SCC File No. 40117

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

B E T W E E N:

GEORGE ZACHARIAS

Appellant
(Appellant)

- and -

HIS MAJESTY THE KING

Respondent
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF ALBERTA

Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PARTS I & II: OVERVIEW AND STATEMENT OF POSITION

1. This appeal raises an important question about the scope of the second branch of the s. 24(2) *Grant* test: when assessing the impact of a *Charter* breach on the protected interests of the accused, should courts consider only the immediate effects of the wrongful state conduct? Or should courts go further and take into account subsequent state actions that are not independently wrongful but that flow directly from the breach, as did the dissenting justice in the court below? This issue arises most obviously where the police find evidence of a crime in the course of a *Charter*-infringing search. Should the fact that the accused is arrested and subject to further state actions on the strength of this evidence be accorded weight in applying the *Grant* test?

2. The Attorney General of Ontario's position is this: where a *Charter* right is breached in the course of discovering evidence of a crime, normal state actions that flow from that discovery, such as an arrest, should not be treated as "effects of the breach" under s. 24(2) unless there was independent misconduct or further unusually intrusive state conduct. To hold otherwise would effectively create a categorical rule that the second *Grant* factor favours exclusion of the evidence, since the discovery of evidence of a crime almost invariably leads to arrest, handcuffing, further detention at the police station, and further intrusions into the accused's liberty interests through a criminal prosecution.

3. This approach has been adopted by the Court of Appeal for Ontario in *R. v. Jennings*, 2018 ONCA 260, which held that the analysis at the second *Grant* s. 24(2) stage in cases where breath samples are obtained in breach of s. 8 should be limited to the impact of the breath sample procedure itself on the person's *Charter*-protected interests. The analysis does not include consideration of the impact of the entire chain of events that occur after the sample is taken. The jurisprudence following *Jennings* has led to the development of a principled and simple

framework where the effects of state actions that involve no independent wrongdoing,[1] and that flow entirely from an initial breach, have no independent value at the second stage of the s. 24(2) test.

4. This framework is appropriate for the second stage of the inquiry under s. 24(2) not only for breath sample cases but more broadly, including to dog sniff searches like in the case at bar. It finds support in this Court's own *Charter* jurisprudence, accords with the relevant concerns under s. 24(2), and strikes a fair balance between effective law enforcement and the protection of *Charter* rights.

PART III: ARGUMENT

i. *R. v. Jennings* and the Development of Ontario's Approach

5. In *Jennings* the Court of Appeal was faced with two competing lines of authority regarding the methodology for assessing the impact on an accused's s. 8 *Charter*-protected interests in breath sample cases. One line of authority held that a trial judge should consider not only the impact of the breath sample procedure, which is minimally intrusive, but the entirety of the course of state action that occurs after the breach. In contrast, the second line of authority involved a more limited approach to the second *Grant* s. 24(2) factor, assessing the impact by reference to the intrusiveness of the breath sample procedure alone.[2]

6. The Court of Appeal adopted the limited approach and rejected the idea that anything beyond the intrusiveness of the taking of the breath samples was relevant. The Court found

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[1] The Attorney General for Alberta takes the position on this appeal that warrantless arrests that rely on illegally obtained evidence should not thereby be considered breaches of the *Charter*. The position of the Attorney General of Ontario is that absent independent wrongdoing, such arrests have no value to the *Grant* analysis irrespective of whether they are considered technical breaches of the *Charter* or not.

[2] It should be noted that, prior to *Jennings*, some decisions that took this limited approach did so, at least in part, on account of this Court's decision in *R. v. Sheppard*, 2009 SCC 35, at para. 14, where this Court declined to consider a potential s. 9 breach arising out of a s. 8 breath sample breach because it would add nothing to the analysis: see *R. v. Ho*, 2014 ONSC 5034, at paras. 17-19, reversed on other grounds 2015 ONCA 559.

support for this position in the jurisprudence, including from this Court, which found the collection of breath samples to have a minimal impact on an accused's *Charter* interests. In addition, the Court noted that:

> 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.

7. The trial judge and summary conviction appeal judge therefore erred in considering the entire chain of events flowing from the breath sample breach as aggravating the impact of the breach and supporting the exclusion of evidence under s. 24(2).[3]

8. *Jennings* has been applied in over a hundred trial level and summary conviction appeal decisions in Ontario. It has also found support in other provinces.[4]

9. Over time, the application of *Jennings* has developed into a clear and simple approach: the effects of breaches that involve no independent wrongdoing, and that flow entirely from an initial s. 8 breach, do not have value at the second stage of the *Grant* s. 24(2) test. However, where the police's subsequent actions involve independent *Charter*-violating conduct or undue restrictions on the accused's liberty, this may properly militate in favour of exclusion of the evidence.[5] For example, in the breath sample context, if the accused person was also prevented from exercising their right to counsel, this would constitute *Charter*-infringing conduct independent of the s. 8 breach that should be considered.

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[3] *R. v. Jennings*, 2018 ONCA 260, at paras. 24-34.
[4] See, for example: *R. c. Belley*, 2019 QCCQ 797, at para 26.; *R. c. Vivian Mathews*, 2021 QCCQ 5232, at para. 32; *R. v. Garcia*, 2019 ABPC 6, at para. 131; *R. v. McGuire*, 2021 YKSC 45, at paras. 91-93, overturning *R. v. McGuire*, 2020 YKTC 32, where the trial judge had taken a chain of events approach to s. 24(2).
[5] See *R. v. Mann*, 2018 ONSC 1703, at para. 50; *R. v. Barr*, 2018 ONSC 2417, at paras. 56-61; *R. v. Kranz*, 2021 ONSC 25, at paras. 106-111; *R. v. Sefton*, 2022 ONSC 1429, at para. 48; *R. v. Persaud*, 2019 ONSC 6163, at paras. 19-20; *R. v. Ferose*, 2019 ONSC 1052, at paras. 67-69.

10. The application of this approach has primarily been limited to breath sample cases.[6] However, its logic would seem to extend to other comparable situations like the dog sniff search in issue in the case at bar.

ii. Ontario's Approach Should be Adopted and More Broadly Applied by this Court

11. Adoption of the limited, *Jennings* style approach to s. 24(2), as suggested by Ontario, provides a workable and clear framework that accords with this Court's *Charter* jurisprudence.

Ontario's Approach is Consistent with the Grant *Approach to s. 24(2)*

12. The approach adopted by the Court of Appeal for Ontario is well-supported by the language of *Grant* itself. In contrast, an approach that considers the entire chain of events or state conduct is inherently incompatible with the mandates of *Grant*.

13. First, in *Grant*, this Court explained that an analysis of the impact on the accused's *Charter*-protected interests calls for an "evaluation of the extent to which the breach actually undermined the interests protected by the right infringed." For example, where there is a breach of s. 8 the focus is the impact that the breach had on the accused's right to privacy or human dignity. The accused's liberty interests, protected by a different *Charter* right, that are impacted later because of what the infringement on their privacy reveals is not part of the analysis.[7]

14. In other words, assessing the impact of the breach is limited to an assessment of the impact of the specific right breached: "To determine the seriousness of the infringement from this perspective, we look to the interests engaged by ***the*** infringed right and examine the degree to which the violation impacted on ***those*** interests". The focus is on the impact of the specific

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[6] The sole exception to this is *R. v. Hoyes*, 2019 NSSC 392. Although the Court in *Hoyes* declined to apply *Jennings* more broadly, that case occurred in the forfeiture context after the charges against Hoyes were already dismissed.
[7] *R. v. Grant*, 2009 SCC 32, at paras. 76, 78; *R. v. Cole*, 2012 SCC 53, at para. 91.

breach on the specific right protected – not all potential impacts on all potentially impacted rights.[8]

15. Ontario's suggested approach reflects this specific and limited impact assessment espoused in *Grant*. In contrast, an approach which would consider the entire chain of impacts, would inappropriately move the focus of the analysis from the specific breach and right at play, to a widespread assessment of the impact of all an accused's *Charter* rights. This conflicts with this Court's approach mandated in *Grant*.

16. Second, Ontario's approach does not lead to categorical rules of exclusion nor inclusion. Such a presumptive approach to s. 24(2) was rejected by this Court in *Grant* where a flexible, multi-factored approach to s. 24(2) was created. That new approach was, in large part, a response to criticisms that the earlier *Collins/Stillman* approach was too categorical.[9]

17. Consideration of all non-*Charter* infringing state conduct occurring after a breach when assessing the impact of that breach would risk a return to the categorical approach as the second *Grant* factor would always favour exclusion in cases where critical evidence is found in the course of a breach. A *Charter* breach that results in evidence of criminal activity will invariably lead to an arrest. In turn, an arrest will almost always lead to a significant impact on an accused's liberty interests.[10] Assessing the impact will therefore invariably point towards the exclusion of evidence – regardless of whether s. 9 was even the specific right at play. Such a presumptive approach goes against the requirement inherent in s. 24(2) that the court consider "all the circumstances".[11]

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[8] *R. v. Grant*, 2009 SCC 32, at para. 77, emphasis added.
[9] *R. v. Grant*, 2009 SCC 32, at paras. 59-66; *R. c. Côté*, 2011 SCC 46, at para. 65.
[10] *R. v. Le*, 2019 SCC 34, at para. 153.
[11] *R. v. Grant*, 2009 SCC 32, at para. 65.

18. Finally, Ontario's approach simultaneously allows for effective law enforcement and generous protection of *Charter* rights. Assessing the impact of non-*Charter*-infringing conduct occurring after a breach that reveals evidence of a crime would instead put police in an untenable situation. On the one hand, they would have clear evidence of a crime and should be encouraged to continuing investigating. On the other hand, any further action by police would, given the categorical approach, entail a significant risk of evidence being excluded at trial. The facts of this case provide a good example: after the dog sniff confirmed the presence of a controlled substance in the appellant's vehicle, should the police have been required to stop their investigation? The repute of the administration of justice would be undermined by an approach that suggests police officers should turn a blind eye to evidence of criminality. In the breath sample context, the police have no reasonable choice but to intrude on the liberty of an impaired driver rather than allowing them to continue on their way, even if the evidence of impairment may have been obtained improperly.

19. Ontario's suggested approach, in contrast, strikes a proper balance. It allows for police to fulfil their duties and responsibilities as officers, while also ensuring that the accused's rights are adequately protected. This is because Ontario's approach to assessing the impact of a *Charter* breach will include consideration of additional, independent breaches, that do not flow directly from the original breach. This Court's decision in *Reilly* is a good example of this approach in practice. In that case, there were four separate independent *Charter* breaches. This Court noted that all four breaches should have been considered under s. 24(2) – consistent with Ontario's proposed approach.[12]

[12] *R. v. Reilly*, 2021 SCC 38, at para. 3.

*Ontario's Approach is Reflected in this Court's Post-*Grant *Jurisprudence*

20. Since its foundational decision in *R. v. Grant*, 2009 SCC 32, this Court has considered the impact of a *Charter* breach under s. 24(2) on over thirty occasions but has not once considered the chain of events that flowed from a single, original breach, under s. 24(2).[13] The same can be said of this Court's jurisprudence pre-dating *Grant*.[14] For example, in cases involving breaches of s. 8 of the *Charter*, this Court has never considered under s. 24(2) the ensuing arrest or transportation to a police station that resulted from the *Charter*-infringing discovery of evidence.[15]

21. Even where the breach at issue involves s. 9, this Court's focus has remained on the impact of the original breach on an accused's liberty interests – not the further detention in the police vehicle or at the station. *Grant* itself illustrates this point. In *Grant*, when assessing the impact of the s. 9 breach on Mr. Grant's liberty interests, the focus was the original psychological detention that occurred when he was approached on the street by police. This Court did not include in its analysis a consideration of the liberty interests impacted when Mr. Grant was arrested after the firearm was located.[16]

22. This Court's use in *Grant* of a breath sample procedure as an apt illustration of a minimally infringing search also provides support for Ontario's approach, as this Court "assuredly did so in the knowledge that most formal demands for breath samples would be accompanied by an arrest and by all of the accompanying incidents itemized by the trial

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[13] See Appendix A for a list of all decisions by this Court post-*Grant* applying s. 24(2).
[14] See, for example: *R. v. Mann*, 2004 SCC 52, at para. 56; *R. v. Genest*, [1989] 1 S.C.R. 59, at para. 57.
[15] See, for example: *R. v. Spencer*, 2014 SCC 43, at para. 78; *R. v. Cole*, 2012 SCC 53, at paras. 91-93; *R. v. Vu*, 2013 SCC 60, at para. 72.
[16] *R. v. Grant*, 2009 SCC 32, at paras. 134-138. See also: *R. v. Le*, 2019 SCC 34, at paras. 151-157; *R. v. Harrison*, 2009 SCC 34, at paras. 28-32.

judge."[17] This Court would not have described a breath sample procedure as having a minimal impact on an accused's *Charter* interests if it had any intention that the test in such cases would also involve consideration of any resulting arrest and further intrusions into the accused's liberty.[18]

iii. The Proposed Approach is Suitable for Dog Sniff Searches

23. The Attorney General for Ontario submits that its proposed approach is well-suited to cases, like the present, which involve s. 8 breaches arising from sniff searches. The legal principles and reasoning underlying the analysis in *Jennings* apply equally to breath sample and sniff search cases:

(1) As in *Jennings*, considering the chain of events resulting from a breach in sniff search cases would lead to a categorical rule that s. 8 breaches in such cases support the exclusion of evidence under the second *Grant* factor. As with those who blow over, those who have been the subject to a sniff search uncovering controlled substances will almost invariably be subject to further detention and searches.[19]

(2) As in *Jennings*, such a categorical approach conflicts with jurisprudence, including from this Court, holding that sniff searches, like the taking of breath samples, are minimally intrusive.[20] Indeed, an argument could be made that sniff searches are less intrusive than the taking of a breath sample, which impacts bodily integrity.

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[17] *R. v. Jennings*, 2018 ONCA 260, at para. 29, citing *R. v. Grant*, 2009 SCC 32, at paras. 106-111.
[18] *R. v. Le*, 2019 SCC 34, at para. 153.
[19] *R. v. Jennings*, 2018 ONCA 260, at para. 32.
[20] *R. v. Kang-Brown*, 2008 SCC 18, at para. 60; *R. v. Chehil*, 2013 SCC 49, at paras. 24, 28.

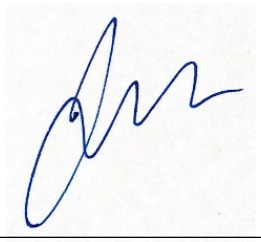
PARTS IV & V: SUBMISSIONS ON COSTS & TIME FOR ORAL ARGUMENT

24. Ontario does not seek costs and has been granted five minutes for oral argument

PART VI: SUBMISSIONS ON CASE SENSITIVITY

25. Ontario makes no submissions on case sensitivity.

ALL OF WHICH is respectfully submitted by,



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DATED at Toronto this 20th day of September 2022

PART VII: TABLE OF AUTHORITIES

Canadian Cases	Paragraph Reference in Factum
R. v. Barr, 2018 ONSC 2417	9
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R. v. Chehil, 2013 SCC 49	23
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R. v. Sheppard, 2009 SCC 35	5
R. v. Spencer, 2014 SCC 43	20
R. c. Vivian Mathews, 2021 QCCQ 5232	8
R. v. Vu, 2013 SCC 60	20

Canadian Legislation		**Paragraph Reference in Factum**
Canadian Charter of Rights and Freedoms, enacted as Schedule B to the *Canada Act 1982* (UK), 1982, c 11	s. 8	3, 5, 9, 13, 20, 23
	s. 9	17, 21
	s. 24	1-5, 7, 9, 11, 16-17, 19-20

APPENDIX A: LIST OF SUPREME COURT SECTION 24(2) DECISIONS

R. v. Lafrance, 2022 SCC 32

R. v. Tim, 2022 SCC 12

R. v. Stairs, 2022 SCC 11, per Karakatsanis J. (dissenting)

R. v. Ali, 2022 SCC 1, per Côté J. (concurring)

R. v. Reilly, 2021 SCC 38

R. v. Le, 2019 SCC 34

R. v. Omar, 2019 SCC 32

R. v. Mills, 2019 SCC 22, per Martin J. (concurring)

R. v. Culotta, 2018 SCC 57

R. v. Reeves, 2018 SCC 56

R. v. G.T.D., 2018 SCC 7

R. v. Jones, 2017 SCC 60, per Abella J. (dissenting)

R. v. Marakah, 2017 SCC 59

R. v. Paterson, 2017 SCC 15

R. v. Saeed, 2016 SCC 24, per Karakatsanis J. (concurring) and Abella J. (dissenting)

R. v. Fearon, 2014 SCC 77

R. v. Mohammad, 2014 SCC 63

R. v. Mack, 2014 SCC 58

R. v. Mian, 2014 SCC 54

R. v. Taylor, 2014 SCC 50

R. v. Spencer, 2014 SCC 43

R. v. Hart, 2014 SCC 52

R. v. Vu, 2013 SCC 60

R. v. MacKenzie, 2013 SCC 50, per LeBel J. (dissenting)

R. v. Aucoin, 2012 SCC 66

R. v. Cole, 2012 SCC 53

R. c. Côté, 2011 SCC 46

R. v. Loewen, 2011 SCC 21

R. v. McCrimmon, 2010 SCC 36, per LeBel, Fish JJ. (dissenting)

R. v. Sinclair, 2010 SCC 35, per Binnie J. (dissenting) and LeBel, Fish JJ. (dissenting)

R. v. Cornell, 2010 SCC 31, per Fish J. (dissenting)

R. v. Nolet, 2010 SCC 24

R. v. Morelli, 2010 SCC 8

R. c. Beaulieu, 2010 SCC 7

R. v. Harrison, 2009 SCC 34

R. v. Suberu, 2009 SCC 33, per Binnie J. (dissenting) and Fish J. (dissenting)