NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. White*, 2022 NSCA 61

Date: 20221019
Docket: CAC 505029
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Nathaniel White

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	April 13, 2022, in Halifax, Nova Scotia
Legislation:	*Canadian Charter of Rights and Freedoms*, ss. 8 and 9; *Criminal Code*, ss. 24(2) and 495(1)(a);
Cases Considered:	*R. v. Debot*, (1986), 30 C.C.C. (3d) 207, aff'd [1989] 2 S.C.R. 1140; *R. v. Grant*, 2009 SCC 32; *R. v. Beaulieu*, 2010 SCC 7; *R. v. Côté*, 2011 SCC 46; *R. v. Simon*, 2020 NSCA 25; *R. v. Vu*, 2013 SCC 60; *R. v. McGuffie*, 2016 ONCA 365; *R. v. Campbell*, 2018 NSCA 42; *R. v. Le*, 2019 SCC 34; *R. v. Tim*, 2022 SCC 12; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Harrison*, 2009 SCC 34; *R. v. Loewen*, 2011 SCC 21; *R. v. Chaisson*, 2006 SCC 11; *R. v. Boutros*, 2018 ONCA 375; *R. v. Pino*, 2016 ONCA 389; *R. v. Kossick*, 2018 SKCA 55; *R. v. Yakubovsky-Rositsan*, 2010 ONCA 748; *R. v. Adler*, 2020 ONCA 246; *R. v. Buhay*, 2003 SCC 30; *R. v. Paterson*, 2017 SCC 15; *R. v. James*, 2019 ONCA 288; *R. v. Omar*, 2018 ONCA 975, aff'd 2019 SCC 32;
Subject:	*Charter of Rights and Freedoms*. Exclusion of Evidence.
Summary:	Mr. White was a passenger in a Volkswagen Jetta parked in a public lot. The Jetta's occupants were detained while police investigated a reported motor vehicle accident in which the

Jetta was allegedly involved. The police then received information through an off-duty officer that a confidential informant had said one of the occupants of the Jetta possessed a firearm. The occupants were arrested and a search revealed guns and drugs in two bags in the Jetta. A *voir dire* was held concerning the admissibility of the evidence of drugs and weapons. The judge concluded that the confidential information did not provide a sufficient basis to form reasonable grounds for arrest, the search was illegal and the evidence should be excluded. The Crown appealed arguing the judge's *Charter* analysis was flawed.

Issues: (1) Did the judge err in assessing the impact of *Charter* breaches or the *Charter*-protected interests of Mr. White?

(2) Did the judge err in considering the "cumulative effect" of the *Charter* breaches at the final balancing stage?

Result: Appeal allowed. The judge failed to adequately identify and weigh Mr. White's privacy interests in her *Grant* analysis. She originally characterized police misconduct as "not serious" and not requiring the court to disassociate itself from that misconduct. Later in the final balancing stage, she concluded that the "cumulative effect" of multiple *Charter* breaches would bring the administration of justice into disrepute. The judge erred in so doing.

In conducting a new *Grant* analysis, the Court concluded that police misconduct was not serious, the privacy interests of Mr. White were only moderately impacted by the search, and the evidence was reliable and dispositive. The administration of justice would not be brought into disrepute by admission of the evidence.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. White*, 2022 NSCA 61

Date: 20221019
Docket: CAC 505029
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Nathaniel White

Respondent

Judges:	Bryson, Bourgeois and Beaton JJ.A.
Appeal Heard:	April 13, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson J.A.; Bourgeois and Beaton JJ.A. concurring
Counsel:	Rachel Furey and Colin Strapps, for the appellant Nicholaus Fitch, for the respondent

Reasons for judgment:

Introduction

[1] The Crown appeals the unreported *voir dire* decision of the Honourable Judge Aleta Cromwell (as she then was) in which the judge excluded evidence of guns and drugs located in a vehicle in a Halifax parking lot following a warrantless arrest of the occupants of a vehicle reported to have been involved in a motor vehicle accident. None of the car's occupants testified at the *voir dire.* The respondent, Nathaniel Dominic White, was one of those occupants.

[2] On a midsummer's day in 2020, the police were investigating a motor vehicle accident which had occurred in a large Halifax parking lot. The investigating officers received information there was a gun in one of the vehicles involved in the collision. The police then arrested the occupants of the car, searched it and located two handguns and various drugs. Charges followed, including two counts of possession of a handgun with readily accessible ammunition and possession of cocaine for the purpose of trafficking.

[3] The car's occupants claimed the initial arrest for possession of a weapon was unlawful and their detention violated s. 9 of the *Charter*. Accordingly, they argued the subsequent search was unreasonable and violated s. 8 of the *Charter*.

[4] The judge found ss. 8 and 9 of the *Charter* were breached and concluded that admitting the evidence under s. 24(2) would bring the administration of justice into disrepute. That exclusion was fatal to the Crown's case.

[5] While the Crown concedes the judge was correct in finding the arresting officer did not have reasonable grounds for the warrantless arrest, it contends that the s. 24(2) analysis was flawed in two ways. First, the judge over-emphasized the impact of the breach on Mr. White's *Charter*-protected interests because she failed to acknowledge and consider his reduced expectation of privacy in the car where the guns and drugs were found. Second, the judge erred in the balancing stage by mischaracterizing the effect of "multiple *Charter* breaches".

[6] The Crown concludes these two errors resulted in an unreasonable finding in the s. 24(2) analysis thereby obviating any deference this Court otherwise owes to the judge's s. 24(2) decision. The Crown urges this Court to conduct its own s. 24(2) analysis, unhindered by the errors that tainted the judge's decision. The

Crown says that the guns and drugs should have been admitted into evidence and doing so would not bring the administration of justice into disrepute.

[7] Mr. White disagrees, arguing that the judge's decision has to be reviewed "contextually" and her failure to mention the diminished expectation of privacy in a vehicle is not fatal since that point was raised in argument. Mr. White challenges the characterization of the impact of cumulative *Charter* breaches, says this Court owes deference to the trial judge's s. 24(2) analysis, and asks for dismissal of the appeal.

[8] For reasons that follow, the appeal should be allowed.

Facts

[9] On August 27, 2020, at approximately 1:14 p.m., the police responded to a report of a hit and run involving two vehicles at 6049 Young Street in Halifax. A female pedestrian was struck by one of the cars which then left the scene. Csts. Andrew MacNeil and Garret McCully of the Halifax Regional Police attended to investigate and spoke with the three occupants of a black Volkswagen Jetta which had been described as one of the two vehicles involved in the accident. Decoda White, Nathaniel White and Mariam Al Husseini were all sitting in the vehicle, eating, when the police arrived.

[10] The occupants of the Volkswagen were detained for approximately 45 minutes while Cst. MacNeil and his partner investigated the motor vehicle accident.

[11] During the course of the investigation, Cst. MacNeil was contacted by Sgt. Perry Astephen asking him to call Sgt. Justin Sheppard regarding information that Sgt. Sheppard had received concerning a firearm that might be located in the vehicle.

[12] Cst. MacNeil contacted Sgt. Sheppard who told him a confidential source had said Decoda White had a firearm in the vehicle. Cst. MacNeil arrested all three occupants of the car for weapon's possession.

[13] When Decoda White was told he was under arrest for possession of a weapon, Cst. MacNeil said he became argumentative and tried to flee. He was subdued and handcuffed.

[14] After the arrests, the Jetta was searched and drugs and two firearms were located in two closed duffle bags, one in the backseat of the vehicle and the other in the trunk. The bag in the backseat contained a loaded handgun along with a chequebook in the name of Decoda White. The bag in the trunk also had a handgun, along with marijuana, cocaine, cash, scales, and Nathaniel White's wallet. At that point, all three of the vehicle occupants were re-arrested for possession of a weapon and drug offences.

Evidence of Cst. MacNeil and Sgt. Sheppard Regarding Confidential Informant

[15] Sgt. Justin Sheppard said that on August 27, 2020, at approximately 1:40 p.m., while at home and off-duty, he received a telephone call from a confidential source who informed him Decoda White was in the company of a light-skinned male and female in a black Volkswagen that had blocked a silver SUV in the parking lot on Young Street where the Steak and Stein and Burger King were located. When the SUV attempted to leave, the driver may have struck another vehicle and left the scene. The confidential source also said that Decoda White possessed a firearm in the vehicle.

[16] Sgt. Sheppard testified that he had known his confidential source for more than five years when he was a member of the Drug Section, and he had used information received from the confidential source on approximately ten occasions. The information received had not proven false on any of these occasions. The confidential source had no convictions for perjury but did have a criminal record. The motivation of the confidential source was monetary gain and giving relevant information to the police.

[17] After he received this confidential source information, Sgt. Sheppard contacted Sgt. Perry Astephen who was in charge of the shift for the area. He told Sgt. Astephen what he had learned from his confidential source and asked Cst. MacNeil to contact him.

[18] Sgt. Sheppard testified he told Cst. MacNeil that Decoda White was involved in blocking an SUV vehicle. He also told Cst. MacNeil that Decoda White was with a light-skinned male and female. The SUV may have struck a female and another vehicle as it left the parking lot and Decoda White possessed a gun.

[19] By contrast, Cst. MacNeil said he was told by Sgt. Sheppard that a confidential source had informed Sgt. Sheppard that Decoda White was seen with a

firearm in the Volkswagen. He says he was not given details about the source, the type of firearm or its location. He conceded there was no firearm in plain sight and nothing else suggested the vehicle occupants were engaged in illegal activity.

[20] On cross-examination and re-direct, Sgt. Sheppard said his notes of his conversations on August 27, 2020 were made on October 3, 2020.

[21] The judge found Cst. MacNeil had testified in a straightforward manner and answered all questions posed to him. Although the judge noted the time delay in Sgt. Sheppard's recordkeeping from August 27, 2020 to October 3, 2020, she found this did not "cause me to question his credibility". However, with respect to differences between Cst. MacNeil and Sgt. Sheppard regarding their conversation, the judge preferred the evidence of Cst. MacNeil as his notes were made contemporaneously.

No Reasonable Grounds to Arrest

[22] The judge observed that s. 495(1)(a) of the *Criminal Code* requires that on a warrantless arrest the police must have reasonable grounds to believe that the person has committed or is about to commit an indictable offence. There is a subjective and objective component when establishing reasonable grounds to arrest without a warrant. The burden is on the Crown to show that on a balance of probabilities, a warrantless arrest was reasonable. All the circumstances must be considered. The judge noted the circumstances in this case included:

> [43] (a) the police attended the parking lot to investigate a motor vehicle accident involving two vehicles – a dark or navy blue Volkswagen Jetta and a second vehicle that had fled the scene, hitting a female pedestrian as it fled;
>
> (b) when officers arrived on scene, they began the investigation into the motor vehicle accident;
>
> (c) Cst. McCully went to speak with the female pedestrian who had been struck by the fleeing vehicle;
>
> (d) Cst. MacNeil spoke with Decoda White, Nathaniel White and Mariam Al Husseini who were in the Vokswagen [*sic*] vehicle in the parking lot;
>
> (e) No details were provided by Decoda White, Nathaniel White or Mariam Al Husseini regarding the type or colour of the other vehicle that had fled the scene;
>
> (f) Ms. Al Husseini provided the vehicle paperwork to Cst. MacNeil;

> (g) Cst. MacNeil returned to his vehicle to begin the report on the motor vehicle accident. While in his vehicle, Cst. MacNeil received a telephone call from Staff Sgt. Perry Astephen and asked to contact Sgt. Sheppard,who had information that a firearm was present;
>
> (h) Cst. MacNeil telephoned Sgt. Sheppard and was told that Sgt. Sheppard had received information from a confidential source that Decoda White was seen with a firearm in the vehicle. By that time, the paramedic had arrived to attend to the female pedestrian;
>
> (i) Mariam Al Husseini was in the ambulance. Decoda White was seated in the front passenger seat of the Volkswagen with the door open and his feet outside of the vehicle, on the ground. Nathaniel White was seated in the back seat of the Volkswagen with the door open and his feet outside of the vehicle, on the ground;
>
> (j) There was no firearm observed in plain view by Cst. MacNeil and there was no evidence of illicit activities.

[23] The judge concluded her listing of relevant circumstances by observing:

> [44] At this point, the investigation has changed from a motor vehicle accident investigation to an investigation into possession of a weapon. I accept there is a heightened public interest to deal quickly and efficiently with a threat to public safety that comes from this type of investigation.

[24] In assessing reasonable grounds to arrest, the judge referred to the well-known decision of *R. v. Debot*, (1986), 30 C.C.C. (3d) 207, aff'd [1989] 2 S.C.R. 1140, from which she quoted:

> Highly relevant … are whether the informer's "tip" contains sufficient detail to ensure that it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.

[25] The judge went on to describe the reliability of the information provided which included:

> [48] (a) Decoda White was with another light-skinned male and female and they had blocked in a silver SUV in the parking lot of the Steak and Stein and Burger King on Young Street in Halifax;
>
> (b) Decoda White and the other two individuals were in a black Volkswagen;

> (c) The silver SUV had attempted to leave, possibly striking another truck when leaving the parking lot; and
>
> (d) Decoda White had possession of a firearm in the vehicle.

[26] The judge was not satisfied that the confidential source was "proven reliable". In any event, she concluded that even if reliable, the *indicia* of reliability had not been passed on to Cst. MacNeil so he could form an objective opinion that there were reasonable grounds to arrest. The judge found Cst. MacNeil subjectively held an honest belief that he had reasonable grounds to arrest the vehicle occupants for possession of a weapon based on the information he had received from Sgt. Sheppard. He considered the information from a senior officer to be reliable, but he was not instructed by Sgt. Sheppard to make an arrest. Although he had never met Decoda White, he knew who he was through police intelligence. Notwithstanding his subjective belief, the judge found there were no objective grounds to sustain reasonable grounds to arrest. The judge concluded the arrest was unreasonable and there had been a breach of s. 9 of the *Charter*.

[27] Because the arrest was unlawful and violated the occupants' s. 9 rights, the search that followed was not incidental to arrest for the purpose of ensuring safety of the police and the public or to protect evidence from destruction or to discover evidence to be used at trial. The search was not otherwise authorized by law. Therefore, it was unreasonable and contrary to s. 8 of the *Charter*. The second arrest based on the unlawful search also breached s. 9 of the *Charter*.

[28] It was not argued, and the judge made no comment about whether a search for safety purposes would have been justified on the basis of the information provided to Cst. MacNeil that Decoda White possessed a handgun in the Jetta.

[29] Having concluded that *Charter* rights were violated, the judge turned to the s. 24(2) analysis to which the Crown takes exception. As developed further below, the Crown says the judge erred in her application of factors described in *R. v. Grant*, 2009 SCC 32.

Standard of Review and Applicable Law

[30] The test to determine whether the administration of justice would be brought into disrepute by exclusion of evidence requires application of a correct legal standard. Where the judge has considered the proper factors and has not made any unreasonable finding the judge's determination is owed considerable deference (*R. v. Beaulieu*, 2010 SCC 7; *R. v. Côté*, 2011 SCC 46; *R. v. Simon*, 2020 NSCA 25 at

¶10). However, if relevant factors are overlooked or the judge has made an error, a fresh s. 24(2) analysis is necessary (*R. v. Vu*, 2013 SCC 60 at ¶67). In *Vu*, the Court observed that the trial judge relied heavily on her finding that an ITO contained no facts supporting a warrant to search for documents respecting ownership or occupation of the residence. The Supreme Court found this finding erroneous and accordingly performed its own s. 24(2) analysis.

[31] The balancing of principles and their relation to the standard of review in the s. 24(2) application are aptly described by the Ontario Court of Appeal in *R. v. McGuffie*, 2016 ONCA 365:

> [60] Section 24(2) recognizes that the admission of constitutionally tainted evidence and the use of that evidence to convict persons may bring the administration of justice into disrepute. As observed in *Grant*, at paras. 67-71, s. 24(2) is premised on the assumption ***that there must be a long-term negative impact on the administration of justice if criminal courts routinely accept and use evidence gathered in violation of the legal rights enshrined in the Charter.*** At the same time, however, ***s. 24(2) accepts that the exclusion of evidence can also bring the administration of justice into disrepute.*** In *Grant*, the Supreme Court provided the framework for differentiating between those cases in which the exclusion of the evidence would promote the proper administration of justice and those cases in which the proper administration of justice would be further harmed by the exclusion of otherwise relevant and probative evidence.
>
> [61] After *Grant*, at paras. 71-86, the admissibility of evidence under s. 24(2) is approached by examining
>
> -- the seriousness of the *Charter*-infringing state conduct;
>
> -- the impact of the breach on the *Charter*-protected interests of the accused; and
>
> -- society's interest in an adjudication on the merits.
>
> [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. ***The more serious the state-infringing conduct and the greater the impact on the Charter-protected interests, the stronger the pull for exclusion.*** The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third [page 660] inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: see *R. v. Harrison* (2009), 97 O.R. (3d) 560, [2009] 2 S.C.R. 494, [2009] S.C.J. No. 34, 2009 SCC 34, at paras. 33-34.
>
> [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the

> evidence: see, e.g., *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones* (2011), 107 O.R. (3d) 241, [2011] O.J. No. 4388, 2011 ONCA 632, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see, e.g., *R. v. Côté*, [2011] 3 S.C.R. 215, [2011] S.C.J. No. 46, 2011 SCC 46, at paras. 81-89; *R. v. Morelli*, [2010] 1 S.C.R. 253, [2010] S.C.J. No. 8, 2010 SCC 8, at paras. 98-112. Similarly, ***if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence***: see, e.g., *Grant*, at para. 140.
>
> [64] The three inquiries identified in *Grant* require both fact-finding and the weighing of various, often competing interests. Appellate review of either task on a correctness standard is neither practical, nor beneficial to the overall administration of justice. ***A trial judge's decision to admit or exclude evidence under s. 24(2) is entitled to deference on appeal, absent an error in principle, palpable and overriding factual error, or an unreasonable determination***: see *Grant*, at paras. 86, 127; *Côté*, at para. 44; *R. v. Cole*, [2012] 3 S.C.R. 34, [2012] S.C.J. No. 53, 2012 SCC 53, at para. 82; *Jones*, at para. 79; *R. v. Ansari*, [2015] O.J. No. 4355, 2015 ONCA 575, 330 C.C.C. (3d) 105, at para. 72.
>
> [Emphasis added.]

[32] In *R. v. Campbell*, 2018 NSCA 42, this Court approved the Manitoba Court of Appeal's summary of the principles:

> [17] The standard of review with respect to alleged *Charter* breaches was discussed by this Court in *R. v. West*, 2012 NSCA 112. The Court endorsed the standard as articulated by the Manitoba Court of Appeal in *R. v. Farrah (D.)*, 2011 MBCA 49 where Chartier, J.A. (as he then was) wrote:
>
> > 7 By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
> >
> > a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the ***correct legal principles were stated and that there was no misdirection in their application.*** This raises questions of law and the standard of review is correctness.
> >
> > b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, ***absent palpable and overriding error, the facts as found by the judge should not be disturbed*** (see *Grant* at para. 129).

> c) The appellate court will also examine ***the application of the legal principles to the facts*** of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).
>
> d) ***The decision on whether to exclude under s. 24(2) of the Charter is an admissibility of evidence issue which is a question of law.*** However, because this determination requires the judge to exercise some discretion, ***"considerable deference" is owed*** to the judge's s. 24(2) assessment ***when the appropriate factors have been considered*** (see *Grant* at para. 86, and *R. v. Beaulieu*, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).
>
> [Emphasis added.]

Did the trial judge err in applying the *Grant* factors?

[33] To repeat, the *Grant* factors are:

1. The seriousness of the *Charter*-infringing state conduct;
2. The impact of the breach on the *Charter*-protected interests of the accused; and
3. The societal interest in having criminal matters adjudicated on the merits.

[34] The Crown insists the trial judge made two errors in law under the s. 24(2) analysis. First, in the second stage of the *Grant* analysis she did not properly identify the privacy interests engaged by the *Charter* breach. Accordingly, she over-emphasized the impact on Mr. White's *Charter*-protected interests. Next, in the final balancing stage, the judge mischaracterized the multiple *Charter* breaches as having a "cumulative" effect.

First Alleged Error: Failure to Properly Assess Impact on *Charter*-protected Interests

[35] This inquiry is concerned with whether the breach "actually undermined the interests protected by the right infringed" (*Grant* at ¶76; *R. v. Le*, 2019 SCC 34 at ¶151; *R. v. Tim*, 2022 SCC 12 at ¶90). This requires identifying the interests protected by the pertinent *Charter* rights and considering how seriously the breaches impacted those interests (*Grant* at ¶77; *Tim* at ¶90). Are the impacts transient, technical or trivial? Are they more intrusive or do they seriously

compromise the interests which the rights protect? The greater the impact, the higher becomes the risk of bringing the administration of justice into disrepute because it could impair public confidence in the real value of the *Charter* rights engaged (*Grant* at ¶76; *Le* at ¶151; *Tim* at ¶90).

[36] The judge's impact analysis was brief:

> [69] Turning to the second line of inquiry, the impact of the breaches on the Applicants are serious. They were arrested, they were searched along with the vehicle that contained two closed bookbags, wherein the expectation of privacy exists, and they were re-arrested. This weighs in favour of the exclusion of the evidence.

[37] The judge only considered the expectation of privacy in relation to the "two closed book bags". Moreover, the judge noted the privacy expectation, but did not assess or quantify it. The Crown submits there is a significant difference in expectation of privacy in a bag in a vehicle that one is not operating and a bag in one's home or being worn on one's person.

[38] The expectation of privacy in a vehicle is usually low because driving is a highly regulated activity (*R. v. Belnavis*, [1997] 3 S.C.R. 341 at ¶38-40); *R. v. Harrison*, 2009 SCC 34 at ¶30; *R. v. Loewen*, 2011 SCC 21 at ¶12).

[39] In this case, to recall, one bag was located in the backseat of the Jetta and a second bag was located in the trunk of the vehicle. The first contained a loaded handgun along with a chequebook in the name of Decoda White. The second, contained a handgun along with marijuana, cocaine, cash, scales, and the wallet of Nathaniel White.

[40] The Crown points out the court must assess the magnitude of the individual's expectation of privacy. The higher the expectation of privacy, the greater the impact the breach of that expectation has on the dignity of the individual. The judge did not undertake that analysis.

[41] Mr. White replies that the distinction between an expectation of privacy in a vehicle and in a home was not overlooked by the judge because it was mentioned by counsel in argument.

[42] Mr. White contends courts must read the decision as a whole, in the context of the evidence and arguments. The judge need not mention every point raised by

counsel. These are legally correct submissions, but cannot absolve a fundamental analytical omission.

[43] The judge's analysis of the expectation of privacy interests was incomplete and constitutes an error in principle (*McGuffie* at ¶71).

The Second Error: Emphasis on Cumulative Breaches at the Balancing Stage

[44] The judge identified three *Charter* breaches. First, illegal detention flowing from unreasonable arrest (s. 9); second, unreasonable search (s. 8); and finally, illegal detention based on the second arrest following the unlawful search (s. 9).

[45] In the final s. 24(2) balancing, the judge referred to the "cumulative effect of multiple *Charter* breaches" to support her conclusion that admitting the evidence would bring the administration of justice into disrepute.

[46] The Crown argues the judge made two associated errors here. First, she did not distinguish between related *Charter* breaches, essentially flowing from an initial breach, and multiple unrelated breaches. Second, the judge was wrong to conclude that multiple *Charter* breaches which she had previously described as "not serious" could be later used in the final balancing to exclude the impugned evidence by elevating the seriousness of either the police misconduct or the impact of the *Charter* breaches.

[47] Regarding the first point, the Crown says the judge was wrong to characterize this case as one of "cumulative effect of multiple breaches". In support of this argument, the Crown cites *R. v. Chaisson*, 2006 SCC 11; *R. v. Boutros*, 2018 ONCA 375; and *R. v. Pino*, 2016 ONCA 389.

[48] *Chaisson* involved an illegal detention followed by an illegal search of a vehicle revealing marijuana. The car's occupants were not cautioned or read their rights. Sections 8, 9 and 10(b) of the *Charter* were violated. The Supreme Court found the judge "committed no reviewable error in concluding that the cumulative effect of these violations warranted exclusion of the impugned evidence under s. 24(2) of the *Charter*".

[49] In *Boutros*, police accessed text messages on Mr. Boutros' phone. He was allegedly the getaway driver in a home invasion. Police violated Mr. Boutros' ss. 8 and 10(b) *Charter* rights. They obtained Mr. Boutros' cellphone password without advising him of his right to counsel. They then examined his phone. The Ontario

Court of Appeal agreed it should consider the "sum effect" of the breaches. The court concluded:

> [45] In my view, the breach of the appellant's s. 10(b) right when the police required him to provide his password had a meaningful negative impact on the appellant's right to choose whether to cooperate with the police and his right to the assistance of counsel. The breaches of s. 8 had virtually no meaningful effect on the appellant's privacy rights in the circumstances of this case.
>
> [46] Bearing in mind that society's interest in a trial on the merits strongly favours admission in this case, ***I am satisfied that the sum effect of the seriousness of the police Charter-infringing conduct, and the negative impact of the breaches on the appellant's Charter-protected interests do not sufficiently favour exclusion of the evidence to overcome society's interest in a trial on the merits***: *McGuffie*, at paras. 62-63. In my view, having considered the three inquiries dictated by *Grant* (2009), and bearing in mind that the effect of those inquiries must be balanced and considered as a whole, I am not satisfied that the appellant has demonstrated that the admission of the text messages would bring the administration of justice into disrepute: *Grant* (2009), paras. 67-71.
>
> [Emphasis added.]

[50] *Pino* is another case where a series of *Charter* breaches occurred. The trial court held the search of Ms. Pino's car was conducted in an unreasonable manner. The police failed to inform Ms. Pino of her right to counsel and failed to facilitate that right, breaching s. 10(b) of the *Charter*. The trial judge also found the police had not given truthful testimony. The evidence found by the impugned search was excluded.

[51] Like *Chaisson* and *Boutros*, *Pino* does not distinguish between discrete and "related" *Charter* breaches. Nevertheless, courts have drawn this distinction. In *R. v. Kossick*, 2018 SKCA 55, the Saskatchewan Court of Appeal referred to the difference:

> [60] Lastly, the Crown submits the trial judge erred in her balancing of the interests at play under s. 24(2) of the *Charter* when she concluded the cumulative nature of the four breaches called for the exclusion of the evidence obtained. The Crown submits that the *Charter* breaches were "essentially a single incident" and, therefore, the number of breaches could not magnify their cumulative severity. While I have found the judge did not err in deciding to assess the cumulative impact of the separate *Charter* breaches, I am not persuaded to the Crown's view of the breaches as being a single incident. There is no discordance in this. ***The first involves an examination of the impact of multiple Charter breaches largely on a single Charter right. The second involves multiple, separate acts or***

> ***omissions on the part of the state, occurring in separate locations, in different circumstances, albeit most of them on the same day.***
>
> [Emphasis added.]

[52] The distinction between distinct and related *Charter* breaches was also made by the Ontario Court of Appeal in *R. v. Yakubovsky-Rositsan*, 2010 ONCA 748 and *R. v. Adler*, 2020 ONCA 246.

[53] The Crown argues there was essentially one police error – failure to form reasonable grounds for arrest – from which the *Charter* breaches followed. Without further aggravating factors "this does not enhance the seriousness of the *Charter*-infringing conduct at the first step of *Grant*". With regard to the second *Grant* factor, the Crown says Mr. White's liberty interests were minimally affected. If the judge elevated the seriousness of the impact under the second *Grant* factor, owing to "cumulative effect", that was an error of law.

[54] Because the judge clearly erred in law by doing a "cumulative effect" analysis in the final balancing stage, it is unnecessary to decide whether the Crown's "discrete" versus "related" breaches argument is correct.

[55] Regarding its second point, the Crown says that at the balancing stage, no additional or new legal assessments are to be undertaken. The judge is to weigh the assessments from the first three stages to determine whether, in all the circumstances, the administration of justice would be brought into disrepute by admission of the evidence.

[56] The judge initially characterized the *Charter* breaches as not serious:

> [68] Notwithstanding the breaches, on a scale of seriousness, the conduct of Cst. MacNeil does not rise to the level which requires the Court to disassociate itself from such conduct. The first line of inquiry does not suggest that the evidence seized should be excluded when considering the totality of the circumstances.

[57] But later the judge said about "cumulative effect":

> [71] When assessing each of these areas having regard to all of the circumstances and the cumulative effect of multiple *Charter* breaches, I find that admitting the evidence seized would bring the administration of justice into disrepute. The evidence gathered during the unlawful arrest and search of the persons and vehicle shall be excluded pursuant to s. 24(2) of the *Charter*.

[58] The Crown says the judge's "compounding effect" conclusion with respect to *Charter* breaches which tipped the s. 24(2) balancing in favour of exclusion of the evidence should have been grounded in the analysis of one of the first two lines of inquiry. If assessment of the first and second factors does not reveal a "cumulative effect" that increases the seriousness of either the police conduct or the impact of the breach, relying on "cumulative effect" at the balancing stage was an error.

[59] Unlike the judge's analysis in this case, the trial court in *Kossick* (2017 SKPC 67, aff'd 2018 SKCA 55) considered the cumulative effect of the breaches under the first inquiry of seriousness of the state-infringing conduct:

> [125] ***However, multiple breaches compound the seriousness of the breaches***. In *R v Lauriente*, 2010 BCCA 72 at para 30, 251 CCC (3d) 492 [*Lauriente*], the Court stated:
>
> > [30] . . . This case involved one investigation in which the police ***overstepped the law in several instances evidencing a pattern of disregard of Charter rights which the trial judge found to be serious***. She specifically found that each of the individual *Charter* breaches were serious, albeit not at the extreme end of the range, or reflecting bad faith on the part of the police. If she had considered the breaches individually, as if they had occurred in a vacuum, or in circumstances which were otherwise unremarkable, she may have concluded that the serious remedy of the exclusion of evidence was not warranted; that is, that the admission of the evidence obtained thereby could not have brought the administration of justice into disrepute. But these breaches did not occur in a vacuum, they occurred in the context of a relatively brief investigation where each step in the investigation followed and built on the prior step, ultimately culminating in the obtaining and execution of the search warrant which led to the respondents' (and Ms. Lauriente's) arrest, and the further breach of Mr. Catalano's right to counsel. In my view, ***the trial judge was entitled to have regard to all of these breaches, both in placing the seriousness of the individual breaches in context***, and, more particularly, in determining whether this pattern of disregard of the *Charter* by the authorities could bring the administration of justice into disrepute.
>
> [126] The s. 8 and s. 9 *Charter* ***breaches considered individually were not at the most serious end of the range. However, as in Lauriente, each breach led to the next***. The unlawful arrest led to the search of the accused. In the patrol car, the seizure of the phone gave Cst. Parker the opportunity to view incoming messages. Viewing those messages motivated Cst. Parker to open the phone and view further messages. The messages derived from a search not truly incident to a

> lawful arrest formed the basis for the search warrant, which resulted in a large extraction of data from the accused's cell phone.
>
> [Emphasis added.]

[60] The judge found Cst. MacNeil's conduct was not "wilful, flagrant, or reckless". It did not require that the court disassociate itself from such conduct. It did not suggest that the evidence seized should be excluded. How could consideration of that same police conduct (cumulative effect of the breaches) later lead to the opposite conclusion?

[61] The cumulative effect analysis should be grounded in a consideration of each of the first two *Grant* factors. It is not a later superadded analysis that alters the initial assessment of the seriousness of the breaches or their impact. The judge erred in doing so.

A New *Grant* Analysis

[62] The judge's errors require this Court to undertake a fresh *Grant* analysis.

[63] In conducting this analysis, this Court is bound by factual findings of the judge (*R. v. Buhay*, 2003 SCC 30 at ¶47).

[64] The purpose of s. 24(2) is to maintain the good reputation of the administration of justice (*Grant* at ¶67). The inquiry is prospective, focused on the long-term impact on the justice system if the impugned evidence is admitted (*Grant* at ¶68-69). Section 24(2) does not seek to punish police or compensate the accused (*Grant* at ¶70).

(a) Seriousness of Charter-infringing Conduct

[65] As previously described, the judge found nothing done by Cst. MacNeil was particularly "wilful, flagrant, or reckless". She went on, "Officer safety and public safety became a live issue while investigating the motor vehicle accident" (¶64).

[66] The judge decided police were acting under the false assumption that they had reasonable grounds for arrest and search and that the search was permitted incidental to arrest for ensuring officer and public safety.

[67] To repeat, the judge concluded:

> [68] … the conduct of Cst. MacNeil does not rise to the level which requires the Court to disassociate itself from such conduct. The first line of inquiry [under *Grant*] does not suggest that the evidence should be excluded when considering the totality of the circumstances.

[68] This conclusion is well-supported in the record. Arguably, had the judge found that all relevant confidential source information had been provided to the arresting officer, there would have been reasonable grounds to arrest at least Decoda White for possession of a weapon. A search of the vehicle would inevitably have followed. The officer believed he had cause to make an arrest. There was no flagrant disregard of Mr. Nathaniel White's *Charter* rights.

[69] As the judge found, this factor favours admission of the evidence.

Impact on *Charter*-protected Interests

[70] At this stage, the Court must assess the extent to which the breach or breaches impacted on the accused's *Charter*-protected interests.

[71] Mr. White was arrested, re-arrested and his bag was searched. These police actions engage liberty and privacy interests. Mr. White's liberty interests are protected by s. 9 of the *Charter*. Section 8 protects individual privacy and dignity (*Grant* at ¶78; *Tim* at ¶91).

[72] The Crown points out in this case there was a valid initial detention while the police investigated a motor vehicle accident allegedly involving the Jetta they occupied.

[73] As the Supreme Court said in *R. v. Paterson*, 2017 SCC 15 at ¶49:

> [49] […] infringements arising from circumstances denoting a "high expectation of privacy" tend to favour exclusion of evidence, while — all other considerations being equal — infringements of lesser interests in privacy will not pull as strongly towards exclusion. […]

[74] Mr. Nathaniel White was a backseat passenger when he was arrested. He was not the driver and there is no evidence that he was the registered owner of the vehicle, thus reducing his privacy interests in the vehicle (*R. v. James*, 2019 ONCA 288 at ¶82, rev'd by 2019 SCC 52 endorsing Nordheimer J.A.'s dissent).

[75] The vehicle was parked in a busy public parking lot in downtown Halifax. When police arrived, the car doors were open. Both Messrs. White had their feet

on the ground while they sat and ate. The expectation of privacy in the vehicle in these circumstances would be low. The expectation of privacy in the closed bags would be higher. But the inside of the vehicle—including one of the bags containing a handgun—would be in plain sight. None of this was discussed by the judge.

[76] As in *Tim*, Mr. White was already detained with respect to a lawful motor vehicle collision investigation. Like *Tim*, this mitigates the impact of an arrest without reasonable grounds.

[77] The personal search that followed was relatively non-intrusive. The search of the vehicle in which Mr. White was a passenger was similarly non-intrusive. There may have been an elevated privacy interest regarding what was apparently Mr. White's bag in the trunk. Mr. White did not testify and claim any privacy interest in the bag in the trunk. In *Belnavis*, the police seized garbage bags full of new clothing with original labeling. The Supreme Court distinguished anonymous bags from personally identified suitcases or kit bags (*Belnavis* at ¶24). Nothing on the exterior of the bag suggested it belonged to Mr. White.

[78] Without considering the privacy interest in a vehicle, the judge found the impact on the vehicle occupants—including Mr. White—to be "serious". Owing to the analytical errors previously described, the judge's conclusion is not entitled to deference.

[79] In *Tim*, the court commented on the impact of a car search on privacy interests:

> [93] With regard to the impact of the s. 8 *Charter* breaches, the first search, a pat-down search, is a "relatively non-intrusive procedure" (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 185), one that is "minimally intrusive" (*Mann*, at para. 56). The search here fit that description. The same can be said of the second search, a search of the appellant's car incident to arrest, given the reduced expectation of privacy in a car (see *MacKenzie*, at para. 31; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 38; *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 534).

[80] In *Tim*, the accused owned the car. In this case, Mr. White was a mere passenger.

[81] On the other hand, there is a greater impact on *Charter*-protected interests when the evidence flows from a *Charter* breach (*Tim* at ¶94). On *Charter* impact, the court in *Tim* concluded:

> [95] Collecting these factors under the second line of inquiry, in my view, the **Charter breaches arising from the unlawful arrest and the first two searches had a moderate impact** on the appellant's *Charter*-protected interests. The appellant was unlawfully arrested, but he was also lawfully detained for the traffic collision investigation; the searches were minimally intrusive, and I am not prepared to speculate on the issue of discoverability. These are not profoundly intrusive impacts, but they are not fleeting, technical, transient, or trivial either. ***This line of inquiry pulls moderately toward exclusion.***
>
> [Emphasis added.]

[82] Unlike Mr. Tim, Mr. White did not own the Jetta. But also, unlike *Tim*, the incriminating evidence here resulted from the illegal search.

[83] The search of the bag in the locked car trunk containing a gun and drugs constituted a more intrusive act involving a somewhat greater expectation of privacy than with the bag in the passenger compartment. But it was not Mr. White's car. The expectation of privacy was not high.

[84] Considering all of the circumstances, the judge's conclusion that the impact on *Charter*-protected interests was serious, cannot be sustained. At its highest, the impact was modest. As in *Tim*, this would moderately pull towards exclusion of the evidence.

Society's Interest in Adjudication on the Merits

[85] The question here is whether the truth-seeking function of the trial is better served by admission of the evidence or its exclusion (*Grant* at ¶79). Considerations at this stage include the seriousness of the offence, the importance of the evidence for the Crown's case, and the reliability of that evidence. This inquiry routinely favours admission of the evidence but it must not overwhelm the other s. 24(2) factors.

[86] The judge found that society's interest in having the case adjudicated on its merits weighed in favour of admission of the evidence:

> [70] Turning to the third line of inquiry, society's interest in having the case adjudicated on its merits, the Defence concedes that the third line of inquiry weighs in favour of admission of the evidence. I agree. Weapon possession and drug trafficking raise serious and dangerous issues that can have devastating ramifications for society. Society has an interest in seeing that charges proceed on their merits. This weighs in favour of admission of the evidence.

[87] This is a serious case, involving guns and drugs. There were two counts of possession of a handgun with readily accessible ammunition and multiple drug charges. This is inherently reliable evidence essential to the Crown's case, the exclusion of which would prevent a trial on the merits.

[88] The proliferation of illegal handguns is a compelling societal concern.

[89] In *R. v. Omar*, 2018 ONCA 975, the Ontario Court of Appeal had to consider admission of a handgun and drugs, following multiple *Charter* breaches. The dissenting judgment was endorsed on appeal by the Supreme Court of Canada (2019 SCC 32). Brown J.A. had this to say regarding s. 24(2) analyses involving illegal handguns:

> [123] I do not quarrel with that proposition, put that way. However, I would respectfully submit that to fail to give some recognition to the distinctive feature of illegal handguns -- which are used to kill people or threaten them with physical harm, nothing else -- and, instead, to treat them as fungible with any other piece of evidence risks distorting the *Charter's* s. 24(2) analysis by wrenching it out of the real-world context in which it must operate.
>
> […]
>
> [135] However, a community's desire to live free from the lethal threat of illegal handguns is not the product of a community "wrought with passion" or "otherwise under passing stress due to current events". It is a most rational desire for a necessary component of the rule of law -- the existence of a safe and ordered community in which individuals have the ability to exercise their liberty rights free from fear and threat of harm to their persons. ***As Grant teaches, the term "administration of justice" in s. 24(2) is not limited to "the processes by which those who break the law are investigated, charged and tried", but it more broadly "embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole"***: at para. 67.
>
> [Emphasis added.]

[90] This *Grant* factor strongly favours admission of the evidence.

Balancing of the s. 24(2) Factors

[91] Balancing the s. 24(2) factors is not a mathematical exercise. If the first two lines of inquiry favour exclusion, it is rare that the third would tip the balance in favour of inclusion of the evidence. Likewise, if the first two lines of inquiry support including the evidence, the third will generally confirm it.

[92] Balancing is prospective and seeks to avoid further damage to the reputation of the justice system from a *Charter* breach. Balancing is focused on systemic concerns (*Grant* at ¶69-70; *Le* at ¶139; *Tim* at ¶98).

[93] On balancing, to repeat, the judge concluded:

> [71] When assessing each of these areas having regard to all of the circumstances and the cumulative effect of multiple *Charter* breaches, I find that admitting the evidence seized would bring the administration of justice into disrepute. The evidence gathered during the unlawful arrest and search of the persons and vehicle shall be excluded pursuant to s. 24(2) of the *Charter*.

[94] No cases were provided to the court in which evidence was excluded when, as here, the court found it unnecessary to distance itself from the police misconduct.

[95] It was an error to transform police misconduct previously found not to require exclusion, into conduct requiring exclusion at the final balancing stage.

[96] The first factor—seriousness of the infringing conduct of the police—does not require the court to disassociate itself from that conduct and tends to inclusion of the evidence. The second—impact on *Charter* rights—only modestly tends to exclusion of the evidence because the impact was moderate. Finally, society's interest in a trial on the merits in a "guns and drugs" case with reliable evidence strongly supports admission of the evidence. Although balancing is not a mathematical calculation, in this case the assessment of the three *Grant* factors plainly favours admission of the evidence.

[97] Balancing all of the factors, the admission of the evidence would not bring the administration of justice into disrepute.

[98] I would allow the appeal and order that the impugned evidence be admitted at trial.

Bryson J.A.

Concurred in:

Bourgeois J.A.

Beaton J.A.