File Number: 40117

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

BETWEEN:

GEORGE ZACHARIAS

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN

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

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PART I – STATEMENT OF FACTS

A. Overview

1. In an otherwise impeccable traffic stop, a police officer fell just shy of the constitutional threshold when he made the decision to employ a drug detection dog for a "sniff search" of the appellant's pickup truck. The dog gave two positive indications, leading to the appellant's arrest and the discovery of more than 100 pounds of cannabis in the box of the truck. At trial, the appellant challenged only the grounds for the sniffer dog search and the related investigative detention.[1] Although the officer honestly believed he had sufficient grounds to suspect the appellant's possible involvement in drug offences, the trial judge found he missed the mark but "not by much".[2] In deciding to admit the evidence under s. 24(2), the trial judge characterized the officer's error as "minuscule" and the impact on the appellant's *Charter*-protected rights as "mitigated" by his reduced privacy interest in a motor vehicle.[3] The appellant was convicted.

2. In the court below, the appellant raised for the first time additional *Charter* breaches he said the trial judge ought to have considered in her s. 24(2) analysis, relating to a pat-down search, his arrest, the search of his truck, and a purported "strip-search" at the police station. The majority of the Court of Appeal declined to consider the new arguments, finding that the trial judge's *Charter* analysis was wholly responsive to the evidence and issues before her. Although the trial judge did not explicitly reference the s. 9 breach arising from the investigative detention, the majority concluded her omission could not have affected the result. The majority dismissed the appeal. The dissenting judge would have permitted the appellant to raise the new issues. She would have allowed the appeal on the basis of the impact of the cascading series of *Charter* breaches she said emanated from the insufficient grounds for the dog search. The appellant now appeals to this Court as of right.

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[1] The appellant abandoned his ss. 10(a) and (b) *Charter* claims during oral submissions at trial: Trial Transcript (November 14, 2019), p 15, l 32 [Appellant's Record ("AR"), Vol II, Tab 3A, p 112].
[2] Reasons for Judgment (*Charter*), p 15, l 36 [AR, Vol I, Tab 1C, p 20].
[3] Reasons for Judgment (*Charter*), p 15, l 38 [AR, Vol I, Tab 1C, p 20]. The trial judge did not expressly consider the s. 9 breach relating to the investigative detention in her s. 24(2) analysis.

3. The appeal should be dismissed for three reasons. First, the majority correctly declined to entertain the new *Charter* arguments. No exceptional circumstances exist that would compel this Court to hear new issues. Second, the trial judge made no reversible errors in her assessment of the impact of the breaches on the appellant's *Charter* protected interests. She was no "passive observer of *Charter* misconduct", as the appellant suggests. To the contrary, the trial judge was fully aware of the circumstances surrounding the seizure of the evidence and correctly assessed that the impact of the misconduct did not strongly favour exclusion. Her lack of referencing the s. 9 breach explicitly could not have affected her conclusion. Third, even if this Court were to conduct the balancing under s. 24(2) anew, the facts would demand the same result: admission of the evidence. There was a minor error in judgment that resulted in a minimally intrusive search into an area with a reduced expectation of privacy that produced real, reliable and crucial evidence of a serious offence.

B. Facts

a) *The traffic stop*

4. On February 17, 2017, Cst. Tyler MacPhail of the Royal Canadian Mounted Police (RCMP) was monitoring traffic on the Trans-Canada Highway by the Sunshine Overpass near Banff, Alberta. He observed a Dodge Ram pickup truck travelling east. The vehicle had illegal window tinting and a non-functioning fog light.[4]

5. Cst. MacPhail followed the vehicle. He activated his overhead lights, which initiated the dashboard camera.[5]

[4] Trial Transcript (November 13, 2019), (morning session) p 11, ll 27–25 and p 12, ll 12–15 [AR, Vol II, Tab 3A, pp 20–21].
[5] Trial Transcript (November 13, 2019), (morning session) p 13, ll 22–23 and (afternoon session) p 35, ll 21–36 [AR, Vol, II, Tab 3A, pp 22, 81]; Exhibit VD-1, In-car Audio and Video [Respondent's Record ("RR"), Tab 2].

6. At approximately 6:32 p.m.,[6] Cst. MacPhail stopped the vehicle. He approached and observed a "Back the Blue" police-support sticker on the vehicle's window.[7] He spoke with the appellant who was in the driver's seat. The appellant said he was travelling from Kelowna, B.C., to Calgary for a couple of days. Because of the sticker, Cst. MacPhail asked the appellant if he worked in law enforcement. The appellant said he did not, and that the sticker was present when his son purchased the vehicle.[8]

7. Cst. MacPhail observed an "excessively large amount of luggage" for a two-day trip inside the cab of the vehicle: two large duffle bags, and a red suitcase on the back seat.[9] The box of the truck had a tonneau cover that prevented Cst. MacPhail from seeing inside.[10]

8. When asked for identification, the appellant provided his passport because his wallet had been stolen and he did not have his driver's licence. Cst. MacPhail noticed the appellant was "excessively nervous"; there was a controlled tightness in the appellant's voice and a noticeable

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[6] Cst. MacPhail testified that he stopped the appellant at 6:45 p.m.: Trial Transcript (November 13, 2019) (morning session), p 13, l 20 [AR, Vol II, Tab 3A, p 22]. The time stamp on the dash cam (one hour ahead of real time) indicates that the time was in fact 6:32 p.m.: Exhibit VD-1, In-car Audio & Video, at 00:41 [RR, Tab 2]. The respondent will refer to the real time based off the time stamp (minus one hour) on the video where necessary (see fn 115). For convenience, Appendix A to this factum contains a chart setting out the timeline of the detention, including video timestamps.

[7] Exhibit VD-1, In-car Audio & Video at 19:33 [RR, Tab 2].

[8] Trial Transcript (November 13, 2019), (morning session) p 17, ll 2–5, p 18, ll 29–31, p 21, ll 28–40, p 23, ll 12–13; (afternoon session) p 19, ll 3–32; p 26, l 27–p 27, l 5 [AR, Vol II, Tab 3A, pp 17, 27, 30–31, 32, 65, 72–73].

[9] Trial Transcript (November 13, 2019), (morning session) p 18, ll 9–34; (afternoon session) p 27, l 13–p 28, l 27 [AR, Vol II, Tab 3A, p 27, 73–74].

[10] Trial Transcript (November 13, 2019), (morning session) p 19, ll 8–15 [AR, Vol II, Tab 3A, p 28].

tremor in his hand.[11] The level of nervousness was "out of the norm" in Cst. MacPhail's experience conducting traffic stops.[12]

9. Cst. MacPhail took the appellant's information to his police vehicle to conduct checks because he intended to issue a ticket for the window tint. He learned that there was a restricted entry related to the appellant in one of the databases. Cst. MacPhail called the Real-Time Information Centre (RTIC) to obtain further information. The dispatcher told Cst. MacPhail that in 2014, the appellant was the subject of a complaint into the distribution of large amounts of marijuana and cocaine in British Columbia: there was an "intel file" created to "determine the size and scope of [the appellant's] drug enterprise and the prospect of any future enforcement".[13] The information was marked as being of "unknown reliability".[14]

10. After he obtained this information, and in combination with his prior observations, Cst. MacPhail formed the suspicion that the appellant was in possession of a controlled substance. Cst. MacPhail decided to detain the appellant for a drug investigation.[15]

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[11] Trial Transcript (November 13, 2019), (morning session) p 18, ll 14–20, p 19, l 17–p 20, l 25, p 21, ll 18–26, p 26, ll 29–33; (afternoon session) p 20, l 32–p 21, l 14, p 22, l 5–p 26, l 2 [AR, Vol II, Tab 3A, pp 27, 28–29, 30, 35, 66–67, 68–72].

[12] Trial Transcript (November 13, 2019), (morning session) p 20, l 9–p 21, l 26 [AR, Vol II, Tab 3A, pp 29–30].

[13] In his testimony, Cst. MacPhail referred to the information as a "complaint"; the audio recording on Exhibit VD-1 indicates that Cst MacPhail was told it was an "intel probe": Trial Transcript (November 13, 2019) (morning session), p 24, ll 26–34, p 25, l 7–p 26, l 1 [AR, Vol II, Tab 3A, pp 33, 34-35]; Exhibit VD-1, In-car Video and Audio, at 10:48-11:33 [RR, Tab 2].

[14] Trial Transcript (November 13, 2019), (morning session) p 25, ll 29–30 [AR, Vol II, Tab 3A, p 34].

[15] Trial Transcript (November 13, 2019), (morning session) p 28, ll 32–39 [AR, Vol II, Tab 3A, p 37].

b) *The investigative detention and the sniffer dog search*

11. For officer safety purposes and to facilitate immediate contact with counsel, Cst. MacPhail requested backup. He also arranged for the closest dog handler, Warden John Henderson, to attend right away.[16]

12. Cst. Maxime Duperre arrived five minutes after receiving the request for backup and, at 6:56 p.m., the appellant was asked to step out of his vehicle. When the appellant did so, Cst. MacPhail noticed the smell of an air freshener or "masking agent" that had not been present during their initial interactions.[17] Cst. MacPhail made a note of his observations and communicated them to the dog handler before the sniff search occurred.[18]

13. Cst. MacPhail told the appellant why he was being detained and advised him of his right to counsel. The appellant declined counsel and, after a light pat of his front pocket area, he was seated in the police vehicle, without handcuffs.[19]

14. Approximately twenty minutes later, Warden Henderson and his narcotics dog, Cazz, arrived on scene.[20] Cazz was deployed around the appellant's vehicle and he gave two positive indications for drugs. On the basis of the positive indications, Cst. MacPhail arrested the appellant for possession of a controlled substance. He read him his *Charter* rights and cautioned him again. This time, the appellant said he wanted to contact a lawyer.[21]

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[16] Trial Transcript (November 13, 2019), (morning session) p 27, l 13–p 28, l 28 [AR, Vol II, Tab 3A, p 36–37].
[17] Trial Transcript (November 13, 2019), (morning session) p 30, ll 5–17 [AR, Vol II, Tab 3A, p 39].
[18] Trial Transcript (November 13, 2019) (morning session), p 30, ll 5–17; (afternoon session), p 5, l 19–24 [AR, Vol II, Tab 3A, pp 39, 51]; Exhibit VD-1, In-car Video and Audio, at 26:42, 36:25, 46:12 [RR, Tab 2].
[19] Trial Transcript (November 13, 2019) (morning session), p 29, ll 4–20; (afternoon session) p 3, ll 6–17 [AR, Vol II, Tab 3A, pp 38, 49]; Exhibit VD-1, In-car Video and Audio, at 24:02 [RR, Tab 2].
[20] Trial Transcript (November 13, 2019), (morning session) p 29, ll 9–13 [AR, Vol II, Tab 3A, p 38].
[21] Trial Transcript (November 13, 2019), (morning session) p 29, l 26–p 30, l 1; (afternoon session) p 15, ll 5–15 [AR, Vol II, Tab 3A, pp 39, 61].

c) *The arrest and searches incident to that arrest*

15. The appellant's vehicle was searched. In the cab of the truck, police found 126 THC-infused pastries and 700 grams of cannabis oil in a glass jar. In the box of the truck, inside duffle and plastic bags, police located 101.5 pounds of cannabis. They also found $12,600 in cash underneath the backbench of the vehicle.[22]

16. Because of the large quantity of cannabis, Cst. MacPhail re-arrested the appellant for possessing the drugs for the purpose of trafficking. Immediately afterwards, Cst. Duperre removed the appellant from Cst. MacPhail's vehicle, handcuffed him and put him in the other police car. Cst. Duperre read the secondary caution and took the appellant to the RCMP Banff Detachment. At the detachment, the appellant was required to wear no more than one layer of clothing (his shirt and pants) and to remove his shoes. The appellant was placed in a phone room to facilitate contact with legal counsel. While he was in the phone room, the appellant was told he was also under arrest for possessing proceeds of crime over $5,000.[23]

17. The appellant was released from police custody at 1:37 a.m. on February 18, 2017.[24]

d) *The voir dire*

18. Prior to trial, the appellant filed a notice alleging breaches of ss. 8, 9, 10(a) and 10(b) of the *Charter*.[25] In that notice, he referenced only the events leading up to the sniffer dog search and sought only exclusion of the statements made to police. At the close of the Crown's case, prior to argument, he abandoned the s. 10 breach allegations; thus, the lone issue that remained for argument in the *voir dire* was whether Cst. MacPhail's subjective suspicion was objectively reasonable such that the initial detention and the search by the sniffer dog were constitutional.[26]

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[22] Trial Transcript (November 13, 2019), (morning session) p 30, l 25–p 34, l 22; (afternoon session) p 7, l 26–p 13, l 39 [AR, Vol II, Tab 3A, pp 39–43, 53–60].
[23] Trial Transcript (November 13, 2019), (afternoon session) p 3, l 32–p 5, l 4 & p 15, l 5–p 16, l 6 [AR, Vol II, Tab 3A, pp 49–51, 61–62].
[24] Trial Transcript (November 13, 2019), (afternoon session) p 3, l 32–p 5, l 4 [AR, Vol II, Tab 3A, pp 49–51].
[25] Appellant's *Charter* Notice [RR, Tab 1].
[26] Trial Transcript (November 13, 2019), (morning session) p 5, ll 2–13; (November 14, 2019) p 15, ll 32–34 [AR, Vol II, Tab 3A, pp 14, 112].

19. The Crown's sole witness in the *voir dire* was Cst. MacPhail.[27] The in-car camera captured the interactions between Cst. MacPhail and the appellant, a copy of which was entered as an exhibit on the *voir dire*.[28] The appellant did not call evidence.

20. At time of trial, Cst. MacPhail was a 14-year veteran of the RCMP. In February 2017, he was a member of the K Division Roving Traffic Unit, a unit of officers with specialized skills in the interception and detection of criminals travelling on highways. By 2017, he had spent eight-and-a-half years in the unit, conducting between 12,000 and 15,000 traffic stops.[29]

21. Through his employment with the RCMP, he participated in several courses focusing on traffic enforcement investigations.[30] He became a certified National Pipeline instructor in 2014 and has since taught in excess of 15 courses.[31]

22. Cst. MacPhail explained his initial grounds for suspecting that the appellant may be involved with drug offences:

- The appellant was operating a truck with a tonneau cover. Cst. MacPhail knew that many trucks have tonneau covers but, in his experience, pickup trucks could be used to transport large amounts of contraband.[32]

- The luggage in the cab of the truck. Based on his experience with traffic stops, Cst. MacPhail believed the luggage was "way more" than what was required by one person for a two-day trip. He found it suspicious the luggage was in the cab as opposed to the box of

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[27] The trial and *voir dire* evidence proceeded in a blended fashion. Although all three witnesses were called at trial, only Cst. MacPhail was proffered for the *voir dire*: Trial Transcript (November 13, 2019), (morning session) p 5, ll 20–27 [AR, Vol II, Tab 3A, p 14].

[28] Trial Transcript (November 13, 2019), (morning session) p 3, ll 22–31; (afternoon session) p 41, ll 17–22 [AR, Vol II, Tab 3A, pp 12, 87]; Exhibit VD-1, In-car Audio and Video [RR, Tab 2].

[29] Trial Transcript (November 13, 2019), (morning session) p 6, l 15–p 7, l 24 and p 11, ll 1–8 [AR, Vol II, Tab 3A, pp 15–16, 20].

[30] Trial Transcript (November 13, 2019), (morning session) p 7, l 38–p 10, l 21 [AR, Vol II, Tab 3A, pp 16–19].

[31] Trial Transcript (November 13, 2019), (morning session) p 9, ll 7–25 [AR, Vol II, Tab 3A, p 18].

[32] Trial Transcript (November 13, 2019), (morning session) p 26, ll 14–18; (afternoon session) p 28, l 33–p 29, l 8 [AR, Vol II, Tab 3A, pp 35, 74–75].

the truck. In his experience, people would move personal effects to the cab of the vehicle when the box is full. Keeping controlled substances out of the cab keeps the odour out.[33]

- The excessive nervousness. The "influx of nervousness" in the appellant's voice and the noticeable tremor in his hand stood out to Cst. MacPhail as "out of the norm" based on his experience with traffic stops. It was elevated considering the reason for the stop.[34] Cst. MacPhail agreed in cross-examination that the nervousness diminished after their initial interaction when he removed him from the car for the investigative detention.[35] This was *after* he formed his initial grounds to suspect drug possession.

- The "Back the Blue" sticker. In his experience and based on his training, these stickers were sometimes used as a potential "disclaimer" by the public to tell police, "I am a good person. I support police" in order to avoid being pulled over. That the appellant did not remove it after his son purchased the vehicle stood out.[36] In summarizing his grounds on the in-car recording, Cst. MacPhail observed that the appellant's claim that his son purchased the vehicle was inconsistent with the fact the car was registered in his name.[37] He agreed in cross-examination that some people might not know what the sticker meant.[38]

- Cst. MacPhail testified, based on his knowledge and experience, British Columbia is a source location where narcotics are produced and sold. Highway 16, Highway 1 and Highway 3 are major corridors used to transport drugs to other parts of the country.[39] The

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[33] Trial Transcript (November 13, 2019), (morning session) p 18, l 36–p 19, l 4 and p 26, ll 20–27; (afternoon session) p 29, l 1–p 32, l 7 [AR, Vol II, Tab 3A, pp 27–28, 35, 75–78].
[34] Trial Transcript (November 13, 2019), (morning session) p 20, ll 9–5 and p 26, ll 29–33 [AR, Vol II, Tab 3A, pp 29, 35].
[35] Trial Transcript (November 13, 2019), (afternoon session) p 23, l 34–p 26, l 2 [AR, Vol II, Tab 3A, pp 67–72].
[36] Trial Transcript (November 13, 2019), (morning session) p 21, l 41–p 23, l 10 and p 26, ll 35–39 [AR, Vol II, Tab 3A, pp 30–32, 35].
[37] Exhibit VD-1, In-Car Audio and Video at 8:52-9:54 [RR, Tab 2].
[38] Trial Transcript (November 13, 2019), (afternoon session) p 20, l 3–30 [AR, Vol II, Tab 3A, p 66].
[39] Trial Transcript (November 13, 2019), (morning session) p 9, l 30–p 10, l 5 and p 23, ll 16–20 [AR, Vol II, Tab 3A, pp 18-19, 32].

appellant was coming from B.C., travelling on Highway 1, and was going to Calgary, a known destination city for drugs.[40]

- The RTIC information. Cst. MacPhail believed the database information provided "a very strong objective indicator" because (1) it originated from a restricted file, and (2) the way it was written suggested ties to organized crime, (3) it suggested an "amount of contraband", and (4) it was a file that "spanned the Province of British Columbia".[41] He acknowledged that the file was from 2014 and that the source of the information was unknown.[42]

23. While he based his suspicion on the totality of the evidence, Cst. MacPhail testified it was the RTIC information that solidified his belief that he had sufficient grounds to meet the reasonable suspicion test. He described the other factors as giving him the "high end of subjective, reasonable suspicion" but said he would not have further detained the appellant without the RTIC information.[43]

24. Because the s. 10 breach allegation was abandoned, the appellant's *Charter* and s. 24(2) argument focused entirely on the grounds for reasonable suspicion and the period prior to his arrest. Crown counsel responded in kind.[44]

e) ***The trial judge's decision***

25. The trial judge rendered her decision orally the day after arguments concluded and two days after she heard the evidence. She described the evidence that the appellant sought to have excluded – more than 101.5 pounds of cannabis and a large amount of cash – and she identified the parameters of the *Charter* application before her: the grounds for the sniffer dog and the

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[40] Trial Transcript (November 13, 2019), (morning session) p 26, l 41–p 27, l 2 [AR, Vol II, Tab 3A, pp 35–36].
[41] Trial Transcript (November 13, 2019), (morning session) p 25, l 8–p 26, l 1 and p 27, l 4–9 [AR, Vol II, Tab 3A, pp 34–35, 36].
[42] Trial Transcript (November 13, 2019), (afternoon session) p 34, l 15–p 35, l 15 [AR, Vol II, Tab 3A, pp 80–81].
[43] Trial Transcript (November 13, 2019), (morning session) p 26, ll 5–9; (afternoon session), p 33, l 35–p 34, l 17 [AR, Vol II, Tab 3A, pp 35, 79-80].
[44] Trial Transcript (November 14, 2019), p 18, l 21–p 44, l 35; (November 15, 2019), p 1, l 20–p 4, l 1 [AR, Vol II, Tab 3A, pp 115–141, 146–149].

related investigative detention. Neither the initial traffic stop nor the grounds for the subsequent arrest were in issue.[45]

26. The trial judge carefully reviewed Cst. MacPhail's evidence, counsel's arguments and the law. She concluded that Cst. MacPhail's honestly held subjective suspicions "were warranted" given his experience and intuition. However, the suspicion was not objectively reasonable; the appellant's ss. 8 and 9 *Charter* rights were breached.[46]

27. As part of her fact-finding, under the first branch of the s. 24(2) *Grant* test,[47] the trial judge held that Cst. MacPhail was acting honestly and diligently in his investigation and that his evidence was credible and reliable. He was well trained, he knew the applicable standard, and he sought to apply it. There was no evidence of a deliberate or systematic breach. She stated, "[i]n fact, I find to the contrary…. If [Cst. MacPhail] missed the mark, it was not by much and not by negligence." She determined the *Charter* infringing conduct was at the low end of the scale: "the failure to meet the standard of reasonable suspicion was minuscule".[48]

28. Under the second branch of the *Grant* test, the trial judge noted that a person does not have a high expectation of privacy in a vehicle and that the search did not demean the appellant's dignity, both of which mitigated the impact on the appellant's *Charter* protected rights. Moreover, Cst. MacPhail made every effort to respect the appellant's rights. This was not a case involving additional *Charter* breaches.[49]

29. After reviewing the third *Grant* factor and finding that it too favoured admission, the trial judge engaged in a final balancing and concluded that the admission of the evidence obtained by

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[45] Reasons for Judgment (*Charter*), p 5, ll 7–10 and 37–39 [AR, Vol I, Tab 1C, p 10]. Although the trial judge did not say so expressly, it is implicit that the grounds for the search incident to arrest were also not in issue.

[46] Reasons for Judgment (*Charter*), p 4, l 21–p 14, l 25 [AR, Vol I, Tab 1C, pp 9–19].
[47] *R v Grant*, 2009 SCC 32.
[48] Reasons for Judgment (*Charter*), p 15, l 11–p 16, l 2 [AR, Vol I, Tab 1C, pp 20–21].
[49] Reasons for Judgment (*Charter*), p 16, ll 4–21 [AR, Vol I, Tab 1C, p 21].

the search would not bring the administration of justice into disrepute. The evidence of the drugs seized from the appellant's truck was admitted in the trial proper.[50]

f) *The verdict*

30. The appellant declined to call evidence, and based on the Crown's case, invited a conviction on the charge of possession of marihuana for the purpose of trafficking. The Crown invited acquittals on the remaining counts.[51]

g) *The Alberta Court of Appeal's split decision*

31. The appellant advanced three grounds of appeal relating to the trial judge's s. 24(2) analysis. The Crown did not cross-appeal the finding of the *Charter* breaches.

32. Central to the appeal was his argument that the trial judge erred by failing to consider, "all the s. 8 and s. 9 *Charter* breaches committed by the police, and their effects on his *Charter*-protected interests".[52] Although he had not identified at trial any *Charter* breaches save the s. 8 and 9 breaches relating to the dog sniff, the appellant took the position that the trial judge ought to have found several more breaches arising from his subsequent arrest and the search of his vehicle incident to that arrest.

33. Justices Wakeling and Creighton dismissed the appeal holding that, but for one oversight, the trial judge made no errors in her s. 24(2) analysis. The majority acknowledged this Court's direction in *Reilly*,[53] that all *Charter* breaches must be considered under s. 24(2), even if they were caused by, or flowed from, earlier *Charter* breaches. However, the present case was distinguishable. In *Reilly*, the trial court found, and the Crown conceded, three separate breaches related to the warrantless entry into a residence. There were no such findings or concessions in

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[50] Reasons for Judgment (*Charter*), p 16, l 23–p 17, l 14 [AR, Vol I, Tab 1C, pp 21–22].
[51] Trial Transcript (November 15, 2019), p 17, l 18–p 18, l 35 [AR, Vol I, Tab 3A, pp 22–23].
[52] Reasons of the Court of Appeal, at para 32 [AR, Vol I, Tab 1D, p 35].
[53] *R v Reilly*, 2021 SCC 38.

this case. The majority declined to address the alleged breaches for the first time on appeal: to do so would be "to change the entirety of the trial and the case the Crown was asked to meet."[54]

34. The majority found only one ground of appeal with any merit: in her s. 24(2) analysis, the trial judge did not expressly reference the s. 9 breach arising from the investigative detention. Because the grounds underlying the sniffer dog search and the investigative detention were virtually identical, and the detention itself was brief and accompanied by the right to counsel, the majority concluded the detention could only have had a minimal impact on the appellant's *Charter* protected rights. This error could not have affected the result.[55]

35. Justice Khullar, dissenting, would have allowed the appeal. Although she found that the trial judge made no errors at the first and third stages of the *Grant* analysis, Khullar JA agreed that the trial judge ought to have considered under the second stage the impact of the s. 8 and s. 9 breaches emanating from Cst. MacPhail's miscalculation of the reasonableness of his grounds to suspect. While she acknowledged the appellant was raising new issues on appeal, in her view there was a sufficient evidentiary record on which to assess the new *Charter* arguments.[56]

36. Justice Khullar would have found two additional s. 8 breaches and four additional s. 9 breaches. In her view, the cumulative effect of these breaches were significant and strongly favoured the exclusion of the drug evidence. In rebalancing the three *Grant* factors, Khullar JA concluded that the admission of the evidence would have undermined public confidence in the administration of justice.[57]

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[54] Reasons of the Court of Appeal, at paras 4–10 [AR, Vol I, Tab 1D, pp 29–30].
[55] Reasons of the Court of Appeal, at paras 7–10 [AR, Vol I, Tab 1D, pp 29–30].
[56] Reasons of the Court of Appeal, at para 48 [AR, Vol I, Tab 1D, p 35].
[57] Reasons of the Court of Appeal, at paras 51–59, 64 [AR, Vol I, Tab 1D, pp 38–41].

PART II – POSITION ON THE QUESTIONS IN ISSUE

37. The appellant advances a single ground of appeal arising from the dissenting judgment in the Court below:

a. Did the trial judge properly consider all the relevant *Charter*-infringing state conduct?

The trial judge properly considered the impact of the *Charter*-infringing conduct that was on the record before her. Although she did not expressly reference the investigative detention caused by the request for a sniffer dog in her s. 24(2) analysis, it would have made no difference to her conclusion that the evidence was admissible: the s. 9 breach related to the same minor error in judgment as the s. 8 breach, and the impact of the brief detention was minimal in the circumstances. The appellant is not entitled to raise new *Charter* breaches for the first time on appeal. Nor is he entitled to raise issues that were not the subject of dissent in the Court below. The trial judge's s. 24(2) analysis is entitled to deference.

PART III – ARGUMENT

A. The new issues should not be entertained on appeal

a) *The only live issue at trial was the sufficiency of the grounds underlying the sniff search and the related investigative detention*

38. From the outset, the appellant's *Charter* complaints were narrow. The appellant did not suggest at any point that the *Charter*-infringing conduct extended beyond the decision to employ the sniffer dog. He did not give notice of any other breaches, he called no evidence about them, and he made no submissions that they occurred, in writing or orally. To the contrary, trial counsel repeatedly and clearly defined the issues for consideration through the course of the *Charter* application.

39. The appellant's *Charter* notice served as a bellwether for the arguments that would be made at trial. It alleged violations of ss. 8, 9, 10(a) and 10(b) but made no mention of any facts beyond those underlying Cst. MacPhail's decision to call in the dog handler except to say that the

"vehicle was searched, and the Applicant was charged with possession for the purpose of trafficking".[58] Indeed, the notice included no request for the exclusion of the seized drugs; the only remedy sought was the exclusion of the statements made during roadside questioning. Although the appellant could have raised issues beyond those set out in the *Charter* notice had they arisen during the *voir dire*, he did not do so.

40. Similarly, the evidence called at the *voir dire* was confined to the issues set out in the *Charter* notice: the reasonableness of the grounds to suspect and the later-abandoned ss. 10(a) and 10(b) *Charter* claims. The trial proceeded as a blended *voir dire*, meaning that the court heard Cst. MacPhail's evidence on the *voir dire* together with the balance of the trial evidence. Trial counsel did not cross-examine Cst. MacPhail – or any of the other witnesses – on any purported ss. 8 and 9 *Charter* breaches other than the sniff search and the investigative detention.[59] To the extent that Cst. MacPhail was asked about the subsequent search of the vehicle or the appellant's arrest, it was in the context of challenging the grounds for suspicion or the timing of access to counsel.[60]

41. Finally, the appellant's oral submissions addressed the same discrete *Charter* issue: Cst. MacPhail's grounds for reasonable suspicion to justify the sniffer dog search and to detain the appellant pending that search.[61] No argument was made that any other conduct constituted an independent – or even a related – breach. For example, trial counsel did not suggest that the investigative detention was unduly long, or that the pat-down search or placement of the appellant in the back of the police car were unnecessary. Of central importance to this appeal, the

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[58] Appellant's *Charter* Notice, at para 4 [RR, Tab 1, p 2].

[59] Trial counsel asked Cst. Duperre about the timing of his call to counsel and the reason for a five-minute delay between arresting the appellant and transporting him to the police station in Banff, presumably in relation to the abandoned s. 10 claims: Trial Transcript (November 13, 2019), (afternoon session) p 6, ll 12–36 [AR, Vol II, Tab 3A, p 52].

[60] See Trial Transcript (November 13, 2019), (afternoon session) p 5, l 16 –p 6, l 40 [AR, Vol II, Tab 3A, pp 51–52].

[61] See Trial Transcript (November 14, 2019), p 18, ll 21–24 and p 31, ll 8–13 [AR, Vol II, Tab 3A, p 115, 128].

appellant's submissions on the second branch of *Grant* addressed only the impact of the roadside stop and the sniffer dog search.[62]

42. In light of this, the trial judge understandably focused on the issues as framed by the parties, on the evidence called, and on the submissions made:

> The grounds for the arrest, if one includes the dog signal, is realistically not in question. The *voir dire* addresses allegations of breaches of ss. 8 and 9 respectively, pertaining to Constable MacPhail's decision to detain the accused for a drug investigation, to deploy the sniffer dog, and then to search the vehicle. [63]

43. The trial judge did not ignore *Charter*-infringing conduct nor was she a "passive sphinx" or "mere umpire" as the appellant suggests.[64] Rather, she explicitly considered the subsequent arrest, and made it clear that the grounds for the arrest were not in issue. The appellant did not suggest otherwise at trial.

44. On appeal, the appellant took an entirely different tack, suggesting for the first time that the events that followed constituted discrete and cascading *Charter* breaches. The majority correctly declined to entertain the arguments. The dissenting judge agreed that the arguments were indeed new issues, but believed the record in the court below was sufficient to permit appellate fact-finding.

b) *There are no exceptional circumstances that warrant consideration of any new issues*

45. A party may raise new arguments on appeal only in exceptional circumstances and only where no prejudice is caused to the other party.[65] In deciding whether exceptional circumstances exist, the appellate court should consider (1) the state of the record, (2) fairness to all parties, (3) the importance of having the issue resolved by the appellate court, (4) its suitability for decision and (5) the broader interests of the administration of justice. There are sound policy reasons for this approach: the appellate court is "deprived of the trial court's perspective" and so only rarely should new issues be entertained.[66]

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[62] Trial Transcript (November 14, 2019), p 32, l 13–p 34, l 21 [AR, Vol II, Tab 3A, pp 129–131].
[63] Reasons for Judgment (*Charter*), p 5, ll 7–10, 37–39 [AR, Vol I, Tab 1C, p 10].
[64] Appellant's Factum, at paras 100–101.
[65] *R v JF*, 2022 SCC 17 at para 41.
[66] *R v JF*, 2022 SCC 17 at para 41.

46. The appellant has not met the test. No exceptional circumstances exist: the record is insufficient to permit fact-finding; it would be unfair to make adverse findings on s. 24(2) where the Crown was not put on notice that additional breaches were alleged and there is no broader interest that would be served by having the issue resolved by this Court.

i) The evidentiary record is insufficient

47. Crucially, the evidentiary record with respect to additional alleged breaches was *not* sufficiently developed at trial to permit an assessment of the existence or scope of additional breaches. With respect, the dissenting justice wrongly assumed the Crown would not have called additional evidence except in relation to the alleged "strip-search".[67] Although the Crown may not have called any additional witnesses had it known that the subsequent arrest and search was in issue, the Crown could have elicited additional evidence from those witnesses to flesh out the record on the following points:

a. The scope of and reasons for the "pat-down" search: The pat-down search depicted on the video tendered at trial showed Cst. MacPhail lightly and briefly tapping the outside of the appellant's front pockets with the back of his hand as he asked, "anything sharp?"[68] Cst. MacPhail was not asked about his grounds for conducting the brief pat-down or the extent of the contact made;

b. The reasons why Cst. MacPhail decided to place the appellant in the back of the police car instead of letting him stay in his own vehicle;

c. The scope of and reasons for the search at the police station, regardless of whether it constituted a "strip-search";

d. The circumstances of the appellant's detention at the station. There is no evidence whether the appellant remained handcuffed, whether he was offered food or, as noted by the dissenting justice, whether he was held in a cell;[69]and,

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[67] Reasons of the Court of Appeal, at para 48 [AR, Vol I, Tab 1D, p 38].
[68] Exhibit VD-1 (In-car Video and Audio), at 24:37 [RR, Tab 2].
[69] Reasons of the Court of Appeal, at para 58 [AR Vol I, Tab 1D, p 41].

e. The reason for the duration of time between the appellant's arrest and his release at the station. There was no evidence about when the police decided to release the appellant and why it took until 1:37 a.m. to do so.

48. Before this Court, the appellant suggests he is "alleging nothing more than the fact these events [the arrests, handcuffing, transportation and detention at the station, and the searches] occurred".[70] However, he also asks the Court to conclude that these events constituted *Charter* breaches and to draw significant adverse inferences about the seriousness of the conduct and its impact on him. Even though the bare facts of the arrests and subsequent searches were before the court as part of the narrative of the investigation, the explanation for that conduct was not. There was significant evidence that could have been called to allow a proper assessment of the existence or impact of any other breaches. This is particularly true with respect to the s. 24(2) analysis.

ii) Allowing the appellant to reverse a tactical decision would be unfair to the Crown

49. The appellant made a tactical decision to focus the issues at trial. The fact that the subsequent warrantless searches and detentions were never put in issue at trial undermines his suggestion that the Crown ought to have called additional evidence about those events.[71] The Crown has no obligation to call evidence to justify searches or detentions that the accused does not challenge even in a *pro forma* way. The Crown did call evidence about the only aspect of the warrantless searches that was in issue: the results of the dog sniff search.

50. There was no "admissible, uncontroverted" evidence of further *Charter* breaches that the Crown ought to have foreseen or that the trial judge ought to have addressed despite trial counsel's silence. The appellant's reliance on the *Arbour* line of cases on this point is misplaced. In *Arbour*, the Court of Appeal for Ontario found that a judge presented with admissible, uncontradicted evidence of a s. 10(b) *Charter* breach during a trial should have held a *voir dire* to determine whether the accused's rights had in fact been infringed.[72] The present case is entirely different from *Arbour*. The circumstances surrounding the seizure of the contested evidence were

[70] Appellant's Factum, at para 70.
[71] Appellant's Factum, at para 72.
[72] *R v Arbour*, [1990] OJ No 1353 (CA).

the explicit subject of a *voir dire* and the appellant's counsel consciously circumscribed the scope of the *Charter* arguments.

51. It is not for the Crown or the Court to develop every possible *Charter* argument that could be made. The appellant was represented by competent trial counsel who made a deliberate decision about the arguments that would be advanced in the *voir dire*. He does not suggest that the trial evidence revealed an unexpected issue or new breach that should have been addressed. The comments of the Court of Appeal for Ontario in *R v Rees* are instructive:

> …Furthermore, experienced defence counsel obviously made a strategic decision to attack the statements on the ground of voluntariness, rather than an alleged infringement of the appellant's s. 10(b) rights. Where, as here, counsel elects to make a virtue out of the appellant's decision not to seek the advice of counsel, this court should respect that tactical decision: see *R. v. Lomage* (1991), 44 O.A.C. 131 (C.A.) at pp. 138-39. The necessary evidence to rule on the *Charter* issue is incomplete in that the appellant was neither examined in chief nor cross-examined on his understanding of his right to legal counsel and, therefore, the trial record contains no finding of fact regarding whether or not the appellant understood the nature of his right. For these reasons, the failure of counsel at trial to raise the *Charter* issue precludes the appellant from raising it on appeal.[73]

While the failure of defence counsel to raise an issue at trial is not determinative, it is a relevant consideration. Trial counsel had every opportunity to explore additional breaches and to make any argument about their impact. They chose not to. To do so now is unfair to the Crown who was deprived of the ability to call relevant evidence at trial.

iii) There is no broader interest that would be served by addressing the new issues

52. While the incomplete evidentiary record and the prejudice to the Crown provide a sufficient basis for refusing to hear the new *Charter* arguments, the balance of the test set out by this Court in *JF* supports the same result. It is unnecessary for this Court to resolve the issue of whether there were additional *Charter* breaches. For the reasons set out in Part III.C of this factum, even if this Court accepted that there were related, technical *Charter* breaches, the balancing of the three *Grant* factors still favours admission of the evidence. In other words, hearing the new issues would not affect the result.

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[73] *R v Rees*, [1994] OJ No 1325 (CA) at para 30.

53. This is not to say that the subsequent events are irrelevant on the s. 24(2) analysis. They are entirely relevant to the threshold question of whether evidence was "obtained in a manner" such that an application under s. 24(2) in engaged. It is at this stage in particular that courts are to take a "purposive and generous approach" and consider the "entire chain of events" involving the *Charter* breach and the impugned evidence.[74] Once the door to s. 24(2) is opened, the focus of the *Grant* inquiry should be on the seriousness and impact of the specific state misconduct when assessing the effect of admitting the evidence on the public's confidence in the administration of justice. The trial judge did exactly that.

B. The trial judge made no reversible error in her s. 24(2) analysis

a) *Deference is owed to the trial judge's s. 24(2) analysis*

54. It is axiomatic that a trial judge's decision under s. 24(2) is entitled to considerable deference on appeal. Unless the trial judge has failed to consider the proper factors or has made an unreasonable finding, appellate courts will not interfere. Even where the appellate court reaches a different conclusion on the breach itself, the underlying factual findings are still owed deference.[75]

b) *The trial judge considered all the circumstances at the threshold stage*

55. As a preliminary matter, the appellant is wrong when he suggests that the trial judge and the majority of the Court of the Appeal failed to take a purposive and generous approach to the application of the *Charter*. That is exactly what happened in this case. The evidence at issue in the s. 24(2) analysis was not just the fruit of the impugned search (the dog sniff results) but the real evidence seized from the appellant's truck. The trial judge understood that the evidence sought to be excluded was the cannabis and cash seized from the appellant's truck incident to arrest. It was that evidence that was central to the prosecution's case and that was real and reliable evidence. Trial counsel said so explicitly in her submissions[76] and the trial judge said as much in her reasons for judgment.[77]

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[74] *R v Tim*, 2022 SCC 12 at para 78.
[75] *R v LaFrance*, 2022 SCC 32 at para 91; *R v Grant*, 2009 SCC 32 at paras 43, 86.
[76] Trial Transcript (November 14, 2019), p 31, ll 15–18 [AR, Vol II, Tab 3A, p 128].
[77] Reasons for Judgment (*Charter*), p 5, ll 1–10 [AR, Vol I, Tab 1C, p 10].

56. The fruits of the search of the vehicle could only be at issue if the trial judge accepted that there was a contextual, temporal or causal connection between the breaches and the evidence. That is, the trial judge necessarily applied a purposive and generous approach to the question of the admissibility of the evidence.

c) *The* Charter-*infringing conduct was minor*

57. It is not open to the appellant to challenge the trial judge's assessment of the seriousness of the misconduct under the first *Grant* inquiry as he has attempted to do.[78] Neither the majority nor the dissent took umbrage with the trial judge's characterization of the single instance of constitutional infirmity as minor or minuscule. Indeed, the dissenting judgment upholds the trial judge's analysis on this point. There is no basis for advancing that argument before this Court.[79]

d) *The trial judge properly considered the impact of the misconduct*

58. The second *Grant* inquiry requires courts to consider the seriousness of the actual impact of the breach on the *Charter*-protected interests of the accused. The court must look at the interests engaged by the rights that were breached and examine the degree to which those interests were impacted by the violation. The more serious the incursion, the stronger this factor pulls towards exclusion of the evidence.[80]

59. With respect to non-bodily physical evidence obtained from a s. 8 breach, like the evidence at issue in this case, *Grant* says that privacy is the principal interest engaged. It contrasted the search of a dwelling house, which attracts a high expectation of privacy, from the search of an automobile, like the appellant's truck.

60. There is no merit to the suggestion that the trial judge improperly ignored the circumstances surrounding the seizure of the evidence under the second line of the *Grant* inquiry. She heard evidence about the chain of events that led to the seizure of the impugned evidence. She specifically adverted to the investigative detention, the sniffer dog search and the search of

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[78] Appellant's Factum, at paras 107–113.

[79] Section 691(1)(a) of the *Criminal Code* allows an appeal to this Court as of right only with respect to a question of law on which a judge of the court of appeal dissents.

[80] *R v Grant*, 2009 SCC 32 at paras 76–78.

the vehicle at the outset of her oral reasons.[81] And she was well aware that the result of the positive indications from the sniff search was that the appellant was arrested and taken to the police station, following the search of his vehicle and the discovery of the cannabis. While she did not characterize any of this conduct as separate breaches, the factual circumstances were squarely before her. However, the focus of the trial judge's attention under the second *Grant* factor was rightly on the impact of the roadside conduct on the appellant's *Charter*-protected rights:

> The *Charter*-protected interest here is the expectation of privacy and the right to be free of search and seizure by the state absent reasonable suspicion. The place which was searched is not one where a person has a high expectation of privacy such as their home or their person. It is a motor vehicle on a public highway. It did not demean Mr. Zacharias's dignity. It did not look into intimate personal places like one's computer or interfere with one person. This mitigates the impact.[82]

61. She distinguished this case from those where there were additional *Charter* violations, including breaches of s. 10 rights, and found that the second branch of *Grant* did not strongly favour exclusion.[83]

62. The trial judge made no error in her assessment about the impact of the s. 8 breach. The effect of that breach, from a privacy standpoint, was an intrusion into the appellant's reasonable expectation of privacy in the truck. It is uncontroversial that a motor vehicle and its contents attract a lower expectation of privacy than many other contexts.[84]

i) The trial judge's analysis of the impact of the misconduct is well rooted in law

63. There is a long line of jurisprudence supporting the trial judge's approach to the second *Grant* factor. Indeed, the language of *Grant* itself compels it: trial courts are directed to consider

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[81] Trial Transcript (November 15, 2019), p 5, ll 7–10 and p 15, l 34ff [AR, Vol II, Tab 3A, pp 150, 160]. As explained above, the grounds for the search of the vehicle were not in issue and no separate *Charter* violation was alleged or found. However, the trial judge's reasons demonstrate that she understood the circumstances in which the evidence was seized.

[82] Reasons for Judgment (*Charter*), p 16, ll 6–11 [AR, Vol I, Tab 1C, p 21].

[83] Reasons for Judgment (*Charter*), p 17, l 2 [AR, Vol I, Tab 1C, p 22].

[84] *R v MacKenzie*, 2013 SCC 50 at para 31; *R v Grant*, 2009 SCC 32 at para 113.

"the seriousness of the impact of the *Charter* breach" and to evaluate how "the breach actually undermined the interest protected by the right infringed".[85] In deciding to admit the handgun seized from Mr. Grant following an unlawful detention and failure to provide s. 10(b) rights, this Court focused on the impact of each of the two breaches and not the events that followed (his arrest and transport to the police station), even though Mr. Grant would not have been arrested but for the initial breaches.[86]

64. Similarly, in *Tim*, this Court admitted evidence obtained following a search based on an unlawful arrest. As in this case, the accused was lawfully detained for a traffic-related investigation. When Tim returned to his car to get documents, a police officer saw him try to conceal a pill. The officer correctly identified the pill as gabapentin but mistakenly believed it was a controlled substance and thus illegal to possess. That mistake led to the arrest of the accused and four searches – two pat-down searches, a search of his car incident to arrest, and a strip-search at the station. Fentanyl, other drugs, ammunition and a loaded handgun were seized. At trial, the accused applied to exclude the drugs and weapons on the basis that his initial arrest was unlawful. Notably, and distinguishable from the present case, Tim expressly challenged the arrest and the four searches that followed at trial.[87] The trial judge and the majority of the Court of Appeal of Alberta found no *Charter* breaches. This Court took a different view, holding that an arrest based on a mistake of law is not objectively reasonable. Because the arrest was unlawful, two searches incident to that arrest were also unlawful. The second two searches, which yielded the loaded handgun and additional ammunition, did not breach s. 8.

65. Justice Jamal, writing for the majority, nevertheless admitted the evidence under s. 24(2). All of the evidence from all four searches was at issue. Jamal J. reiterated that, in deciding whether evidence was "obtained in a manner" that breached the accused's *Charter* rights, the Court should take a "purposive and generous approach", considering the "entire chain of events involving the *Charter* breach and the impugned evidence.[88] Despite the wide lens applied to the

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[85] *R v Grant*, 2009 SCC 32 at paras 8, 134–138.
[86] *R v Grant*, 2009 SCC 32 at paras 8, 134–138.
[87] *R v Tim*, 2022 SCC 12 at paras 13–16.
[88] *R v Tim*, 2022 SCC 12 at para 78.

threshold question, the focus of the *Grant*-inquiry was on the actual misconduct and the impact of that misconduct: the unlawful arrest and the two searches incident to arrest alone.

66. Particularly relevant to the present case is the majority's conclusion that, even taken together, the breaches pulled only "moderately" towards exclusion. After finding that the impact of the s. 9 breach was mitigated by the fact Tim was lawfully detained for a traffic collision, Jamal J. considered the impact of the s. 8 breaches:

> 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).[89]

67. In the final balancing, the first factor pulled "weakly" – and the second factor moderately – towards exclusion, while the third factor strongly favoured admission. The evidence was admitted.

68. Even where this Court ultimately excluded the evidence, the focus was on the *Charter*-infringing conduct itself and not all the events that followed. For example, in *Reilly*, the police committed a series of related *Charter* breaches when they entered a private residence and then a bedroom, without a warrant or any exigent grounds, to effect an arrest. Because of one officer's decision to enter the residence, other officers engaged in a clearing search for safety reasons, and observed evidence in plain sight. All of the searches were conducted in the absence of any legal justification for the initial warrantless entry. Although they later obtained a warrant to re-enter the home and seize the evidence, all levels of court found (and the Crown conceded) at least three s. 8 breaches related to the initial entry and search.[90] The evidence was ultimately excluded on appeal. In assessing the impact of the breaches, Griffin JA (whose conclusion about the exclusion of the evidence was adopted by this Court)[91] considered the impact of the *Charter* breaches and not the events that inevitably followed (the accused's arrest and transport to the station, and the

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[89] *R v Tim*, 2022 SCC 12 at paras 92–93.
[90] *R v Reilly*, 2020 BCCA 369 at para 51, aff'd 2021 SCC 38.
[91] *R v Reilly*, 2021 SCC 38.

search of the house pursuant to the warrant).[92] The same focused analysis can be found in other decisions from this Court.[93]

69. Perhaps the most compelling example of this approach emanates from impaired driving cases, where the lynchpin of the Crown's case is often the officer's grounds to make a demand for a breath sample under s. 320.27(1)(b) of the *Criminal Code*. In order to make such a demand, the officer must have reasonable grounds to suspect that a person has alcohol in their body. A positive result on an approved screening device can furnish the necessary grounds to believe that a person is impaired such that the police can make a demand for a breath sample under, s. 320.28, or arrest the person, transport them to the police station, and/or search them further. That is, much like a dog sniff search, the initial "screening search" can furnish the essential grounds for all the police conduct that followed.

70. In *Jennings*,[94] the Court of Appeal for Ontario addressed two competing lines of authority about the scope of the police conduct that must be considered where there is a s. 8 breach relating to the grounds for making the initial demand. One line of authority held that it is the entire chain of conduct – from the first demand to the arrest, further detention, and any searches that occur – that must be considered under the second branch of *Grant*. This is the approach taken by the appellant and the dissenting justice in the case at bar. This line of authority characterized the impact of a s. 8 breach relating to a breath sample demand as serious and favouring exclusion. The second line of authority considered only the impact of the intrusiveness of the breath sample procedure. The Court of Appeal adopted the second line of cases, emphasizing that *Grant* itself described breath sample searches as "minimally intrusive":

> To find otherwise would be to create a categorical rule that s. 8 breaches in breath sample cases automatically favour the exclusion of evidence under the second *Grant* factor, since drivers in these cases are almost invariably arrested and taken to the police station to provide further breath samples. This would be contrary to the approach taken by the Supreme Court in *Grant* and to a sound characterization of what is at stake for the individual in providing a breath sample. Accordingly, it was an error for the trial judge,

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[92] *R v Reilly*, 2020 BCCA 369 at para 137, aff'd 2021 SCC 38.
[93] See e.g. *R v Harrison*, 2009 SCC 34; *R v Spencer*, 2014 SCC 43 at para 87; *R v Mian*, 2014 SCC 54.
[94] *R v Jennings*, 2018 ONCA 260.

> and the SCAJ, to have followed *Au-Yeung* in this respect and not to have found the impact of the breach to have been minimal, favouring admission.[95]

71. Although *Jennings* was decided in the context of impaired driving cases, the Court's reasons for rejecting the first line of cases are apposite to the case at bar. The assessment of the impact of breath demand procedure in *Grant*, adopted in *Jennings*, mirrors this Court's characterization of dog sniff searches. In the companion cases of *Kang-Brown* and *A.M.*, Binnie J. (writing for a minority of the Court in both cases) described the dog sniff search as "minimally intrusive" and "a very narrowly targeted invasion of the suspect's privacy interest."[96] These cases predated the revised approach to 24(2) set out in *Grant*, but the assessment of the impact of dog sniff searches on privacy interests remains relevant.

72. Assessing the impact of the breach itself rather than the entire chain of events does not open the floodgates to the admission of evidence or undermine the *Grant* analysis. Rather it centers the analysis on the misconduct at issue, which here relates to a single miscalculation in grounds at the investigatory stage. The question is always whether the admission of the evidence would bring the reputation of the administration of justice into disrepute.[97] Maintaining focus on the breach does not dilute that analysis. There may be cases where a single error in the assessment of grounds has a significant impact on the *Charter*-protected interests of the accused, or where the seriousness of that error compels exclusion of the evidence. Each case is assessed on its own facts.

73. Conversely, if the dissenting judge's approach is correct, then exclusion would be required in nearly every case involving a minor or technical breach at the early stage of the investigation if that breach played an essential role in the discovery of the evidence. *Grant* did away with categories of presumptively inadmissible evidence. The fact that a minor breach at an early stage of a straightforward investigation led to the arrest of the accused and the search of his belongings should not mean the evidence is presumptively inadmissible or that the impact is necessarily at the most serious end of the scale.

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[95] *R v Jennings*, 2018 ONCA 260 at para 32.
[96] *R v A.M.*, 2008 SCC 19 at paras 9, 42, 74. See also: *R v Kang-Brown*, 2008 SCC 18 at para 60.
[97] *R v LaFrance*, 2022 SCC 32 at para 88.

ii) The trial judge's conclusions on the impact of the s. 8 breach apply to the entire chain of events

74. Even if this Court finds that the trial judge ought to have considered the impact of the subsequent events more explicitly, her conclusion on the ultimate impact of the Cst. MacPhail's conduct remains sound. Whether or not the trial judge expressly considered the impact of the search of the vehicle,[98] the appellant's privacy interest in the motor vehicle – and its contents – was reduced. Although the search of the vehicle included a search of the large duffle bags, it does not affect the trial judge's conclusion that the search did not look into "intimate personal places like one's computer or interfere with one['s] person"[99]. This case is unlike *Reilly*,[100] *Le*,[101] or *Côté*,[102] where the intrusion involved a private residence, or *Spencer*,[103] where the police obtained access to personal digital devices or accessed a key (IP subscriber information) that would unlock a trove of otherwise anonymous evidence. The appellant was briefly detained in the course of a lawful traffic stop for the purposes of a minimally invasive, highly targeted search that led to a search of the contents of a motor vehicle and his arrest.

75. Moreover, the trial judge did not conclude that the impact was "trivial". Rather, both the trial judge and the majority correctly assessed that the intrusion into the accused's privacy interests in a vehicle did not trench on an area with a high expectation of privacy. This assessment is supported by the facts: the intrusion into the appellant's *Charter*-protected interests did not extend beyond the detention and searches at the roadside, except for a five-minute ride to the police station from where he would later be released. There is no reason to interfere with the trial judge's assessment of the second *Grant* inquiry.

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[98] The dissenting judge found that, although it was ambiguous, the trial judge considered only the dog sniff search: Reasons of the Court of Appeal, at footnote to para 28 [AR, Vol I, Tab 1D, p 34]; contrast this with the trial judge's specific reference to the search of the car at the outset of her oral reasons on the *Charter* application: Reasons for Judgment (*Charter*), p 4, l 21 [AR, Vol I, Tab 1C, p 9].

[99] Reasons for Judgment (*Charter*), p 16, ll 10–11 [AR, Vol I, Tab 1C, p 21].
[100] *R v Reilly*, 2021 SCC 38.
[101] *R v Le*, 2019 SCC 34.
[102] *R v Côté*, 2011 SCC 46.
[103] *R v Spencer*, 2014 SCC 43.

e) ***The trial judge's failure to describe the impact of the s. 9 breach did not affect the result***

76. The trial judge did not specifically advert to the impact of the s. 9 breach on the appellant's liberty interests. Instead, her focus under s. 24(2) was on the impact of the sniff search. Although this may have been an error, it was entirely understandable in the circumstances of the case. The decision to detain and the decision to employ the sniffer dog were closely intertwined and rested on the very same grounds to suspect criminal activity. The constitutionality of both decisions related to the same state conduct. The trial judge's conclusion that the misconduct was minor, not a result of negligence, and emanated from a small error in judgment applied to both the ss. 8 and 9 breaches. The trial judge's analysis of the seriousness of the misconduct was unaffected by the error.

77. Likewise, the oversight could have no impact on the trial judge's assessment of the third branch of *Grant*, society's interest in an adjudication of the case on its merits. The trial judge properly found that the evidence was highly reliable, and that it was critical to the Crown's case on a very serious charge.[104] Implicit in her reasons was the conclusion that this factor pulled strongly towards admission.

78. Indeed, the only possible effect of the oversight could have been under the second branch of the *Grant* analysis. However, there was no such effect. First, the trial judge was aware of the s. 9 breach: she heard full submissions on the issue the day before her ruling and, immediately preceding the s. 24(2) analysis, she made a finding that the appellant's s. 9 rights had been breached. When she assessed the impact of the *Charter*-infringing conduct, she must have appreciated that the appellant was detained pending the arrival of the sniffer dog. Second, the detention – like the sniffer dog search – had only a minimal impact on the *Charter*-protected interests of the appellant. The investigative detention was relatively brief,[105] accompanied by the right to counsel (which was refused), and was necessary to facilitate the sniffer dog search.

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[104] Reasons for Judgement *(Charter)* (November 15, 2019), p 16, ll 23–38 [AR, Vol II, Tab 1C, p 161].

[105] The appellant's suggestion that the appellant was detained for 45 minutes, including 30 minutes after the officer decided to detain him but before he advised him of his right to counsel,

79. This was not a case like *Le*, where this Court found that the impact of an arbitrary detention was heightened by "the absence of any reasonable basis for justification".[106] As will be explained further below, in this case the officer had subjective grounds that were warranted and that only barely missed the mark of objective reasonableness. Moreover, the appellant was already lawfully detained as a result of the traffic infraction.

80. The majority of the Court of Appeal correctly found that the error could not have made a difference to the outcome. The *curative proviso* in s. 686(1)(b)(iii) applies.

C. Even if this Court considers the s. 24(2) analysis anew, evidence was properly admitted

81. If this Court finds that the subsequent searches and arrests constituted separate *Charter* breaches because of the initial ss. 8 and 9 breaches, then no deference is owed to the trial judge's s. 24(2) analysis.[107] However, even in these circumstances, the evidence should still be admitted.

82. The nature of the state conduct was the very same, regardless of whether or not the events that followed are characterized as *Charter* breaches. If there were additional breaches, they were technical and minor: that is, they are only *Charter* breaches because of the officer's miscalculation in assessing his grounds for suspicion.

83. It bears repeating that this is not a case where there was an absence of any grounds to suspect criminal activity nor was it a case of negligence, ignorance or recklessness. Rather the

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is not supported by the record. At its longest, the detention relating to the drug investigation lasted 38 minutes from 6:44 p.m., when the grounds for detention first crystallized, to 7:22 p.m. (when Warden Henderson communicated the results of the sniff search). During this time, Cst. MacPhail called for backup, called for the drug detection dog, and continued to deal with the traffic infractions arising from the initial traffic stop. The detention had a dual-purpose, including completion of the paperwork related to the *Traffic Safety Act*. Moreover, the appellant was advised of his changed jeopardy and the reason for his continued detention at 6:56 p.m., as soon as 12 minutes after the grounds first crystallized and immediately upon the arrival of backup: see Appendix A – Timeline

[106] *R v Le*, 2019 SCC 34 at para 155.
[107] *R v LaFrance*, 2022 SCC 32 at para 91.

trial judge found that Cst. MacPhail only barely missed meeting the requisite standard. She found that he was well trained, understood the applicable standard and, most importantly, sought to apply that standard. She found that he has "significant information raising suspicion" and "more than a hunch that the accused was possibly acting as a drug courier".[108] The officer's efforts to respect the appellant's *Charter* rights was palpable. Any error was minuscule. To borrow the language from this Court's decision in *Fearon*, "[t]here is not here even a whiff of the sort of indifference on the part of the police to the suspect's rights that requires a court to disassociate itself from that conduct."[109]

84. Indeed, a different judge could reasonably have come to a different conclusion on the existence of objective grounds to suspect the appellant's possible involvement in a drug offence. In two decisions from this Court involving sniffer dog searches, the test for reasonable grounds to suspect were met on facts not dissimilar from the case at bar. A comparison of the facts of the cases illustrates how close a call Cst. MacPhail's assessment was.

85. In *MacKenzie*, this Court found that the following grounds gave rise to the requisite grounds to deploy a sniffer dog in the context of a highway traffic stop:

- Erratic driving: The accused was travelling 112kmh in a 110kmh zone. His vehicle decelerated quickly; and pulled over on its own before police could effect a stop.
- Extreme nervousness compared to other traffic stops: The accused's hands were shaky and trembling, he was sweating, breathing rapid, carotid artery pulsing rapidly. He took asthma medication – but there was no decrease in the rapid breathing.
- Physical signs: The accused's eyes were "pinkish."
- Known drug pipeline: The accused was returning to Regina from Calgary.
- Inconsistent story: Changed story on how long he'd been travelling.
- Record check: Negative record check.
- Training and experience: took pipeline courses, conducted more than 5000 stops, discovered drugs on about 150 occasions – during highway traffic stops.[110]

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[108] Reasons for Judgment (*Charter*), p 15, ll 30–34 [AR, Vol I, Tab 1C, p 20].
[109] *R v Fearon*, 2014 SCC 77 at para 95.
[110] *R v MacKenzie*, 2013 SCC 50 at paras 5-17, 91.

86. Similarly, in *Chehil*, decided at the same time as *MacKenzie*, the Court found that the following grounds amounted to reasonable suspicion, which this Court defined as the possibility that the accused be involved in drug trafficking in the context of an airport dog sniff search:

- Ticket purchase: The plane ticket was the last one purchased before flight departed and it was paid for in cash.
- Travel details: The accused flew one-way from Vancouver to Halifax and was travelling alone, overnight, on a mid-to-late week flight on a less expensive airline.
- Luggage: One checked bag.
- Training and experience of the officer: The investigative officer testified that most people with that constellation of factors had been proven to be drug couriers and that it was not common to innocent travelers.[111]

In both cases, there were potentially innocent explanations for each of the factors taken individually. However, the totality of the circumstances met the requisite test.

87. In the present case, Cst. MacPhail, a very experienced pipeline officer with more than 12,000 traffic stops under his belt, took into account many of the same factors: the extreme nervousness, the known drug route between a source city and a destination city, the inconsistencies between the purported reason for the travel and the large amount of luggage in the cab of the truck, the evidence about the "Back the Blue" sticker, and the information about the CFSEU file linking the appellant to a drug-trafficking investigation. The trial judge rightly found that "if he missed the mark, it was not by much".[112] The police conduct was at the very low end of the scale.

88. It is difficult to imagine a more minor misstep in the assessment of the reasonable grounds to justify a dog sniff search and related investigative detention. The police officer knew the law, tried his best to apply the law and missed the mark only marginally. The results of that misstep were a minimally intrusive, highly targeted sniff search of the odours emanating from a vehicle, and the relatively brief detention that was a necessary corollary of the search. The officer relied, in good faith, on the results of that search (the positive indications from the sniffer dog) to effect

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[111] *R v Chehil*, 2013 SCC 49 at paras 64-69.
[112] Reasons for Judgment (*Charter*), p 15, l 26 [AR, Vol I, Tab 1C, pp 20].

an arrest and a search incident to that arrest. The arrest was based on reliable and real evidence indicating the presence of controlled substances. There is no need for the Court to dissociate itself from the evidence obtained as a result of that miscalculation. The first *Grant* inquiry pulls weakly – if at all – towards the exclusion of the evidence.

89. For the reasons set out above, the second *Grant* inquiry does not pull strongly towards exclusion either. Although the combined effect of the various searches and detentions was not insignificant, neither was it serious. The appellant was already lawfully detained, a detention prolonged only briefly by the request for a drug detection dog and then because of the discovery of the drugs themselves. None of the searches impacted the appellant's personal dignity. He was not searched personally (except for the brief, back-of-hand tapping and the inquiry about whether he had anything sharp on his person), nor were his electronic devices, home or any other areas attracting a high expectation of privacy. The appellant was handcuffed only briefly, he was transported to a police station from where he was released. Even if the combined impact of the separate breaches is described as "significant" it still does not militate strongly in favour of exclusion.

90. Lastly, there is no doubt that the third *Grant* inquiry favours admission of the evidence: this was a large quantity of a controlled substance and the exclusion of the evidence would have gutted the Crown's case.

91. This Court has emphasized that it is not necessary that *both* the first and second factors of *Grant* pull towards exclusion before evidence can be excluded: it is the sum not the average that matters.[113] But in this case, there is almost no pull to exclusion. To the contrary, when all the circumstances are considered, the public's confidence in the administration of justice would be undermined by the exclusion, not the admission, of the evidence.

[113] *R v Le*, 2019 SCC 34 at para 141.

PART IV – COSTS

92. In accordance with the usual practice in criminal matters, no costs should be ordered.

PART V – NATURE OF ORDER SOUGHT

93. The appeal should be dismissed, without costs.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

94. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation, or restriction on public access to information in this file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 12th day of August 2022.

Amber Pashuk
Counsel for the respondent,
Her Majesty the Queen

Kyra Kondro
Counsel for the respondent,
Her Majesty the Queen

PART VII – TABLE OF AUTHORITIES

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APPENDIX A: Timeline of Detention

Video Time Elapsed[114]	**Estimated Real Time**[115]	**Description**
00m00s	6:31 PM	Cst. MacPhail pulls on the road.
00m42s	**6:32 PM**	**Initial detention for traffic infractions** Appellant stopped. [**Note**: *In his testimony, Cst. MacPhail says he believes stopped the appellant at 6:45 PM. 13/20*]
01m07s – 02m20s	6:32 PM-6:33 PM	Cst. MacPhail has conversation with appellant from passenger side, takes his passport.
02m22s	6:34 PM	Cst. MacPhail walks back to his vehicle. He narrates his observations about luggage and nervousness.
02m43s – **12m18s**	6:34 PM-**6:43 PM**	Cst. MacPhail runs computer checks and learns there is an entry for a 2014 file. He calls the Real Time Information Centre (RTIC). He is put on hold twice, and during this time Cst. MacPhail speaks to dispatch and inquires about the location of dog handler Warden Henderson. RTIC advises MacPhail about the details of the 2014 entry. Conversation with RTIC ends. **Officer subjectively believes he has reasonable grounds to suspect drug offences**
12m57s – 14m30s	6:44 PM-6:46 PM	Cst. MacPhail contacts dog handler Henderson. Advises he will be detaining someone. Explains his grounds. Told Henderson will be there in a half hour.
14m42s	6:46 PM	Cst. MacPhail calls for backup.

[114] This time comes from the ribbon at the bottom of the video player that indicates the time elapsed. The video starts at 0:00 (M:SS) when the in-car video is activated. For ease of reference, the "time elapsed" is shown in the following format: 0m0s.

[115] The in-car camera contains time and date stamp which can be displayed by (1) clicking on the "Subtitle" pull-down menu, (2) clicking on "Sub Field", and (3) clicking on "DVB subtitles – [English]. The time stamp on the video is one hour ahead of the actual time.

15m07s-15m57s	6:47 PM	Cst. MacPhail says he is going to write a ticket for the window tint and will be starting his notes. [*On video at 15m58s, he says the time is 18:47, the time on the dash camera is off by one hour*]
18m14s	6:49 PM	Cst. MacPhail is advised an officer is getting on the highway.
21m08s	6:52 PM	The other officer advised that he will be there in two minutes. Cst. MacPhail says **he is writing a ticket and making notes**.
22m15s	6:54 PM	Cst. MacPhail explains his reasons for detaining the appellant.
23m19s	6:54 PM	Cst. Duperre arrives. [**Note:** *At 23m45s, Cst. MacPhail says the time is 18:55. At trial, Cst. Duperre said he received a call for assistance at 7:06 PM.*]
24m02s	6:56 PM	Cst. MacPhail asks Cst. Duperre if he can bring the appellant to the station if he wants a lawyer, because he does not want to wait to facilitate a lawyer call.
24m37s	**6:56 PM**	**Appellant is advised he is under investigative detention** Cst. MacPhail does a quick touch of the appellant's pockets and asks if there is anything sharp in there.
24m55s-25m42	6:56 PM-6:57PM	Cst. MacPhail explains to appellant he will be detained for a drug investigation and that a drug dog has been called because of concerns about contraband inside the vehicle. **Advises appellant of right to counsel, to silence.** Cst. MacPhail explains what will happen: if the dog gives a positive indication, the appellant will be arrested and if the dog doesn't, they will deal with the traffic tickets but the CDSA investigation trumps the traffic investigation.
25m42s	6:57 PM	**Appellant declines access to counsel**
26m20s	6:58 PM	Cst. MacPhail tells the appellant to get in the back of the police vehicle, and says he is **not placing handcuffs** on the appellant.
26m42s	6:58 PM	Cst. MacPhail states to camera that there is now a strong smell of air freshener that was not there before, this adds to his suspicion.

28m15s	7:00 PM	Cst. MacPhail tells the appellant again that he is being detained for a drug investigation and asks if he understands. Cst. MacPhail advises appellant of his *Charter* rights and again asks if appellant wants to call a lawyer.
29m12s	7:01 PM	Cst. MacPhail tells appellant he can watch the dog; says they will deal with the traffic ticket as well. Advises the appellant to "make sure you get the tint taken off".
29m50s-31m45s	7:01 PM-7:03	Cst. MacPhail asks appellant about details related to traffic ticket
36m25s-43m07s	7:08 PM-7:15 PM	Waiting for the drug dog, the officers discuss the grounds for search. Henderson approaches from oncoming lanes of traffic.
45m23s	**7:17 PM**	**Warden Henderson and drug dog on scene.** Cst. MacPhail tells Henderson that the appellant sprayed air freshener. Henderson conducts walk-around with dog.
50m31s	**7:22 PM**	**Grounds for arrest crystallize.** Henderson tells Cst. MacPhail that, twice, the dog gave an indication on the front passenger door panel.
51m37s	**7:23 PM**	**Appellant arrested for possession of a controlled substance.** Cst. MacPhail advises appellant of *Charter* rights and reads caution. Appellant says he wants to call a lawyer.
53m30s	7:25 PM	Cst. MacPhail asks Cst. Duperre if he can put him in cuffs in the front. Handcuffs are placed on the appellant, in front. [*At trial, Cst. Duperre testified that he handcuffed the appellant "in around 1939 hours"*]
53m48s	**7:25 PM**	**Officers start search of appellant's truck**
55m10s	7:27 PM	Cst. MacPhail opens the tailgate and finds bags full of marijuana. Cst. MacPhail says he is going to re-arrest the appellant. Asks Cst. Duperre to take him to the station to call a lawyer.
56m02s	**7:28 PM**	**Cst. MacPhail tells the appellant he is under arrest for possession for the purpose of trafficking marijuana and possession of cannabis resin**.

57m05s	7:29 PM	*Charter* rights and caution re-provided. Appellant says he wants to speak to lawyer.
58m19s	7:30 PM	Cst. MacPhail says he's turning the appellant over to Cst. Duperre. Cst. MacPhail reminds Cst. Duperre to provide secondary caution.
59m14s	7:31 PM	The appellant is taken out of Cst. MacPhail's police car.
[not on video]	Time Unknown	Cst. Duperre reads appellant the secondary caution. This occurred before the appellant was brought to the RCMP detachment.
	7:39 PM[116]	Cst. Duperre and Cst. MacPhail leave the road side and drive to the Banff Detachment.
	7:46 PM	The appellant arrives at Banff RCMP detachment with Cst. Duperre. The appellant is directed to go down to one layer of clothing – shirt, pants and no shoes.
	7:52 PM	The appellant is placed into phone room to call a lawyer.
	7:54 PM	Cst. MacPhail advises that the appellant is to be arrested for possession of proceeds of crime over $5000. Cst. Duperre opens the door to the phone room, **advises the appellant of the new charge** and closes it.
Next day	1:37 AM	The appellant is released from police custody.

[116] The times in this column going forward are based on Cst. Duperre's evidence at trial.