the issue as whether the trial judge erred in law by considering some *Charter*-compliant conduct to be mitigating.[70]

64. The majority found that the trial judge erred in law because he considered the *Charter*-compliant conduct of the other officers who followed Cst. Sinclair into the residence to be

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[67] 2011 SCC 46 [*Côté*] at ¶44.
[68] BCPC Reasons, A.R., Vol. I, p. 22, ¶92; pp. 24-25, ¶104.
[69] BCCA Reasons, A.R., Vol. I, p. 90, ¶92.
[70] BCCA Reasons, A.R., Vol. I, p. 104, ¶160.

mitigating.

65. However, the majority's finding was the result of inappropriate parsing of the trial judge's reasons. When read as a whole, it is apparent that he did not consider this conduct as mitigating. The majority was wrong not to defer to the trial judge's conclusion with respect to the seriousness of the breach. The totality of the police conduct was properly considered by the trial judge as it was necessary to respond to defence allegations of misconduct by all the officers, and to situate the conduct on a scale of culpability.

(i) The conduct of the other officers was a relevant consideration in response to defence allegations of unconstitutional conduct

66. As set out below, the trial judge found that the police officers who followed Cst. Sinclair into the residence conducted themselves in a professional manner.

67. As Willcock J.A. states, it was necessary for the trial judge to consider the *Charter*-compliant conduct of the other officers because the trial judge had to address defence counsel's submissions that the conduct of the other officers aggravated Cst. Sinclair's serious *Charter* breach.[71] As set out at paragraphs 36-38 above, defence counsel argued that when the police entered the residence and unlawfully arrested the respondent, they then doubled down on their unconstitutional conduct by searching the residence incidental to the unlawful arrest, and that the manner by which the police conducted the cursory search aggravated the breach. Willcock J.A. explained why it was necessary for the judge to consider the conduct of the other officers: [72]

> It would have been an error in principle to treat the *Charter*-compliant conduct of other officers as attenuating the seriousness of Constable Sinclair's misconduct. In the circumstances of this case, however, it was necessary to address the appellant's submission that conduct of other officers aggravated Constable Sinclair's serious *Charter* breach. In my view, it is reading too much into the reasons for judgment to say that the trial judge engaged in the former exercise rather than the latter. [Emphasis added.]

[71] BCCA Reasons, A.R., Vol. I, p. 105, ¶165.
[72] BCCA Reasons, A.R., Vol. I, p. 105, ¶165.

(ii) The judge was required to situate the misconduct on a scale of culpability

68. A trial judge's reasons must be read in the context of the evidence, and the issues and arguments at trial.[74] The majority failed to do so in finding that the trial judge considered the *Charter*-compliant conduct of the other officers who followed Cst. Sinclair into the residence mitigated the seriousness of the breach. Willcock J.A. properly situated the trial judge's reasons within the trial record.

69. When the trial judge's reasons are read as a whole, he is simply and properly situating the police misconduct in entering the respondent's residence on a scale of culpability. As this Court has repeatedly observed, a court's task when considering the seriousness of the *Charter*-infringing conduct is "to situate that conduct on a scale of culpability."[75]

70. Nowhere in his reasons did the trial judge state that the *Charter*-compliant conduct of the other officers mitigated the seriousness of the breach. But the majority, by parsing the reasons for judgment, concluded that the trial judge had done so.[76] The majority's focus is on paragraph 92 of the trial judge's reasons which state:[77]

> There is no question that the conduct of Constable Sinclair resulted in a serious violation of the applicant's s. 8 *Charter* right. That being said, it is necessary to assess the totality of the police conduct at the time the applicant's s. 8 *Charter* right was violated.

71. This passage was just one of many in which the trial judge evaluated the seriousness of the breach. As Willcock J.A. points out, immediately after this passage "the trial judge specifically addressed the most significant [defence] allegation of *aggravating* misconduct: that the search following the unlawful entry into the residence and unlawful arrest was unnecessary or too extensive".[78] The trial judge addressed these allegations in the following paragraphs:[79]

> [94] I find from the evidence that the police were in the residence for approximately 10 minutes. I also find that no property was moved or removed from the residence during the course of the clearing search. The residence was then secured and a search later conducted after the issuing Justice granted the application for a warrant to search. At all

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[74] *R. v. Villaroman*, 2016 SCC 33 at ¶15.
[75] *R. v. Paterson*, 2017 SCC 15 [*Paterson*], at ¶43, and *R. v. Le*, 2019 SCC 34 [*Le*], at ¶143.
[76] BCCA Reasons, A.R., Vol. I, p. 90, ¶93.
[77] BCPC Reasons, A.R., Vol. I, p. 22, ¶92.
[78] BCCA Reasons, A.R., Vol. I, p. 104, ¶164.
[79] BCPC Reasons, A.R., Vol. I, pp. 22-23, ¶¶94-95; pp. 24-25, ¶104.

> material times, the police believed that the warrant issued by the Justice was a valid warrant.
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> [95] But for the conduct of Constable Sinclair, the police otherwise conducted themselves in a professional manner. In particular, I find Constable Adzijaj conducted himself professionally. His rejected suggestion that they contact the applicant by cell phone and request that he present himself at the door of his residence would have been a far preferable, and safer, strategy.
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> …
>
> [104] In conclusion, Constable Sinclair's Charier-infringing conduct was serious. It impacted on the privacy interests of the applicant. Constable Sinclair acted contrary to, or without, senior officers' directions. Had Constable Sinclair's conduct in entering the residence had the approval, either implicitly or expressly, of a senior officer, then the overall state conduct would fall at the serious end of spectrum and would likely result in the court having to disassociate itself from the state conduct by excluding the evidence obtained from the search of the residence.

72. The majority say that these paragraphs indicate that the trial judge contrasted and assessed the totality of the police conduct to the seriousness of Cst. Sinclair's conduct.[80] They go on to say at paragraph 100 that the logic of the trial judge's reasons in referring to other officers not being involved in Cst. Sinclair's misconduct was "to identify that the totality of the state conduct as less serious and less likely to require the court to disassociate from it by excluding the evidence". Here the majority is referring to the following paragraph in the trial judge's reasons for judgment:

> [105] When assessing the totality of the state conduct in this case, I am not prepared to find that the admission of evidence obtained from the search of the residence will likely have a negative impact on the public's confidence in the rule of law and will, thereby, risk bringing the administration of justice into disrepute.

73. The majority's comment at paragraph 100 is an overstatement. As Justice Willcock J.A. states, to say that the trial judge treated the *Charter*-complaint conduct of the other officers as mitigating the seriousness of Cst. Sinclair's misconduct is to read too much into the reasons for judgment.[81]

74. The trial judge found that Cst. Sinclair's conduct was not "indicative of a pattern of systemic or institutional police disregard of constitutional rights."[82] The majority accepted that there was an absence of systemic misconduct, but went on to add that it does not mitigate the

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[80] BCCA Reasons, A.R., Vol. I, p. 90, ¶¶94-96.
[81] BCCA Reasons, A.R., Vol. I, p. 105, ¶165.
[82] BCPC Reasons, A.R., Vol I, p. 24, ¶103.

seriousness of the *Charter*-infringing conduct.[83]The majority implies that the trial judge's finding an absence of systemic misconduct equates to a positive finding that the absence mitigated the seriousness of the breach.

75. This reasoning is faulty. The absence of an aggravating factor does not equate to the presence of a mitigating factor, just as an absence of bad faith on the part of the police, as this Court has said, does not equate to a positive finding of good faith.[84] In other words, an absence of systemic misconduct on the part of police does not equate to a finding that the *Charter*-compliant police conduct was a mitigating factor.

76. The trial judge's finding that the police misconduct was not systemic does not mean, without more, that he concluded that the seriousness of Cst. Sinclair's breach was mitigated by the *Charter*-compliant conduct of the other officers. To repeat, he simply concluded that Cst. Sinclair's conduct was not "indicative of a pattern of systemic or institutional police disregard of constitutional rights." That is the extent of his conclusion, no more.

77. The context within which the trial judge's finding was made also illustrates that he did not consider the lack of systemic misconduct to be a mitigating factor. The trial judge found that Cst. Sinclair's conduct resulted in a serious violation of the respondent's s. 8 *Charter* rights, and that the unlawful entry into his residence was significant and unjustified.[85] In considering the seriousness of Cst. Sinclair's breach, the trial judge properly focused on Cst. Sinclair's actions as evident in this passage of his reasons:[86]

> It is the conduct of Constable Sinclair that calls into question whether the court ought to disassociate itself from the police conduct at the time of the s. 8 *Charter* breaches.

78. Specifically, the trial judge focused on Cst. Sinclair's unilateral, unsanctioned decision to enter the respondent's residence to arrest him which the trial judge described as "opportunistic."[88] The trial judge also described Cst. Sinclair's conduct as negligent and concluded that it could not

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[83] BCCA Reasons, A.R., Vol. I, p. 91, ¶101.
[84] *Le*, at ¶147.
[85] BCPC Reasons, A.R., Vol. I, p. 22, ¶92; pp. 24-25, ¶104; p. 26, ¶112.
[86] BCPC Reasons, A.R., Vol. I, p. 23, ¶98.
[88] BCPC Reasons, A.R., Vol. I, p. 24, ¶101.

be equated with good faith but was not indicative of a pattern of systematic or institutional police disregard of constitutional rights.[89]

79. It was in the context of this discussion of Cst. Sinclair's conduct alone that the trial judge said that the breach would fall at the serious end of the fault spectrum had Cst. Sinclair's actions been approved by a senior officer.[90] The majority was critical of this comment because they concluded that Cst. Sinclair's "conduct alone was already at the serious end of the spectrum."[91]

80. In stating this, the majority reveals their own view of the breach, which was different than the trial judge's view. This exceeds the bounds of appellate intervention by re-characterizing the evidence absent any unreasonable finding or any clear and determinative error on the part of the trial judge.[92] As will be seen, the majority had determined the seriousness of the breach even before they embarked upon their fresh s. 24(2) analysis, and this predetermined their ultimate conclusion that the evidence ought to have been excluded.

81. Mention should be made to the trial judge's description of Cst. Sinclair's conduct as "not wilful"[93]. Willcock J.A. points out that the wrongful entry and arrest was certainly wilful in the sense that it was intentional, but added that the breach was not wilful in the sense that Cst. Sinclair did not believe he was acting inappropriately.[94]

82. While the trial judge ought not to have applied the "not wilful" legal label to Cst Sinclair's conduct, the remainder of the trial judge's analysis shows that he understood the nature and impact of Cst. Sinclair's actions. The trial judge acknowledges that Cst. Sinclair's actions were not made in good faith. He also openly questions Cst. Sinclair's sophistication and insight. As Willcock J.A. points out, "He clearly recognized [at para. 62] that "ignorance of *Charter* standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith."[95]

83. What is important is to properly situate that conduct on a scale of culpability. The trial judge clearly did so by recognizing that Cst. Sinclair's conduct was opportunistic, and could not

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[89] BCPC Reasons, A.R., Vol. I, p. 24, ¶103.
[90] BCPC Reasons, A.R., Vol. I, pp. 24-25, ¶104.
[91] BCCA Reasons, A.R., Vol. I, p. 90, ¶97.
[92] *Côté*, at ¶51.
[93] BCPC Reasons, A.R., Vol I., p. 24, ¶101.
[94] BCCA Reasons, A.R., Vol. I, p. 105, ¶¶166-167.
[95] BCCA Reasons, A.R., Vol. I, p. 105, ¶167. See *Grant*, at ¶75.

be equated with good faith, a significant finding in determining the fault line or seriousness of the breach.[96] The majority did not disturb this finding.

(iii) Conclusion on Legal Issue #1

84. In the circumstances of this case, upon considering the evidence, the issues and submissions of counsel, the trial judge did not err in law by considering the *Charter*-compliant-conduct of the other officers. Rather, the majority erred. They ought to have done what Willcock J.A. did, that is to defer to the trial judge's findings with respect to the seriousness of the breach.

C. Issue # 2 – The trial judge did not err in law in his overall balancing of the *Grant* factors under s. 24(2)

(i) Legal Framework

85. This Court has established a framework in deciding whether to exclude evidence under s. 24(2). The framework requires the court to assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to the three *Grant* factors. No overarching rule governs how the balance is to be struck. The court must assess the effect of admission or exclusion on the long-term repute of the justice system and ensure that it is not damaged any further by the breach. [97]

86. This Court has said the balancing is not capable of mathematical precision.[98] This was explained in *Paterson*:[99]

> …As was observed in *Grant* 2009, at para. 140, "[t]he balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision." Indeed, because the *Grant* 2009 factors are mutually incommensurable - balancing seriousness of state conduct, seriousness of the infringement of *Charter* rights and the impact upon society's interest in adjudication - the "balancing" will never be an entirely objective exercise. A reviewing court must, however, come to a reasoned conclusion…

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[96] *Grant*, at ¶79.
[97] *Grant*, at ¶86; *Côté*, at ¶48.
[98] *Grant* at ¶86;140.
[99] *Paterson*, at ¶54.

(ii) There is no particular manner to express the overall balancing inquiry

87. The issue for this Court to consider is whether there is a right way or wrong way for a trial judge to express in their reasons the balancing exercise mandated by this Court in *Grant*. Specifically, the question is whether the trial judge erred in law by considering the extent to which the administration of justice may be brought into disrepute by the admission of evidence at each stage when considering sequentially the three *Grant* factors. Willcock J.A. identified the legal issue as follows: did the trial judge err in his s. 24(2) assessment by "improperly weighing the factors considered in that assessment, as identified in *Grant*."[100]

88. The trial judge's reasons reflect that he was well aware of the approach this Court has mandated for conducting a s. 24(2) inquiry. He correctly detailed the "revised approach" to s. 24(2) inquiry articulated in *Grant*.[101] With respect to the balancing requirement, he referred to paragraph 71 of *Grant* which states that a court "must assess and balance the effect of admitting the evidence on society's confidence in the justice system" having regard to the three *Grant* factors.[102]

89. The trial judge then considered each of the three *Grant* factors in turn. First, he found that the breach was serious with respect to the first *Grant* factor. In reaching this conclusion, the trial judge states:[103]

> When assessing the totality of the state conduct, I am not prepared to find that the admission of evidence obtained from the search of the residence will likely have a negative impact on the public's confidence in the rule of law and will, thereby, risk bringing the administration of justice into disrepute.
>
> This factor favours inclusion.

90. Second, the trial judge found that the breach had a significant impact on the respondent's privacy interests (*Grant* factor #2).[105] The trial judge accepted that the police intrusion into his residence to arrest him significantly impacted his *Charter*-protected interests. However, the trial judge noted that: (i) the police did not seize anything; (ii) no family members were present which could have caused an impact on the respondent's relationship with them; and (iii) there was no

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[100] BCCA Reasons, A.R., Vol. I, pp. 102-103, ¶155.
[101] BCPC Reasons, A.R., Vol. I, pp. 15-16, ¶¶59-66.
[102] BCPC Reasons, A.R., Vol. I, p. 15, ¶59.
[103] BCPC Reasons, A.R., Vol. I, p. 25, ¶¶105-106.
[105] BCPC Reasons, A.R., Vol. I, p. 26, ¶¶112-113.

impact on the respondent's dignity apart from the intrusion on his privacy interests.[106] He concluded by stating:[107]

> I find that the unwarranted police intrusion into the residence of the applicant was significant and unjustified. However, I do not find that it was profoundly intrusive to the extent of establishing that the state conduct would bring the administration of justice into disrepute.
>
> This factor favours inclusion.

91. Third, the trial judge found that society's interest in adjudication of the case on its merits (*Grant* factor #3) favoured admission. The trial judge found that the evidence in question was real and highly reliable, and existed independent of the *Charter* breaches, and the two robbery charges are very serious.[108]

92. Having determined that each of the three *Grant* factors favoured inclusion, the judge ended with his conclusion on balancing:

> In balancing the *Grant* factors, I find that the evidence obtained from the search of the applicant's residence is admissible.[109]

93. The majority referred to the Crown's submission that when the reasons are read as a whole, it is clear the judge properly applied the s. 24(2) analytical framework. The majority found this argument superficially attractive, but nevertheless concluded that the trial judge erred in principle by failing to undertake the broader inquiry mandated by s. 24(2).[110]

94. Relying on this Court's decision in *Le*, the majority said that the evaluative exercise of whether the admission of evidence would bring the administration of justice into disrepute "is the question to the end of which the three lines of inquiry identified in *Grant* are undertaken."[111] That is not exactly what *Le* stands for, nor what is endorsed in *R. v. McGuffie*.[112] As stated in *R. v. Pawar,* the proposition endorsed in *Le* and *Paterson* and expressed in *McGuffie*, is that if the first and second *Grant* factors make a strong case for exclusion, the third inquiry will rarely tip the

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[106] BCPC Reasons, A.R., Vol. I, p. 25, ¶¶109-111.
[107] BCPC Reasons, A.R., Vol. I, p. 26, ¶¶112-113.
[108] BCPC Reasons, A.R., Vol. I, p. 26, ¶¶115-117.
[109] BCPC Reasons, A.R., Vol. I, p. 27, ¶120.
[110] BCCA Reasons, A.R., Vol. I, p. 93, ¶¶112-113.
[111] BCCA Reasons, A.R., Vol. I, p. 93, ¶114 referring to *Le*, at ¶¶141-142.
[112] 2016 ONCA 365 [*McGuffie*].

balance in favour of admissibility.[114] That said, whether admitting the evidence would bring the administration of justice into disrepute is the ultimate question in a 24(2) inquiry.

95. The trial judge did directly make a finding on the ultimate question after having considered the three *Grant* factors. As Willcock J.A. correctly points out, the trial judge's conclusion at paragraph 120 is terse but sufficient:[115]

> That statement is terse. However, in my opinion, it was not necessary for the trial judge to say more. What he said is sufficient to establish that he undertook the broad inquiry mandated by s. 24(2). We should bear in mind that "it is no argument to say the judge's reasons could have been more comprehensive": *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at para. 47; *R.E.M.* at para. 17; *F.H. v. McDougall*, 2008 SCC 53 at para. 100.

96. The majority erred because ultimately it does not matter where in his reasons the trial judge made findings applicable to balancing the effect of admitting the evidence on society's confidence in the justice system. Neither *Le*, nor *Paterson* say anything to the contrary. What matters is that the judge properly applied the s. 24(2) framework, which his reasons as a whole indicate he did.

97. The majority state that the compartmentalization of the trial judge's analysis led to the foregone conclusion that the evidence would be admitted as there were no competing factors to balance by way of an overall assessment, recognizing that *Grant* factor #3 clearly favoured admission.[117] The majority then concluded that had the trial judge conducted what they considered "the correct analysis", he would have concluded that the seriousness of the cumulative breaches and their impact on the *Charter*-protected rights of the respondent favoured exclusion of the evidence.[118]

98. The majority once again overstep the bounds of appellate intervention. Their conclusion is not supported by the trial judge's findings regarding the seriousness of the breach or the impact on the respondent's privacy interests. Although the trial judge found that the breach was serious and that unwarranted police intrusion into the respondent's residence was significant and unjustified, he nevertheless considered these findings on a scale.

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[114] 2020 BCCA 251, at ¶97.
[115] BCCA Reasons, A.R., Vol. I, p. 107, ¶180.
[117] BCCA Reasons, A.R., Vol. I, p. 94, ¶116.
[118] BCCA Reasons, A.R., Vol. I, p. 94, ¶117.

99. One factor that the trial judge relied on to situate the conduct on a scale of seriousness was that the police believed that search warrant to be a valid warrant.[119] This favours admission of the evidence and supports the characterization of the search and seizure as not particularly egregious.[120] Other factors noted by the trial judge include: (i) the police were in the residence for approximately 10 minutes; (ii) and no property was moved or removed from the residence during the clearing search.[121] The factors the trial judge considered with respect to the impact of the breach on the applicant's *Charter*-protected interests are listed in paragraph 99 above.

100. The trial judge's reasons clearly reveal his view, based on his assessment of the evidence, that the first two lines of inquiries were too weak to support exclusion. As this Court stated in *Le*, this will often favour the admission of the evidence:

> …if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.[122]

101. In sum, the majority was wrong not to defer to the trial judge's assessment in favour of the assessment they would have preferred.

102. Willcock J.A. disagreed with the majority that the judge inevitably would have excluded the evidence. Clearly referring to the deference doctrine, Willcock J.A. properly emphasized that an appellate court's assessment of the right outcome in the balancing process should not affect the court's assessment of whether the trial judge erred in law: [123]

> In particular, I cannot say, as my colleague has, that if the trial judge had conducted the correct analysis (reserving all comment on how admission of the evidence would effect the repute of the administration of justice until last and treating the overall balancing more expansively), he would have properly concluded that the seriousness of the cumulative breaches and their impact on the *Charter*-protected rights of the appellant favoured exclusion of the evidence. Our own assessment of the right outcome of the careful balancing process described in *Paterson* should not affect the assessment of whether the trial judge has erred in law.

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[119] BCPC Reasons, A.R., Vol. I pp. 22-23, ¶94.
[120] *R. v. Morelli*, 2010 SCC 8, at ¶99.
[121] BCPC Reasons, A.R., Vol. I, p. 22, ¶94
[122] *Le*, at ¶142.
[123] BCCA Reasons, A.R., Vol. I, p. 108, ¶181.

(iii) The appeal ought to be allowed and convictions restored

103. This appeal ought to be allowed and the respondent's convictions restored if this Court finds that the majority was wrong with respect to finding legal errors in the trial judge's consideration of the seriousness of the breach and in the way he weighed and assessed the three *Grant* factors. The trial judge's conclusion admitting the evidence ought to be owed appellate deference as it was by Willcock J.A.

104. Alternatively, the appeal ought to be allowed and the convictions restored as the majority erred in their fresh s. 24(2) analysis, for the reasons set out below.

D. Issue # 3 – The majority erred in their fresh s. 24(2) analysis

105. In contrast to the trial judge's finding, the majority concluded in their fresh s. 24(2) analysis that the breach was at the serious end of the scale.[125]

106. The majority's reasons indicate that the errors they wrongly identified with respect to the trial judge's analysis impacted their fresh s. 24(2) analysis and predetermined their decision to exclude the evidence. The majority states, prior to embarking upon their fresh s. 24(2) analysis, that: (i) the trial judge would have excluded the evidence if he had conducted "the correct analysis"; (ii) Cst. Sinclair's "conduct alone was already at the serious end of the spectrum"; and (iii) the trial judge's characterization and findings as to the seriousness of the police conduct was significant both as to the errors they identified in his s. 24(2) analysis, and to their fresh analysis under s. 24(2).[126]

107. Embarking upon their fresh s. 24(2) analysis with these factors predetermined, the majority gave no weight to a significant factor on balancing that ought to have favoured admission of the evidence: the evidence was seized pursuant to a lawfully-issued search warrant; and there was no causal connection between the breach and the issuance of the search warrant.

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[125] BCCA Reasons, A.R., Vol. I, p. 96, ¶126; p. 98, ¶134.
[126] BCCA Reasons, A.R., Vol. I, p. 94, ¶117; p. 90, ¶97; p. 82, ¶56.

108. The majority, for good reason, did not dispute the Crown's position that there was no causal connection between the breach of the respondent's rights and the evidence obtained on the following day pursuant to the search warrant. All the information obtained from the breach was excised from the ITO. The remaining information, all gathered before the breach occurred, was sufficient to issue the warrant. This information provided the grounds to establish that the respondent was one of the perpetrators of the Boss Vapes robbery, as well as the perpetrator of the Deer Lake Market robbery; and that items connected to the robberies, particularly the respondent's personal clothing worn while committing both robberies, would be located in his residence. In other words, enough information remained in the ITO to issue the warrant independent of the breach.

109. But the majority gave no weight to this critical factor, having decided that: (i) the breach fell "at the very serious end of the spectrum"[128] in contrast to the trial judge's finding that the breach was serious but did not fall on the serious end of the spectrum[129]; and (ii) the impact of the breach was "profoundly intrusive"[130] in contrast to the trial judge's finding that it was not so proudly intrusive to the extent that it would bring the administration of justice into disrepute.[131]

110. The majority concluded that the police conduct fell at the very serious end of the spectrum because the police did not obtain a *Feeney* warrant to enter the respondent's residence. The majority found it "disturbing" that the police did not discuss the requirement for a *Feeney* warrant at their pre-arrest meeting.[132] This is an overreaction. The majority failed to consider – and should have – that the police never intended to enter the respondent's residence to arrest him. The plan was to arrest him outside the residence, and only went awry due to Cst Sinclair's sudden, unilateral, unsanctioned, "opportunistic" decision to enter the residence.

111. Balancing the three *Grant* factors, the majority concluded that there was no reason to override what they described as the "general rule" enunciated in *McGuffie*, *Paterson* and *Le*.[133] That is, where the first and second inquiries, taken together, make a strong case for exclusion, the

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[128] BCCA Reasons, A.R., Vol. I, p. 90, ¶97; p. 96, ¶126.
[129] BCPC Reasons, A.R., Vol. I, pp. 24-25, ¶104.
[130] BCCA Reasons, A.R., Vol. I, p. 100, ¶144.
[131] BCPC Reasons, A.R., Vol. I, p. 26, ¶112.
[132] BCCA Reasons, A.R., Vol. I, p. 98, ¶134.
[133] BCCA Reasons, A.R., Vol. I, p. 101, ¶¶148-149.

third inquiry will seldom if ever tip the balance in favour of admissibility. However, as the majority correctly noted, *McGuffie* did not purport to establish an inflexible, "two-strikes-and-the-evidence-is-out" rule; but that it is nevertheless useful as a general analytical tool or rule of thumb.[134]

112. The majority, relying on *Côté*, rejected the Crown's argument that (i) the validity of the search warrant and (ii) lack of causal connection between the breach and the evidence obtained pursuant to the warrant favour admission of the evidence.[135] In the majority's view, the Crown was attempting to compartmentalize the *Charter* breach and the judicially authorized search. The majority held this was a flawed approach because the "totality" of the search process was tainted by the breach, which preceded the issuance of the warrant.[136]

113. There is no evidence to support the majority's finding that the "totality" of the search process was tainted by the breach. At most, there was a temporal and contextual link. The unlawful entry and arrest occurred a day prior to the judicially authorized search, and the arrest and the seizure of evidence upon execution of the warrant occurred with respect to the same investigation. That was the extent of the link. And as stated at paragraph 33 above, there is no evidence to support the BCCA's finding that the police targeted the warrant to the evidence they saw in the respondent's home.

114. The majority was wrong to rely on *Côté*. The misconduct in that case is far worse than the conduct in the present case. The trial judge in that case made findings that the police misconduct was continual – over several hours – and systematic from the outset of the investigation – the police had violated virtually every *Charter* right accorded to a suspect. The seriousness of the misconduct was aggravated by the fact that the investigators misled a judicial officer in order to obtain search warrants. The trial judge characterized the police misconduct as "extraordinarily troubling."[137]

115. The facts in *Côté* stand in stark contrast to Cst. Sinclair's isolated error of judgment. The trial judge in the present case was satisfied that the police misconduct was neither systemic nor continual – the breach was brief, approximately 10 minutes in duration. The majority did not find

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[134] BCCA Reasons, A.R., Vol. I, p. 101, ¶148.
[135] BCCA Reasons, A.R., Vol. I, pp. 100-101, ¶¶146-147.
[136] BCCA Reasons, A.R., Vol. I, p. 88, ¶84.
[137] *Côté*, at ¶2.

otherwise in their fresh s. 24(2) analysis.

116. Cromwell J.'s statement that the question of exclusion must not be approached in a compartmentalized fashion was said in the context of the aggravated facts and the trial judge's finding that the totality of the search process was tainted by the unconstitutional searches that preceded the issuance of the warrant. It was in that context Cromwell J. stated:[138]

> This finding [to exclude evidence] is consistent with well-established case law. *Grant 1993* provides a good example of how illegal warrantless searches can taint a subsequent search that is otherwise lawful. In that case, the information obtained through the warrantless perimeter search was used to support the police's application for search warrants. This Court held that once the illegally obtained information was excised from the affidavits presented to the issuing justice, the information that remained was sufficient to issue the warrants. While this Court held that the warrants were valid, it found that the illegal searches "were nevertheless an integral component in a series of investigative tactics which led to the unearthing of the evidence in question". It was thus "unrealistic to view the perimeter searches as severable from the total investigatory process which culminated in discovery of the impugned evidence" (p. 255). Similarly, in the case at bar, given the trial judge's findings of fact that the police misconduct was continual and systematic from the outset of the investigation, the question of exclusion must not be approached in a compartmentalized fashion. [Emphasis added.]

117. Cst. Sinclair's conduct was not an integral component in a series of investigative tactics which led to the finding of the evidence on the following day pursuant to the search warrant. The police initially attended the respondent's residence for one purpose only: to arrest him, not to search for evidence. The police officers who conducted the ten-minute cursory search of the residence incidental to arrest did so with the sole intention of seeing whether anyone else was there who may have had access to firearms. Nothing was seized from the residence at that time. And the vast majority of information in the ITO filed in support of the warrant came from the evidence the police gathered prior to the respondent's arrest.

118. Just because there was a temporal and contextual link between the arrest and the finding of the evidence the following day does not inevitably lead to the conclusion that Cst. Sinclair's unauthorized entry, and the cursory search incidental to arrest, was an integral component of the investigation that led to the finding of evidence.

119. These circumstances clearly distinguish this case from *Côté* and reveal that there was no

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[138] *Côté*, at ¶79.

basis upon which the majority could conclude that the "totality" of the search process was tainted by the unconstitutional entry, arrest, and clearing search, which preceded the issuance of the warrant.[139]

120. This lack of a causal connection between the breach and the evidence favours admission of the evidence. In *R. v. Perjalian*, the BCCA, referring to this Court's decision of *R. v. Strachan*,[140] stated:[141]

> At para. 47, the Court went on to say that the absence of a causal connection between the breach and discovery of the evidence may be relevant in the s. 24(2) analysis itself, in considering whether admission of the evidence would bring the administration of justice into disrepute.

121. In *R. v. Mian*, this Court concluded that the lack of a causal connection between the breach and the evidence was a proper factor for a judge to consider in a s. 24(2) analysis.[143]

122. Appellate courts across the country have found that a weak causal connection weighs in favour of admission: *R. v. Volk*; *R. v. Spence*; *R. v. Keror*; and, *R. v. Schrenk*.[144]

123. The implication of the majority's decision is that evidence seized pursuant to a search warrant could rarely if ever be admitted when there had been an earlier unlawful entry into a residence for the purpose of arresting a suspect. The evidence will inevitably be excluded even if the entry is brief, the police misconduct is not systemic and does not amount to bad faith, and there is no causal connection between the breach and the obtaining of the evidence.

124. In other words, it's one strike you're out – whatever the circumstances – whenever there is a temporal and contextual connection short of a causal connection.

125. In practical terms, this means that police who find themselves in similar circumstances might as well conclude their investigation without seeking and executing a warrant, since the evidence is destined for exclusion despite the lack of causal connection.

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[139] BCCA Reasons, A.R., Vol. I, p.101, ¶¶147.
[140] *R. v. Strachan*, [1988] 2 S.C.R. 980.
[141] *R. v. Perjalian*, 2011 BCCA 323, at ¶66.
[143] 2014 SCC 54 [*Mian*]at ¶88.
[144] 2010 SKCA 3, at ¶29; 2011 BCCA 280, at ¶51-59; 2017 ABCA 273, at ¶37; and, 2010 MBCA 38, at ¶118.

126. As this Court has stated, the *Grant* test is a flexible and the balancing imprecise.[145] Rather than slavishly adhere to the general rule first espoused in *McGuffie*, the majority should have approached the balancing flexibly and considered all the factors relevant on balancing, particularly the lack of causal connection between the breach and the evidence obtained by the search warrant. This factor clearly favoured admission of the evidence. Their failure to give any weight to this factor is a legal error.

PART IV – SUBMISSIONS ON COSTS

127. The appellant does not seek costs and asks that no costs be awarded against it.

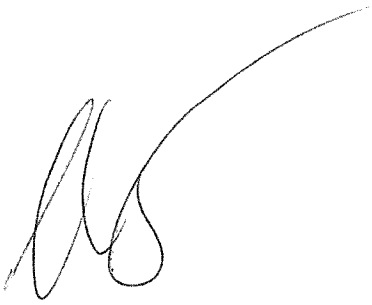
PART V – NATURE OF ORDER SOUGHT

128. The appellant submits that this Court should allow the appeal, set aside the order of the BCCA, and restore the respondent's convictions.

PART VI – PUBLICATION BAN

129. There are no publication bans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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March 8, 2021
Vancouver, B.C.

[145] *Grant*, at ¶85-86; *Mian*, at ¶88.

PART VII – TABLE OF AUTHORITIES

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