SCC File 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)

RESPONDENT'S FACTUM

(Pursuant to Rule 42 of the *Rules for the Supreme Court of Canada*)

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PART 1 – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. On November 17, 2017 the respondent opened his bedroom door to police officers. He was tackled and arrested on his bed. Following his arrest, the officers conducted a clearing search of the home and observed evidence useful for their investigation. This conduct was without warrant and without exigent circumstances. It was a serious violation of the respondent's rights under the *Canadian Charter of Rights and Freedoms*.

2. Following the arrest and search, the Royal Canadian Mounted Police (the "RCMP") obtained a search warrant and seized evidence from the home. At trial, the respondent challenged the admission of this evidence.

3. The trial judge agreed that the police conduct breached the respondent's s. 8 *Charter* rights. Nevertheless, the trial judge found the evidence admissible in his analysis under s. 24(2).

4. This appeal concerns the correct application of the factors identified by this Court in *R v. Grant*, 2009 SCC 32.

5. The majority of the British Columbia Court of Appeal (the "BCCA") found the trial judge had erred in two ways. First, the majority found the trial judge erred in law by treating the *Charter*-compliant conduct of other officers as mitigating the seriousness of the *Charter*-infringing conduct.

6. Second, the majority found that the trial judge failed to properly weigh the *Grant* factors in the overall balancing stage to determine whether the administration of justice will be brought into disrepute.

7. As a result of these errors the majority did not defer to the trial judge's ruling and engaged in a fresh s. 24(2) analysis. The appeal was allowed, the evidence excluded, and the matter remitted for a new trial.

8. The breaches of the respondent's *Charter* rights were flagrant violations of well-established legal principles, in an area where he enjoys a high expectation of privacy. The breaches were serious, and the trial judge erred in his overall assessment. The majority was correct in their findings on the trial judge's errors.

9. This Court need not interfere with the majority findings to reaffirm principles of deference to trial judges' decisions. Faced with the legal errors present in this case, an appellate court need not defer to such reasoning. This appeal should be dismissed.

B. Statement of Facts

10. On November 3, 2017 an e-cigarette store, "Boss vapes", was robbed in Burnaby, B.C. On November 16, 2017, "Deer Lake Market," a convenience store, was robbed in Burnaby, B.C. The respondent became a suspect in these robberies after one of the perpetrators was arrested and gave a warned statement to the RCMP.[1]

11. The respondent was implicated in the robberies and his residence was identified. On November 17, 2017, members of the RCMP and the Metro Vancouver Transit Police (the "MVTP") had a briefing to discuss the arrest of the respondent.[2]

12. At the time, the respondent was bound by a court order that included a curfew of 7pm to 6am and a condition that he present himself at the doorway to his residence to ensure compliance with the curfew. The officers devised a plan to attend the residence and conduct a curfew check. Once the respondent presented himself at the door he would be arrested.[3] The respondent shared the residence with others who were not targets of the investigation.

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[1]The trial judge's ruling on the *Charter Voir Dire* (the "BCPC reasons") are located in the Appellant's Record ("A.R.") Vol. I, pp. 3-27. References to the BCPC Reasons will be from this point on be to paragraph alone.
[2] BCPC Reasons, para. 15.
[3] BCPC Reasons, para. 23.

The warrantless entry and arrest

13. Shortly after 8:00pm on November 17, 2017 Constable Sinclair and Constable Adzijaj positioned themselves at the rear sliding glass door of the respondent's residence. The officers knocked and announced their presence.[4]

14. After hearing no response from the respondent, Constable Sinclair tried the sliding glass door and discovered it to be open. The officer entered the home unilaterally and without consulting any of his fellow officers.[5]

15. Constable Adzijaj became nervous and fearful when he saw Constable Sinclair enter the residence. He was hoping things didn't "go south." Constable Adzijaj felt it necessary to follow his fellow officer inside for officer safety reasons.[6]

16. Constable Adzijaj was aware that entering someone's home without a warrant could potentially be a very serious breach of the *Charter*.[7] He testified that if given the opportunity, he would have advised against it. However, there was no discussion amongst the officers or thought of retreating once inside the residence.[8]

17. The officers made their way to the bedroom door of the respondent. Music could be heard playing inside. Constable Sinclair knocked on the bedroom door and announced "Police."[9]

18. The respondent opened the door and Constable Sinclair gave the following evidence about what happened next:

> I asked him for identification because I said I'd never dealt with him before, which is just - - just kind of a quick conversation there. And then within a- -

[4] BCPC Reasons, para. 25.
[5] BCPC Reasons, para. 27.
[6] BCPC Reasons, para. 28.
[7] A.R. Vol. III, pp. 27, ll 40-47.
[8] A.R. Vol. III, pp. 39-40, ll 10-47.
[9] BCPC Reasons, para. 31.

> moment after that, I notified him that he was under arrest for robbery. And it's kind of like a bear hug, I just kind of quickly grabbed him, and we both fell onto - he had a bed, like, immediately there at the - - behind us. And that's where Adzijaj came in right behind me, and we took one arm and put the handcuffs on him.[10]

19. Constable Sinclair searched the respondent and removed his shoes. The respondent was taken into custody.[11]

20. In his testimony, Constable Sinclair testified that he believed the arrest was conducted in a safe manner. He testified that he would have done it the same way a second time. He did not think it was a "big deal."[12]

The warrantless clearing search

21. Following the arrest, Constable Adzijaj conducted a clearing search of the residence. While clearing the upper portion of the residence he noticed a closet door propped open. He looked inside the closet and observed a flat of vape juice commonly used for e-cigarettes.[13]

22. Constable Pare also made his way into the residence after the arrest for a quick "look around."[14] He recalled being told at the earlier briefing to keep a "lookout" for a black mask if an arrest was made.[15] The perpetrator in both robberies had been wearing a black skull mask. Constable Pare made his way into a small office connected to the living room. He entered the office to clear for occupants. Once inside, in plain view, he observed a black skull mask.[16]

23. Corporal Chen also assisted in the clearing search of the residence. Corporal Chen conceded there were no officer safety concerns once the respondent was taken into custody.

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[10] A.R. Vol. III, pp. 55, ll. 21-31.
[11] BCPC Reasons, para. 34
[12] A.R. Vol. III, pp. 87, ll 21-27, pp. 88, ll 16-32.
[13] BCPC Reasons, para. 36
[14] BCPC Reasons, para. 47
[15] BCPC Reasons, para. 42.
[16] BCPC Reasons, para. 48. See also A.R. Vol. III, pp. 114, ll 1-14.

The search warrant for the residence

24. After the arrest and clearing search the RCMP applied for a search warrant. The Information to Obtain the search warrant (the "ITO") contained observations and evidence observed during the unlawful arrest of the respondent and the clearing search of his residence.

25. The ITO *also* contained the warned statement of the accomplice and other lawfully obtained evidence in the investigation. The ITO was sworn on the evening of November 17, 2017 and the search warrant was executed at 12:40pm, the next day, November 18, 2017.

26. During the execution of the search warrant the police seized the following items relevant to their investigation: several packages of Belmont cigarettes; vape products; a pair of grey sweatpants; a black mask with a white skull logo; a pair of black gloves; a black Under Armour hoodie; two pairs of Nike running shoes; a CZ 858 model rifle; and a loaded magazine.

Positions of the parties

27. The respondent filed Notice that he was seeking an order excluding all evidence seized from his residence pursuant to ss. 8 and 24(2) of the *Charter*. Four officers testified on the *voir dire*: Constables Adzijaj, Sinclair, Pare and Corporal Chen.

28. The respondent challenged the lawfulness of the search warrant issued for his residence and the unlawful arrest and clearing search in a s. 8 *voir dire*. Submissions on ss. 8 and 24(2) were heard together in the *voir dire*.

29. The respondent's position was that his rights were violated when the police entered his residence without warrant and arrested him inside his bedroom. The respondent's position was that a further breach occurred when the police conducted a clearing search of the residence after the arrest.[17]

[17] A.R. Vol. II, pp. 87, para. 6(a)-(c) [respondent's written submissions].

30. The respondent was not required to argue these breaches in a s. 8 *voir dire*, because Crown counsel conceded that the respondent's rights had been breached by this police conduct. At the commencement of submissions on the *voir dire* Crown conceded three distinct breaches: (i) the entry into the sliding door; (ii) the further entry into the bedroom; and (iii) the clearing search following the arrest.[18] The respondent made submissions on the facial validity of the warrant and s. 24(2) following the Crown concession.

31. The respondent argued that after excision of the unlawfully obtained evidence the search warrant was no longer facially valid. As a result of these breaches collectively, the respondent argued the evidence should be excluded at trial.

32. In submissions on s. 24(2) the respondent characterized the unlawful entry into the home as intentional, wilful behaviour which demonstrated a reckless disregard for the respondent's rights.[19] The respondent argued that Constable Sinclair's evidence demonstrated a casual attitude towards the *Charter* and this was the type of police attitude that the court cannot be seen to condone.[20]

33. The respondent said the clearing search was itself another serious breach of his rights. The respondent argued that the police essentially "doubled down" on their initial warrantless entry by committing yet another serious breach in searching the residence.[21] The "clearing search" breach was further aggravated because the police used it as an opportunity to search for evidence in the absence of any officer safety concerns.[22]

34. The respondent argued the impact on his privacy rights was significant given the high expectation of privacy in his home. The respondent argued these were settled legal principles.

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[18] A.R. Vo. III, pp. 121, ll 41-47, pp. 122, ll 1-44.
[19] A.R. Vol. III, pp. 138, ll, 12-15.
[20] A.R. Vol. III, p. 139, ll 8-9 and pp. 140, ll1-5.
[21] A.R. Vol. III, p. 140, ll 9-15.
[22] A.R. Vol. III, p. 140, ll 16-30.

35. The respondent stated that the third factor usually favoured admission of the evidence, but it was somewhat tempered in the present case because the Crown still had other forms of evidence available in the prosecution.

36. For their part, Crown counsel acknowledged that various portions of the ITO had to be excised given the concession on the breaches. Nevertheless, the Crown argued that the ITO could still be upheld upon review.

37. In submissions on s. 24(2) Crown counsel disputed the respondent's characterization of Constable Sinclair's conduct. Crown argued that the officer was mistaken about the scope of the respondent's right to privacy because he mistakenly believed the respondent to be living in a separate suite within the home.[23]

38. The Crown argued there was an evidentiary basis for the officer to believe the respondent lived in a separate suite hived off from the rest of the residence.[24] The Crown argued, the seriousness of Constable Sinclair's *Charter*-infringing conduct must be viewed in this context. The Crown submitted that the police had a plan to arrest the respondent which was *Charter* compliant and Constable Sinclair reasonably believed he was in common property when he went into the residence. The Crown submitted the breach was therefore committed in good faith.[25]

39. By way of the clearing search the Crown argued that it was *bona fide* conduct notwithstanding it was in breach of the respondent's rights. The Crown argued that a clearing search of the residence would have taken place even if the respondent had been arrested lawfully.

40. By way of impact on the rights of the respondent, the Crown conceded that the privacy rights of the respondent were very high. The Crown stated this was a common sense proposition and that this factor weighed heavily in excluding the evidence.[26]

41. In balance the Crown argued that the police didn't intend to breach the rights of the respondent and the breaches were the result of an honestly held but mistaken belief by Cst. Sinclair.

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[23] A.R. Vol. III, p. 157, ll 25-43.
[24] A.R. Vol. III, p. 159, ll 25-29.
[25] A.R. Vol. III, p. 161, ll 20-22.
[26] A.R. Vol. III, p. 165, ll 35-47.

Further the search of the residence was bona fide and in good faith. The respondent argued that in all of those circumstances the long-term repute of the administration of justice favours admission of the evidence.

Trial judge's ruling on the voir dire

42. The trial judge upheld the validity of the search warrant upon review. This finding was not disturbed by the Court of Appeal and is not at issue before this Court.

43. The trial judge went on to consider the exclusion of the evidence on the basis of the s. 8 breaches that did occur. The trial judge found three breaches of the respondent's rights which mirrored the concessions of the Crown.[27]

44. The trial judge ruled that the conduct of Constable Sinclair resulted in a serious violation of the respondent's rights but deemed it necessary to consider the totality of the police conduct at the time of this breach.

45. The trial judge found that Constable Sinclair appeared to lack insight into the importance of rights guaranteed by s. 8 of the *Charter*. However, he found that his conduct was opportunistic but not wilful. He found a lack of systemic or institutional conduct and that other officers had acted professionally. The trial judge found that the totality of the police conduct did not bring the administration of justice into disrepute and the first factor of the *Grant* analysis favoured inclusion of the evidence.

46. The trial judge characterized the impact on the respondent's rights as significant and unjustified and noted that the Crown had essentially conceded this point.[28] However, he noted there was not the presence of other family members in the home and it did not impact the respondent's dignity. He ruled that it was not profoundly intrusive and therefore did not bring the administration of justice into disrepute. The trial judge found this factor favoured the admission of the evidence.

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[27] BCPC Reasons, para. 91.
[28] BCPC Reasons, para. 107.

47. Under the third factor the trial judge found the evidence to be real and highly reliable in the context of serious charges. He concluded that this factor favoured admission of the evidence.[29]

48. On balance the trial judge found the evidence admissible.[30]At trial, the respondent invited the trial judge to convict on counts #1, 4, 5, 6, 7, and 8 of the information before the provincial court.

BCCA Reasons

49. The BCCA unanimously agreed that the trial judge did not err in upholding the facial validity of the search warrant.[31] The Court of Appeal was also unanimous in finding there was a sufficient link between the breaches of the respondent's rights and the seized evidence. The Court of Appeal held that the "obtained in a manner" threshold was sufficiently overcome to engage in a s. 24(2) analysis.[32]

50. Justice Griffin (Justice Fenlon concurring) allowed the appeal, excluded the evidence, and ordered a new trial. The majority concluded that the trial judge had erred in two ways during his analysis under s. 24(2). Consequently, the decision was not owed deference and the Court of Appeal conducted a fresh s. 24(2) analysis.

51. The majority found the trial judge had erred by (i) improperly considering the *Charter*-compliant conduct of the police as mitigating the *Charter*-infringing conduct of their actions, and (ii) improperly balancing the *Grant* factors in the overall assessment.

52. In the majority's view the trial judge had erred in principle by attenuating Cst. Sinclair's serious conduct with other conduct which did not breach the *Charter*. This reasoning inevitably led the judge to rule that the totality of the police conduct was therefore less serious and favoured admission.

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[29] BCPC Reasons, para. 117.
[30] BCPC Reasons, para. 120.
[31] The Court of Appeal's reasons (the "BCCA reasons") are located in the Appellant's Record (the "A.R.") Vol. I, pp. 71-108. References to the BCCA Reasons will be, from this point on, to paragraph alone. BCCA Reasons, para. 154.
[32] BCCA Reasons, paras. 84, 154.

53. Further the majority found the trial judge erred in assessing the effect on the administration of justice independently at each stage of the *Grant* analysis. This approach effectively compartmentalized what is meant to be a broad overall analysis.

54. In their fresh s. 24(2) analysis the majority endorsed the trial judge's initial finding that the conduct of Constable Sinclair resulted in a serious violation of the respondent's rights.[33] The majority went on to state that these violations were flagrant and contrary to well established principles of law. The law surrounding a warrantless entry into a residence has been clear since this Court's decision in *Feeney.* The majority found the violations to be at the serious end of the spectrum and pull towards exclusion of the evidence.

55. Addressing the second inquiry under *Grant*, the majority noted the trial judge had correctly observed the respondent enjoyed a high expectation of privacy in his home and the unwarranted police intrusion was "significant and unjustified."[34] The impact on the respondent's *Charter* rights was connected to the seriousness of the breaches because they were carried out in an area where the expectation of privacy is high.[35]

56. Although the search warrant was valid the majority concluded that the doctrine of discoverability did not carry much weight in the present case.[36] The majority found the impact of the breaches to be profoundly intrusive and this factor pulled towards exclusion of the evidence.[37]

57. As to the third factor in the *Grant* analysis the majority acknowledged that the exclusion would seriously weaken the case against the respondent and society has an interest in the adjudication of the case on its merits. The majority found this factor favoured admission of the evidence.

58. On balance, the majority relied on this Court's decision in *Paterson* and *Le* to guide their analysis:

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[33] BCCA Reasons, para. 125.
[34] BCCA Reasons, para. 135.
[35] BCCA Reasons, para. 137.
[36] BCCA Reasons, para. 140.
[37] BCCA Reasons, para. 144.

> [148] As stated above under the general principles relevant to a s. 24(2) analysis, the more serious the unconstitutional conduct and the greater the impact on the *Charter*-protected interests, the stronger the case for exclusion. As I observed in discussing the judge's improper weighing of the *Grant* factors, "[w]here the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility" (*Le* at para. 142, citing *Paterson* at para. 56; *McGuffie* at para. 63). It is important to note that this general rule should not be applied rigidly. The majority of the Supreme Court of Canada in *R. v. Omar*, 2019 SCC 32, by substantially adopting the reasons of Justice Brown in *R. v. Omar*, 2018 ONCA 975, implicitly endorsed this general principle.

59. The majority concluded it was not necessary to depart from this general rule in the present case and excluded the evidence, quashed the convictions and ordered a new trial.

60. Justice Willcock, in dissent, would have deferred to the trial judge's assessment of the *Grant* factors. He held the trial judge had not erred in his analysis and there was no need to undertake a fresh s. 24(2) analysis.

61. For his part, Willcock J.A. agreed that it would have been an error in principle to treat the *Charter*-compliant conduct of other officers as attenuating the seriousness of Cst. Sinclair's misconduct.[38] However, he viewed the trial judge's treatment of this "other" evidence as a response to counsel's submissions in the *voir dire*.

62. Justice Willcock asserted that the respondent had argued at trial that the supervising officers who planned the respondent's arrest had implicitly approved the entry into and search of the home. In this context, it was necessary for the trial judge to respond to this submission. To go beyond this would be "reading too much into the reasons for judgment."[39]

63. As to the second error alleged on appeal, Willock J.A. agreed with the majority that assessing the effect on the administration of justice at each stage cannot replace the overall balancing inquiry. However, he viewed that it is not an error to consider the extent to which the

[38] BCCA Reasons, para. 165.
[39] BCCA Reasons, para. 165.

administration of justice may be brought into disrepute at each stage. Willcock J.A. noted that the trial judge had used language that mirrored the leading cases in his analysis.

64. Ultimately, Willcock J.A. noted that the trial judge's balancing assessment was "terse" but it was not necessary to say more at that point. The trial judge did all that was required and it is "no argument to say the judge's reasons could have been more comprehensive."[40]

65. Justice Willcock cautioned against letting a review court's own assessment of the analysis effect the determination as to whether the trial judge had erred in law.

PART II – ISSUES ON APPEAL

66. Whether 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 the *Charter*-infringing conduct.

67. Whether 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.

68. Whether the majority 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.

[40] BCCA Reasons, para. 180.

PART III – STATEMENT OF ARGUMENT

ISSUE #1

Did the trial judge err in law in his assessment under s. 24(2) of the Charter by considering Charter-compliant police conduct to be mitigating?

The legal framework

69. This Court held in *R v. Harrison,* 2009 SCC 34 that a systemic problem can aggravate the seriousness of a breach, but its absence is not a mitigating factor in the analysis.[41] Similar conclusions have been reached in *R v. McGuffie* 2016 ONCA 365 at para. 67*; R v. Skurski,* 2019 ONSC 2943 at para. 27; and *R v. Johns,* 2018 ONSC 464 at para. 33.

70. In the matter at bar, the Court of Appeal was unanimous that it would have been an error in law to mitigate the *Charter*-infringing conduct by reference to other lawful *Charter*-compliant conduct.

71. It is clear the trial judge referenced other lawful conduct in his analysis.[42] It is also clear the trial judge deemed it necessary to address the "totality" of the police conduct in the first branch of the *Grant* analysis.[43] His purpose in addressing this conduct is where the Court of Appeal split.

72. The appellant submits that these comments were made in direct response to defence counsel's submissions. The appellant also submits that the trial judge's impugned reasons were made in the context of situating the *Charter*-infringing state conduct on a scale of culpability.

73. The respondent submits the trial judge used the lawful police conduct to mitigate his finding that the breach was serious. This led to a finding that the overall or ***totality*** of the police conduct was therefore less serious. This is an error in law.

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[41] *R v. Harrison,* 2009 SCC 34 at para. 25.
[42] A.R. Vol I, p. 22, para. 94, p. 23, paras. 95, 104.
[43] A.R. Vol. I. p. 22, para. 92.

74. The respondent submits that a plain reading of the trial judge's ruling supports this position. The language used by the trial judge and the logic of the reasons as a whole, are illustrative of this point.

The trial judge erred in law

75. In *R v. Gagnon,* 2006 SCC 17 this Court emphasized the requirement of a review court to examine the reasons as a whole:

> ……A trial judge's language must be reviewed not only with care, but also in context. Most language is amenable to multiple interpretations and characterizations. But appellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the individual linguistic components……

76. In the matter at bar the trial judge began his s. 24(2) analysis with a finding that Constable Sinclair's conduct was serious. This is an infallible proposition. The entry into a private home absent judicial authorization or exigent circumstances is a serious breach of the *Charter*. This Court has recognized as much in *R v. Silveira,* [1995] 2 S.C.R. 297 at para. 152; *R v. Paterson,* 2017 SCC 15 at para. 46; and *R v. Morelli,* 2010 SCC 8 at paras. 105 and 106.

77. The trial judge was aware of these firmly established legal principles. This was apparent in the exchange with Crown counsel at the outset of their submissions when the trial judge immediately stated "I'll be candid. I found the conduct concerning."[44]

78. The trial judge said the following about the seriousness of the breach in the context of his 24(2) analysis:

> There is no question that the conduct of Cst. 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 applicant's s. 8 Charter right was violated. [emphasis added][45]

[44] A.R. Vol. III, p. 157, ll 11-12.
[45] BCPC Reasons, para. 92.

79. This impugned paragraph exemplifies the legal error. The remainder of the reasons endorse this erroneous logic. The reasons reveal the trial judge started with a finding of an unquestionably serious breach and concluded that the factor nonetheless favoured admission and is by implication less serious.

80. It is difficult to reconcile the trial judge's starting and ending point, without appreciating that the trial judge mitigated his initial "serious" finding, by considering other lawful police conduct.

81. Immediately after finding that there was a serious breach the trial judge went on to note that Constable Adzijaj (an officer who entered the home along with Constable Sinclair) conducted himself professionally:

> [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. [emphasis added]

82. The trial judge's conclusions on the first factor in the *Grant* analysis were as follows:

> [104] In conclusion, Constable Sinclair's *Charter*-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.
>
> [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.

83. Constable Adzijaj's preferred method of affecting the arrest was not a relevant factor in the analysis. The "totality of the police conduct" referred to by the trial judge included the lack of any systemic or institutional failings of the police department, that the treatment of the respondent was neither inhumane nor degrading and that the initial plan to arrest the respondent was *Charter*

compliant. This lawful police conduct was assessed against Constable Sinclair's serious *Charter* infringing conduct to conclude that the ***totality*** of the police conduct was therefore less serious.

84. It is never necessary to address the totality of police conduct that is occurring at the time of a breach. The only necessity is to address the state conduct that lead to the breach.[46] The observation that police were acting properly before they acted improperly does not mitigate the seriousness of the breach.[47]

85. Justice Griffin writing for the majority noted the erroneous reasoning of the trial judge at paragraph 100:

> The logic of the judge's reasons in referring to other officers not being involved in Constable Sinclair's misconduct was to identify that the totality of the state conduct was less serious and less likely to require the court to dissociate from it by excluding the evidence.

86. A logical, common sense interpretation of the trial judge's reasons reveals that he found a serious breach in a well settled area of the law. He was right to do so and noted it twice in his reasons. There was, as he stated, "no question" about this. However, his examination of the "totality of the police conduct" attenuated this finding and he fell into error.

87. The *Grant* analysis and the remedial function of s. 24(2) serve to address the *Charter*-infringing conduct of the state. They are not intended to be an overarching assessment of police conduct in the investigation from beginning to end. The "totality of police conduct" is never at issue. The trial judge fell into error when he assessed lawful police conduct against unlawful police conduct to reach a conclusion that the totality of the police conduct was therefore less serious.

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[46] *Grant* at para. 72.
[47] *Johns* at para. 33.

Response to the appellant's argument

(i) The trial judge was responding to counsel's submissions

88. The appellant argues that the trial judge was simply responding to trial counsel's submissions about the conduct of the other officers. In dissent, Willcock J.A. found that it was "necessary" for the trial judge to address the conduct of the other officers in order to address counsel's submissions:

> [163] This conduct was alleged to have been part of a pattern of disregard of the appellant's rights, of "intentional, wilful, reckless behaviour". The suggestion in argument at trial was that those who planned the appellant's arrest, at the briefing to which counsel referred, implicitly approved the entry into and search of his home. It was in the context of that assertion that we must read the trial judge's assessment of the police conduct. In light of the submissions, the judge was correct to say it was necessary to address *the totality of the police conduct* at the time the applicant's s. 8 *Charter* right was violated.
>
> [164] Immediately after the passage cited by my colleague as reflecting consideration of the conduct of some officers as *mitigating*, (para. 92 of the reasons on the *voir dire*), the trial judge specifically addressed the most significant allegation of *aggravating* misconduct: that the search following the unlawful entry into the residence and unlawful arrest was unnecessary or too extensive. He found that it was not, apparently rejecting the suggestion that the police "doubled down" on Constable Sinclair's misconduct.

89. The respondent did not argue at trial that those who planned the appellant's arrest implicitly approved the entry into and search of his home. There is no basis for this assertion. Counsel for the respondent at trial argued there was a pattern of breaches. Crown counsel conceded there were three separate and distinct breaches. The trial judge found three separate breaches.

90. The respondent did not argue that the clearing search was an aggravating factor on Constable Sinclair's already serious conduct. The clearing search was a separate breach altogether. The comment "doubling down" was a reference to the police committing yet another breach not aggravating the unlawful entry.

91. Trial counsel began her submissions on s. 24(2) by stating:

> I'll deal next with the *Grant* factors. The first factor, of course, is the seriousness of the *Charter*-infringing state conduct. In my submission the overall state conduct here is very serious. Each of the individual breaches, I say, are serious by themselves, but collectively they establish that there was a pattern of abuse or pattern of disregard, and that weighs heavily in favour of exclusion.[48]

92. There was no suggestion that trial counsel argued a systemic breach or that other members approved of Constable Sinclair's conduct. The majority also rejected this assertion in their reasons.[49]

93. Counsel at trial did not suggest that Constable Sinclair's conduct was inhumane or degrading. However, the trial judge made an explicit finding that the arrest of the respondent "did not entail conduct that was inhumane or degrading."[50]

94. Counsel at trial argued a pattern of breaches in the arrest of the respondent but did not argue the breach was systemic to the police department. However, the trial judge made a finding that Constable Sinclair's conduct was not indicative of a pattern of system or institutional disregard of constitutional rights.[51]

95. Counsel at trial did not argue that the plan to arrest the respondent using the guise of a curfew check was unlawful or inappropriate. In fact, counsel argued the opposite. Yet the trial judge made a point in his reasons to note the plan to arrest the respondent was a lawful one.[52]

96. These are not findings made in response to trial counsel's submissions. Trial counsel was not arguing "aggravating factors" on a *Charter* breach. Counsel was arguing that a second, separate breach altogether had occurred, and this breach was serious in and of itself. The trial judge's comments are an attempt to address the totality of police conduct both unlawful ***and*** lawful. The latter of which has no part in the analysis.

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[48] A.R. Vol. III, p 136, ll 21-30.
[49] BCCA Reasons, para. 98.
[50] A.R. Vol. I, p. 24, para 102.
[51] A.R. Vol. I, p.24, para 103.
[52] A.R. Vol. I, p. 23, para 99.

(ii) The trial judge was situating the misconduct on a scale of culpability

97. The appellant argues that the reasoning employed by the trial judge was merely to situate the breach on a scale of culpability. There is no doubt that a trial judge is expected to do just that in the context of a 24(2) hearing.[53] The appellant argues that the trial judge's comments are to be read as highlighting the absence of aggravating factors as opposed to the presence of mitigating factors. The appellant submits the trial judge was merely responding to trial counsel's arguments and therefore these comments are properly situated within the trial record.

98. The appellant suggests the majority exceeded the bounds of appellate intervention when they concluded that Constable Sinclair's conduct was already at the serious end of the spectrum. The appellant argues that the BCCA "re-characterized the evidence in a way they would have preferred to suit their preferred outcome." The appellant further states that the majority ought to have deferred to the trial judge's findings with respect to the seriousness of the breach.

99. In fact, there is no discernible difference between the majority's findings that Constable Sinclair's conduct was "already at the serious end of the spectrum" and the trial judge's finding that "there was no question it was a serious violation."

100. There is no need to create further subcategories of "serious" within the scale of culpability. Factors such as wilfulness or ignorance of *Charter* standards are what situate the conduct on the scale of culpability. These are what make the breach serious. There are no further aggravating factors to consider. The trial judge was alive to Constable Sinclair's flagrant disregard of *Charter* rights.

101. Constable Sinclair committed a clear and flagrant breach and was completely ignorant of the scope of his authority in that regard. He testified at trial that it was "no big deal" and that he would "do it again." His evidence at trial was so flagrantly ignorant of *Charter* standards that the Crown openly acknowledged Constable Sinclair's unreasonable beliefs about the scope of his

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[53] *Grant* at para. 75.

authority and told the trial judge "now he knows because after court I told him"[54] To wit the trial judge responded "we hope."[55]

102. It was on this basis that the trial judge correctly found the conduct to be a "serious violation" of the respondent's *Charter* rights. The trial judge properly situated the conduct at the outset of his reasons.

Conclusion on Issue #1

103. In essence, the appellant relies on the trial judge's conclusion to admit the evidence as an indication that he found the breach to be less serious. The appellant argues that the majority ought to have deferred to this ultimate conclusion.

104. The difficulty with the appellant's submission is that it ignores the trial judge's initial finding that the breach was serious. This finding is firmly supported by well established principles of law and the evidentiary record. The majority deferred to this finding. However, the trial judge fell into error when he went on to consider the totality of police conduct in his analysis. The reasons, when read as a whole, reveal such an error.

105. The majority was correct to find the trial judge erred in this regard and the appeal should be dismissed.

ISSUE #2

Did the trial judge err in law in his overall balancing of the Grant factors?

The legal framework

106. The respondent agrees there is no particular manner to express the overall balancing inquiry mandated by s. 24(2). However, the respondent disagrees with the submission that "the issue for

[54] A.R. Vol. III, p. 157, ll 41-43.
[55] A.R. Vol. III, p. 157, ll 44.

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" in *Grant*.[56]

107. There is never a "right way" or a "wrong way" for a trial judge to express their reasons. The issue for this Court to decide is whether the trial judge, in this case, fell into error in the balancing exercise mandated by *Grant*. It is not the way in which the trial judge expressed his reasons that creates the error, it is the reasoning the trial judge employed.

108. The trial judge correctly stated the test in *Grant* and applied the three factors as required in the s. 24(2) analysis. The appellant argues that the majority erred because "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."[57]

109. To the contrary the language of s. 24(2) requires a trial judge to determine whether the admission of the evidence would bring the administration of justice into disrepute "having regard to all the circumstances"

110. It is clear from *Grant* that a review of the three lines of inquiry is what precedes the analysis as to whether the administration of justice would be brought into disrepute. Willcock J.A. in his dissent cites the language of paras. 72-76 of *Grant* to support his finding that the trial judge applied the correct test.

111. While those paragraphs reference the exclusion of evidence at each stage of the analysis, they must be read in conjunction with paragraph 85:

> [85] To review, the three lines of inquiry identified above — the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits — reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of

[56] Appellant's Factum, p. 24, para. 87.
[57] Appellant's Factum, p. 26, para. 96.

> the evidence obtained by *Charter* breach would bring the administration of justice into disrepute. [emphasis added]

112. It is the three lines of inquiry which guide the consideration as to whether the administration of justice will be brought into disrepute.[58] This is a sequential analysis and "all of the circumstances" referred to in s. 24(2) encompasses the three lines of inquiry. This Court stated as much in *R v. Taylor*, 2014 SCC 50:

> [37] Having concluded that there was a breach of Mr. Taylor's right to counsel under s. 10(*b*) prior to the taking of the first set of blood samples, the remaining issue is whether to exclude the evidence under s. 24(2) of the *Charter*. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on the public's confidence in the justice system, having regard to "the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits"[emphasis added][59]

113. The majority endorsed this approach in their reasons.[60]

The trial judge erred in balancing the Grant factors

114. In the case at bar the trial judge determined whether the administration of justice will be brought into disrepute independently at each stage of the *Grant* analysis. This is apparent at paragraphs 105 and 112 of the trial judge's reasons.[61]

115. By assessing whether the administration of justice would be brought into disrepute independently, the trial judge effectively foreclosed the possibility of any balancing exercise at the end of the inquiry. With this reasoning, the overall balancing process mandated by s. 24(2) becomes nothing more than a mathematical formula. This is where the trial judge fell into error and this was the error recognized by the majority of the BCCA.

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[58] *R v. Le* 2019 SCC 34 at para. 41.
[59] *Taylor*, at para. 37.
[60] BCCA Reasons, para. 114.
[61] BCCA Reasons, paras. 105 and 112.

116. To employ the reasoning of the trial judge will render the balancing analysis nothing more than the average of three independent conclusions. This error becomes apparent in the trial judge's reasons on balance which are as follows "In balancing the *Grant* factors, I find that the evidence obtained from the search of the applicant's residence is admissible."[62]

117. In dissent, Willcock J.A. acknowledged the statement was terse, but it was not necessary to say more. It is, as he rightly points out, "no argument to say the judge's reasons could have been more comprehensive."[63] The difficulty in this case however, is that it could *not* have been more comprehensive at this stage even if he tried. Nothing more *could* have been said because the conclusion was pre-determined by that stage.

118. The appellant submits the majority of the BCCA 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."[64]

119. The appellant submits the majority ought to have deferred to the trial judge's findings with respect to the seriousness of the breach and the impact on the respondent's privacy interests.

120. The respondent submits that the issue is not a matter of form, but of substance. The trial judge's reasons do not reveal that he undertook the appropriate analysis.

121. The trial judge noted the violations to be serious at two points in his ruling.[65] The majority adopted the trial judge's finding that the *Charter*-infringing conduct was serious and the impact on the respondent's rights was significant and unjustified.

122. The majority relied on Doherty J.A.'s comments in *McGuffie*, later adopted by this Court in *Le* to support their position:

> [141] In *Grant*, the Court identified three lines of inquiry guiding the consideration of whether the admission of evidence tainted by a *Charter* breach

[62] BCPC Reasons, para. 120.
[63] BCCA Reasons, para. 180.
[64] Appellant's Factum, p. 26, para. 96.
[65] BCPC Reasons, paras. 92, 104.

> would bring the administration of justice into disrepute: (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. While the first two lines of inquiry typically work in tandem in the sense that both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion. More particularly, it is not necessary that *both* of these first two lines of inquiry support exclusion in order for a court to determine that admission would bring the administration of justice into disrepute. Of course, the more serious the infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the case for exclusion (*R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 62). But it is also possible that serious *Charter*-infringing conduct, even when coupled with a weak impact on the *Charter*-protected interest, will *on its own* support a finding that admission of tainted evidence would bring the administration of justice into disrepute. It is the sum, and not the average, of those first two lines of inquiry that determines the pull towards exclusion.

123. The trial judge assessed his findings that the breach was serious, and had a significant impact, independently of one another in his assessment on the administration of justice. It is the sum, not the average, of the first two lines of inquiry that determines the pull towards exclusion.[66]

Conclusion on Issue #2

124. The trial judge's reasoning precluded an effective balancing of a serious *Charter* breach combined with a significant impact on the respondent's privacy interest. Those findings ought to have been viewed cumulatively as per their impact on the administration of justice.

125. The majority was correct to find the trial judge erred in this regard and the appeal should be dismissed.

[66] *Le* at para. 141.

ISSUE #3

Did the majority err in their fresh s.24(2) analysis?

Jurisdiction does not lie to address this issue

126. The appellant has appealed to this Court as of right under s. 693(1)(a) of the *Criminal Code*. Such an appeal is limited to the "question of law on which a judge of the court of appeal dissents." This appeal is based on Willcock J.A.'s dissent. Justice Willcock did not dissent on the fresh analysis conducted by the majority. On the contrary, he specifically stated that it was unnecessary to "engage in a fresh and independent s. 24(2) analysis" in light of his disagreement with the majority on the first two issues raised by the appellant in this Court (at para. 156). In other words, it is only the first two issues raised by the appellant that are based on the dissent of Justice Willcock. It follows that there is no jurisdiction on this as of right appeal to address the third issue.[67]

127. Even if there were jurisdiction to address the third issue (and it is submitted there is none), there would be no jurisdiction to address the appellant's argument challenging the majority's finding that there was a sufficient link between the *Charter* violations and the seized evidence. The appellant had argued in the Court of Appeal, as a threshold issue, that there was an absence of a causal, temporal or contextual link between the *Charter* violations and the seized evidence. The majority rejected this argument,[68] relying in part on this Court's admonishment in *R v. Côté*, 2011 SCC that "the question of exclusion must not be approached in a compartmentalized fashion."[69] The majority specifically found that the accused "has demonstrated a sufficient temporal and contextual link between the unconstitutional conduct of the police and the evidence sought to be excluded."[70] The appellant renewed this argument "again" at the balancing stage, saying "there

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[67] In *R v. Keegstra*, [1995] 2 S.C.R. 381 at para. 31, this Court stated that "in some cases, two issues which may have been discussed separately at the court of appeal will be so inextricably linked as to form two aspects of the same question of law." This is not applicable where, as here, the dissenting judge explicitly declines to address the issue in question.

[68] BCCA Reasons, paras. 66-81.

[69] 2011 SCC 46 (*Côté*) at para. 79.

[70] BCCA Reasons, para. 84.

were at best only weak temporal and contextual links between the breaches and the obtaining of the evidence, and no causal link."[71] The majority again rejected this argument, citing *Côté*.[72]

128. In this Court the appellant argues the *Charter* breaches were not "an integral component in a series of investigative tactics,"[73] seeking to distinguish this Court's decision in *Côté*. The appellant concludes that the "lack of a causal connection between the breach and the evidence favours admission of the evidence."[74] This argument essentially rejects the majority's finding that there was a sufficient connection between the breaches and the evidence obtained. Importantly, Willcock J.A. specifically agreed with the majority that there was such a link.[75] The respondent submits that in arguing against this link the appellant is not supporting the dissenting reasons of Justice Willcock.

Alternatively, the majority did not err in their fresh s. 24(2) analysis

129. The appellant argues that the majority failed to give due weight to the lack of causal connection in their fresh s. 24(2) analysis. The appellant submits that the breaches were not an integral component in the investigation and the majority was wrong to rely on *Côté* in support of their decision.

130. The appellant says the majority gave no weight to this critical factor having pre-determined that the breach was serious and profoundly intrusive. The appellant takes issues with these findings describing Constable Sinclair's conduct as an "isolated error in judgment" and the impact on the respondent's rights being brief; "approximately 10 minutes in duration."

131. The respondent says that the majority gave due weight to and considered the lack of a casual connection in their analysis. The majority was correct to find that the totality of the search process

[71] BCCA Reasons, para. 146.
[72] BCCA Reasons, para. 147.
[73] Appellant's Factum, p. 31, para. 117.
[74] Appellant's Factum, p. 32, para. 120.
[75] BCCA Reasons, para. 154(b).

was tainted by the unconstitutional entry, arrest, and clearing search, which preceded the issuance of the warrant.

132. The respondent says the breaches were serious and their impact was on an area where the respondent enjoys a high expectation of privacy. The lack of a causal connection was not sufficient in the circumstances to ignore these findings.

(i) The breach was serious

133. The conduct of Constable Sinclair was not a brief error in judgment, but a wilful disregard of the *Charter*-protected rights of the respondent. Entry into someone's home absent judicial authorization or exigent circumstances has consistently been found to be a serious violation.

134. The majority of the BCCA noted that this Court's decision in *R v. Feeney*[76] was released in 1997 and that those requirements have now been codified in s. 529 of the *Criminal Code.*

135. Even prior to this Court's decision in *Feeney,* Cory J. writing for the majority in *Silveira* said:

> …As a result of this case, police officers will be aware that to enter a dwelling-house without a warrant, even in exigent circumstances, constitutes such a serious breach of *Charter* rights that it will likely lead to a ruling that the evidence seized is inadmissible.[77]

136. More recently in *Paterson* this Court reaffirmed those principles from *Feeney* and *Silveira:*

> …These police officers were not operating in unknown legal territory: their intention to effect a seizure on a "no case" basis was legally insignificant, in light of the well-established legal principles governing the authority of police to enter a residence without a warrant. The presumptive unreasonableness of warrantless searches, and the high privacy interest attaching to a person's residence have long been fundamental to our understanding of the proper relationship between citizen and state. And, longstanding judgments of this Court — *Grant* 1993, *Silveira* and *Feeney* — have, in considering the exigency of circumstances prompting warrantless entry, required the Crown to show *urgency*, particularly in the context of the search of a residence. As the Court observed in *Silveira*, at para. 140, "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'." Similarly, at para. 41, La Forest J. (in dissent, but not on this point) reiterated the high value

[76] *R v. Feeney,* [1997] 2 S.C.R. 13.
[77] *R. v. Silveira,* [1995] 2 S.C.R. 297 at para. 152.

> which the law places upon the security of a home from state intrusion. It is, he said, a "bulwark for the protection of the individual against the state [which] affords the individual a measure of privacy and tranquillity against the overwhelming power of the state"[78]

137. Constable Adjzijaj conceded in cross examination that entering someone's home in these circumstances could potentially be a serious breach of the *Charter*.[79] He acknowledged that had Constable Sinclair consulted with him, he would have advised against him entering the respondent's home.[80]

138. Constable Sinclair was not operating in unknown legal territory or a constitutional grey area. He was not influenced by any sort of urgency or exigency. He was not isolated or pressured into his "error in judgement." Constable Sinclair had the benefit of multiple officers at the scene, senior officers available by radio and the availability of a *Feeney* warrant should he have sought one. His decision to enter the home was wilful, considered and a flagrant violation of well-established principles of law.

139. Constable Sinclair's ignorance as to the scope of his authority may be the only factor precluding a finding that he deliberately breached the *Charter* in the circumstances. The appellant would have us reward the ignorance of Constable Sinclair by considering that the police *never intended* to breach the respondent's rights.

140. It is true, that in the absence of a deliberate intention to breach the *Charter*, a court will have difficulty finding actual bad faith. However, the absence of bad faith, is of course, not analogous to a finding of good faith.

141. This Court has routinely held, since the seminal decision in *Grant*, that ignorance of *Charter* standards cannot be equated with good faith.[81] More recently in *Le* this Court stated that police negligence in meeting *Charter* standards requires courts to dissociate themselves from such conduct.[82]

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[78] *Paterson*, at para. 46.
[79] A.R. Vol. III, p.27, ll 40-44.
[80] A.R. Vol. III, p. 39, ll 8-13.
[81] *Grant* at para. 72.
[82] *Le* at para. 143.

142. The respondent submits the majority was well positioned to find that Constable Sinclair's conduct fell at the very serious end of the spectrum. To conclude otherwise would be to ignore firmly established principles of law.

(ii) The impact was intrusive

143. The majority noted that the trial judge correctly held that the respondent enjoyed a high expectation of privacy in his home which was universally recognized. The majority endorsed the trial judge's finding that the unwarranted police intrusion was "significant and unjustified."[83]

144. The majority departed from the trial judge's finding that the impact was significant, although not "profoundly" so. The majority noted the respondent was tackled in his own bedroom by a large officer who was joined by other officers. The seriousness of the breach is closely connected to the impact because it was carried out in an area with a high expectation of privacy.[84]

145. The majority rejected the appellant's submissions that the doctrine of discoverability ought to mitigate the impact of the *Charter* breach.[85] The majority noted that discoverability can be a relevant factor in the analysis, but in the case at bar it does not carry significant weight.[86]

146. The majority relied on this Court's decisions in *Le* and *Paterson* to support their position that the search encroached on an area with a high expectation of privacy and was profoundly intrusive. The majority concluded this factor favoured exclusion.[87]

(iii) The majority gave sufficient weight to the lack of a causal connection

147. It is important to consider the majority's findings respecting the seriousness of the breach and the impact on the respondent in order to properly assess the weight to be given to the lack of a

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[83] BCCA Reasons, para. 135.
[84] BCCA Reasons, para. 137.
[85] BCCA Reasons, para. 138.
[86] BCCA Reasons, para. 140.
[87] BCCA Reasons para. 144.

causal connection. The lack of causal connection may be a relevant factor in the s. 24(2) analysis. However, it is but one factor to consider among others in the *Grant* test.[88] The lack of a causal connection is not determinative and is not to be assessed in isolation.

148. The majority specifically addressed the lack of causal connection in response to the appellant's submissions.[89] Implicit in the appellant's argument is that the lack of a causal connection is heightened in the matter at bar because the evidence was ultimately obtained pursuant to a valid search warrant. The appellant argues that all the evidence used to uphold the warrant was obtained prior to the *Charter* breaches.

149. The appellant frames the issue as if the search warrant was inevitable in the circumstances. While not specifically referencing the doctrine of discoverability, the appellant nonetheless suggests that the majority ought to have given greater weight to the absence of any casual connection, given the seizure of the evidence was ultimately by way of a valid warrant.

150. In that sense, the appellant argues that the breaches were not part of a series of investigatory tactics as the majority concluded. In this context, the appellant submits the lack of a causal connection favours the admission of the evidence.

151. The difficulty with this position is that the trial record is silent on whether the police would have applied for the search warrant in the absence of the arrest of the respondent in his home. The only evidence on this point comes from Corporal Chen who recalled discussing the "possibility" of a search warrant if the respondent was arrested at the residence.[90] Corporal Chen was unable to recall when the decision was made to obtain a search warrant.[91] Notably, Constable Sinclair had no recollection of a discussion about a search warrant in the briefing prior to the arrest of the respondent.[92] At best the evidence establishes the possibility of obtaining a search warrant once the respondent was arrested.

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[88] *R v. Mian,* 2014 SCC 54 at para. 88.
[89] BCCA Reasons, paras. 146-148.
[90] A.R. Vol. III, p. 94, ll 17-29.
[91] A.R. Vol. III, p. 102, ll 31-34.
[92] A.R. Vol. III, p. 67, ll 28-31.

152. The majority was right to say that the search warrant targeted the evidence observed in the respondent's home. Paragraphs 48(d) and (f) specifically reference items observed in the unlawful clearing of the residence.[93] The arrest of the respondent comprised an entire section of the ITO with the heading: "Arrest of Liam Reilly."[94]

153. During the arrest, Constable Sinclair removed the respondent's shoes and left them inside the bedroom. The respondent was wearing grey sweatpants. Constable Sinclair testified that he removed the shoes to search his socks. He then, apparently, forgot to put the shoes back on.[95]

154. After the arrest, Constable Sinclair went back to the detachment and viewed further CCTV video of the robbery. While viewing the video he determined that the shoes he had observed on the respondent were the same shoes worn by the perpetrator of the robbery.[96] Moreover, Constable Sinclair further opined that the sweatpants worn by the respondent during his arrest matched the ones worn by the perpetrator of the robbery. All of this information was specifically referenced in the ITO.[97]

155. During the clearing search of the residence Constable Pare had observed a black face mask with a white skeleton imprinted on it. This matched the facemask worn by the perpetrator of the robbery. This evidence formed part of the grounds of the ITO.[98]

156. There was, of course, other lawfully obtained evidence not connected to the *Charter* breaches outlined in the ITO. The affidavit was not targeted ***exclusively*** to the evidence observed in the unlawful arrest and search, but that is not what the majority stated. The ITO made specific reference to cogent pieces of evidence that were observed as a result of the *Charter* breaches.

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[93] A.R. Vol. III, p. 67, para. 48(f).
[94] A.R. Vol. III, p. 61, para. 43.
[95] A.R. Vol. III, p. 85, ll 23-28.
[96] A.R. Vol III, p. 85, ll 32-39.
[97] A.R. Vol. I, p. 67, para. 48F(f)
[98] A.R. Vol. I. p. 44, para. 44(d)

157. The respondent is not asking to revisit the issue of a causal connection. However, there was sufficient evidence in the record for the majority to conclude that the breaches formed an integral component of the investigation into the respondent.

158. The officers had planned to arrest the respondent before obtaining a search warrant. The officers unlawfully arrested the respondent in his home and unlawfully searched the residence observing compelling evidence. This evidence made its way into the grounds to lawfully search the residence.

159. The totality of the search process began with the arrest of the respondent in his bedroom and concluded with a lawful search warrant that withstood excision. There was strong temporal and contextual connection. The Court of Appeal was unanimous in its ruling that the connection passed the "obtained in a manner" threshold.

160. The lack of a causal connection was a relevant factor to consider, however it must also be measured with the majority's findings that the breach was at the serious end of the spectrum and profoundly intrusive. The appellant relies on cases such as *Spence*, *Schrenk*, *Keror* and *Volk* to support his position that the lack of a causal connection favours admission. With respect, the respondent says those cases do not stand for the proposition advanced by the appellant.

161. In *Spence* the British Columbia Court of Appeal not only found the lack of a causal connection, but also the complete lack of any temporal connection.[99] The Court of Appeal did not find a connection sufficient to overcome the "obtained in a manner" threshold. The BCCA also upheld the trial judge's decision that the breaches had no impact on the accused.[100]

162. More importantly the rulings in *Keror* and *Volk*, relied on by the appellant, establish the important distinction noted by the majority in the case at bar. In both of these cases, the lack of causal connection was also viewed contextually against the seriousness of the *Charter* breaches and the impact on the accused.

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[99] *R v. Spence*, 2011 BCCA 280, para. 57.
[100] *Spence* at para. 55.

163. In *Volk* the Saskatchewan Court of Appeal found the breaches to be at the lower end of the scale and noted that they occurred in an area where there is a lower expectation of privacy.[101] In *Keror* the Alberta Court of Appeal found the breach to be not particularly serious and that it had little if any impact on the *Charter*-protected interests of the accused.[102]

164. In each of these cases the first two factors of *Grant* and the lack of any causal connection were assessed cumulatively to reach the conclusion that the evidence should be admitted.

165. The majority undertook the same analysis in the case at bar. The majority noted that notwithstanding the lack of causal connection the police conduct was serious and had a profound impact. It was therefore necessary to exclude the evidence.[103]

166. The appellant is urging this Court to apply a rigid analysis as to whether the lack of causal connection should tip the balance towards admission. The appellant suggests that the majority's position is that evidence could rarely, if ever, be admitted in circumstances where an earlier warrantless search tainted a future lawful search. A "one strike and you're out" scenario to use the words of the appellant.

167. With respect, this argument ignores the findings of the majority respecting the first two factors in *Grant*. To ignore these findings is to engage in precisely the error identified by Cromwell J. in *Côté* and noted by the majority in their reasons.[104] The majority carefully considered the lack of a causal connection but it was also faced with serious police misconduct. In the face of such misconduct there was well settled jurisprudence to support their position.[105] The conclusion reached by the majority was sound in law and principle.

168. The appeal should be dismissed.

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[101] *Volk* at para. 29.
[102] *Keror* at para. 36.
[103] BCCA Reasons, at para. 152.
[104] BCCA Reasons, at para. 147.
[105] *Côté* at para. 79.

PART IV – SUBMISSIONS ON COSTS

169. The respondent makes no submissions on costs.

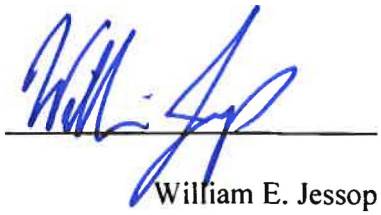
PART V – NATURE OF THE ORDER SOUGHT

170. That the appeal be dismissed.

PART VI – PUBLICATION BAN

171. There are no publication bans.

ALL OF WHICH IS RESEPCTFULLY SUBMITTED THIS 4TH DAY OF MAY, 2021



William E. Jessop
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