# ANNEXE 2 : SCÉNARIO (DROIT PÉNAL)

1. Laurent Simoneau conduisait sa vieille Volkswagen Jetta sur le chemin Innes en banlieue d'Ottawa vers 22 h 30 lorsqu'il a croisé l'auto-patrouille de la policière Amina Yacoub du Service de police d'Ottawa qui circulait en sens inverse. L'agent Yacoub a constaté qu'un des phares avant de la voiture de M. Simoneau ne fonctionnait pas : elle a donc fait demi-tour pour suivre la voiture du prévenu. Ce faisant, elle a constaté qu'elle ne pouvait pas lire le numéro de la plaque d'immatriculation, le feu de plaque ne semblant pas fonctionner. L'art. 62 du *Code de la route*, L.R.O. 1990, chap. H.8 exige que les deux phares avant soient fonctionnels (61(1)), tout comme les feux d'éclairage de la plaque d'immatriculation (62(19)).

2. L'agent Yacoub a donc actionné ses gyrophares pour signaler à M. Simoneau qu'il devait immobiliser son véhicule en bordure du chemin. M. Simoneau a immobilisé son véhicule à 22 h 35.

3. L'agent Yacoub s'est approché de la portière du côté conducteur de la Jetta et a demandé à Simoneau de baisser la vitre. Lorsque Simoneau a obtempéré, la policière a senti une odeur de marijuana émanant du véhicule. Simoneau a produit son permis de conduire et ses preuves d'assurances.

4. L'agent Yacoub a trouvé que Simoneau semblait nerveux et, ses yeux étant rouges, elle a soupçonné qu'il était sous l'influence de la marijuana. Lorsque l'agent lui a demandé d'où venait l'odeur de marijuana, Simoneau a répondu qu'il en avait vapoté et a montré une vapoteuse qui se trouvait dans le porte-gobelet de la voiture.

5. L'agent a alors indiqué à M. Simoneau qu'il était en contravention de l'art. 12 de la *Loi sur le contrôle du cannabis*, L.O. 2017, c. 26 (conduire un véhicule lorsque du cannabis se trouve à bord). Il était alors 22h50. L'agent Yacoub ayant avec elle un appareil de détection approuvé, elle a ordonné à M. Simoneau de sortir de son véhicule pour se soumettre à un dépistage salivaire en vertu de l'art. 320.27 du *Code criminel*. L'agent Yacoub a vérifié l'heure de sa demande : il était alors 23 h 17.

6. Lorsque M. Simoneau a ouvert sa portière, l'agent Yacoub a remarqué un sac à dos ouvert qui se trouvait sur le siège du passager avant. Elle a noté en outre que M. Simoneau semblait de plus en plus nerveux.

7. « Qu'est-ce qu'il y a dans le sac? » a demandé la policière. Simoneau n'a pas voulu répondre. La policière lui a alors demandé de s'asseoir dans l'auto-patrouille et elle est ensuite retournée à la Jetta pour jeter un coup d'œil rapide à l'intérieur et pour fouiller le contenu du sac. Le sac contenait des quantités importantes de cannabis dans un sac n'arborant pas de symbole normalisé du cannabis, de mise en garde relative à la santé ou de timbre d'accise, ainsi qu'une petite quantité d'une autre substance contenant une poudre blanche ressemblant à la cocaïne. L'agent Yacoub a donc saisi le contenu du sac. Elle est retournée à l'auto-patrouille où elle a administré le test de dépistage au moyen d'un appareil de détection approuvé ; les résultats du test ont semblé indiquer que M. Simoneau avait les facultés affaiblies par la drogue. Il était alors 23 h 55.

8. L'agent Yacoub a donc placé M. Simoneau en état d'arrestation à 23 h 57 pour conduite avec les facultés affaiblies et lui a lu ses droits en vertu de la *Charte*. Elle a ensuite décider de saisir la Jetta et pris des arrangements pour son remorquage à cette fin, ainsi qu'à des fins de perquisition pour déterminer la présence d'autres drogues. Une fois la Jetta remorquée, l'agent Yacoub a quitté le lieu de l'arrestation à 00 h 30 et conduit M. Simoneau au poste de police pour des tests de dépistage approfondis pour déterminer précisément le taux de drogue dans son sang.

9. À l'arrivée au poste de police à 00 h 54, l'agent Yacoub réitère à Simoneau la mise en garde en vertu de la *Charte*. M. Simoneau demande donc de consulter un avocat et on lui en donne l'occasion en privé quelques minutes plus tard. Une fois la consultation terminée, l'agent Yacoub remet M. Simoneau entre les mains du technicien certifié Cyril Goodenow à 1 h. Ce dernier a fait une demande formelle de fournir un échantillon de liquide buccal. M. Simoneau obtempère mais les résultats ne sont pas concluants, atteignant à peine la limite permise de 5ng/mL de THC.

10. Pendant que M. Simoneau consulte un avocat vers 01 h 10, l'agent Yacoub vérifie de façon plus approfondie le contenu du sac à dos : aucune autre drogue n'est trouvée à part le cannabis et la substance ressemblant à la cocaïne. Une fouille de la Jetta saisie est effectuée à la fourrière du poste de police et un autre sac de poudre blanche est trouvé sous le siège du conducteur ainsi que 1 500 $ en espèces.

11. M. Simoneau est formellement accusé en vertu des articles 61(1) et 62(19) du *Code de la route*, de l'art. 12 de la *Loi sur le contrôle du cannabis*, de possession de plus de 30g de cannabis en contravention de l'al. 8(1)a) de la *Loi sur le cannabis*, de possession de cannabis illicite en contravention de l'al. 8(1)b) de la *Loi sur le cannabis*, de possession de cocaïne à l'encontre de l'article 4(1) de la *Loi contrôlant certaines drogues et autres substances* et de possession de cocaïne en vue d'en faire le trafic à l'encontre de l'art. 5(2) de la *Loi contrôlant certaines drogues et autres substances.*

**Historique du dossier**

1. M. Simoneau n'ayant pas d'antécédents judiciaires, il est remis en liberté sur promesse de comparaître.

2. La divulgation est complète et l'accusé et son avocat ont eu l'occasion d'en prendre connaissance avant de fixer la date du procès.

3. La Couronne a choisi de procéder par mise en accusation et l'accusé a opté pour un procès devant juge de la Cour supérieure sans jury.

4. Le procès est fixé à l'intérieur des délais prescrits par l'arrêt *Jordan*.

**Points en litige**

1. L'accusé entend contester l'admissibilité en preuve de la drogue et de l'argent trouvé lors de la perquisition du véhicule à la fourrière, affirmant qu'un mandat de perquisition était nécessaire. Il prétend que la perquisition est donc contraire à l'art. 8 de la *Charte* et que les éléments de preuve obtenus au moyen de cette perquisition doivent être écartés en vertu de l'art. 24(2) de la *Charte canadienne des droits et libertés*.

2. L'accusé entend contester aussi l'admissibilité en preuve de la drogue trouvée dans son sac à dos, affirmant qu'il ne peut s'agir d'une fouille accessoire à l'arrestation et qu'aucun motif raisonnable et probable n'existait permettant à l'agent Yacoub de croire à une infraction criminelle et d'ainsi fouiller le sac. Il ajoute qu'il n'a pas consenti à la fouille du sac et qu'aucune circonstance d'urgence liée à la sécurité publique n'existait. Il prétend donc que la perquisition est donc contraire à l'art. 8 de la *Charte* et que les éléments de preuve obtenus au moyen de cette perquisition doivent être écartés en vertu de l'art. 24(2) de la *Charte canadienne des droits et libertés*.

3. L’accusé entend invoquer l’al. 10a) et 10b) de la *Charte* car il a été informé qu’il était mis en arrestation pour conduite avec les facultés affaiblies et pour les infractions à la loi provinciale seulement et que sa consultation avec l’avocat n’avait porté que sur ces infractions. Il ajoute que trop de temps s’est écoulé entre l’heure de l’immobilisation de son véhicule en bordure du chemin et l’heure où il a pu consulter un avocat.

**Jurisprudence**

1. *R v McGowan-Morris*, 2025 ONCA 349 (décision intégrale en annexe)
2. *R v Randall,* 2025 ONCJ 337
3. *R v Lam,* 2025 ONCJ 338
4. *R v Young,* 2025 ONSC 2883

# Formule 1
# AVIS DE DEMANDE

(*Règles de procédure en matière criminelle*)

ONTARIO
COUR SUPÉRIEURE DE JUSTICE

N° du dossier du greffe (s'il est connu)

Région

ENTRE :

**SA MAJESTÉ LE ROI**

**le(la) requérant(e)/l'intimé(e)**

**- et -**

(nom de l'accusé)

**le(la) requérant(e)/l'intimé(e)**

**SACHEZ** qu'une demande sera présentée _____ le _____ jour de _____ 20 _____ ,
(préciser le mois)

à(au) _____
(adresse du palais de justice)

pour l'obtention d'une ordonnance portant

(indiquer le redressement demandé)

**LES MOTIFS DE LA DEMANDE SONT LES SUIVANTS :**

1. Que _____
2. Que _____
3. Tout autre motif conseillé par l'avocat(e) et autorisé par l'honorable Cour.

**À L'APPUI DE LA DEMANDE, LE(LA) REQUÉRANT(E) SE FONDE SUR CE QUI SUIT :**
(indiquer les documents tels que transcriptions, etc. sur lesquels le(la) requérant(e) se fonde)

**1.**

_____
(preuve)

**LE REDRESSEMENT DEMANDÉ EST LE SUIVANT :**

1. Une ordonnance faisant droit à la demande et portant
(indiquer le redressement précis demandé)

**LE(LA) REQUÉRANT(E) PEUT RECEVOIR SIGNIFICATION DES DOCUMENTS SE RAPPORTANT À LA DEMANDE**

1. En conformité avec la règle 5, par
(indiquer l'adresse, le numéro de téléphone et l'adresse de courrier électronique)

.....

**FAIT** à(au) ..... (Ontario) ce ..... jour de ..... 20 .....

_____
Signature du(de la) requérant(e) ou de son avocat(e)

.....
(indiquer le nom et l'adresse, ainsi que le numéro de téléphone et l'adresse de courrier électronique)

# Form 1
# NOTICE OF APPLICATION

(*Criminal Proceedings Rules*)

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No. (if known)

Region

BETWEEN:

**HIS MAJESTY THE KING**

**applicant/respondent**

**- and -**

(specify name of accused)

**applicant/respondent**

**TAKE NOTICE** that an application will be brought on _____ day, the _____ day of _____ ,
(specify month)

20 _____ , at _____
(specify address of court house)

for an order granting

(set out relief sought)

**THE GROUNDS FOR THIS APPLICATION ARE:**

1. That _____
2. That _____
3. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:**
(set out documents such as transcripts, etc. upon which the Applicant relies)

**1.**

(evidence)

**THE RELIEF SOUGHT IS:**

1. An Order allowing the application and granting
(indicate particular relief sought)

**THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION**

1. By service in accordance with rule 5, through
(specify address, telephone number and email)

.....

**DATED** at ..... , Ontario, this ..... day of ..... , 20 .....

_____
Signature of applicant or counsel

.....
(set out name and address, as well as telephone number and email)

# COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McGowan-Morris, 2025 ONCA 349
DATE: 20250507
DOCKET: C70451

Trotter, George JJ.A. and Brown J. (*ad hoc*)

BETWEEN

His Majesty the King

Appellant

and

Johvon Jermaine McGowan-Morris

Respondent

Katie Doherty, for the appellant

Carter Martell, for the respondent

Heard: November 22, 2024

On appeal from the acquittal entered by Justice Daniel F. Moore of the Ontario Court of Justice on February 14, 2022.

**Trotter J.A.:**

## A. INTRODUCTION

[1] This appeal requires us to consider the powers of the police when conducting a search of a vehicle pursuant to s. 12(3) of the *Cannabis Control Act*, 2017, S.O. 2017, c. 26, Sched. 1 ("the *CCA*" or "the Act"). The section empowers a police officer who has reasonable grounds to believe that the Act is being

contravened to conduct a warrantless search of a vehicle or boat and any person found in it.

[2] The respondent was a passenger in a Jeep that the police pulled over to investigate a potential contravention of the *CCA*. Another passenger, Dontray Williams, ran from the vehicle. The police caught Mr. Williams and forcibly grounded him. They removed the respondent from the Jeep and grounded him too. The police found two handguns and an extended magazine in the Jeep.

[3] The respondent and Mr. Williams were tried together on various firearms offences: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 86(1), 86(2), 91(1), 92(1), 92(2), 94(1), and 95(1). Both applied to exclude the fruits of the search of the Jeep based on violations of ss. 8, 9, 10(a), and 10(b) of the *Canadian Charter of Rights and Freedoms*. The trial judge held that the respondent's rights under ss. 9, 10(a), and 10(b) were infringed and excluded the evidence against him under s. 24(2) of the *Charter*. The respondent was acquitted. The trial judge did not exclude any evidence as it related to Mr. Williams. His trial continued, but he too was acquitted.

[4] The Crown appeals the trial judge's findings that the respondent's rights were violated or, alternatively, his decision to exclude the evidence of under s. 24(2) of the *Charter*. The following reasons explain why I would allow the appeal and order a new trial.

## B. THE FACTS

[5] The events giving rise to this case occurred on August 23, 2020. They were captured on video from a police car camera.

[6] There were four people in the Jeep that night. Dimitri Apostolos was driving the vehicle. He was accompanied by his girlfriend, Anastasia Georgiou. At about 9:00 p.m., Mr. Apostolos and Ms. Georgiou picked up Mr. Williams and the respondent.

[7] The four of them drove to various locations in Toronto to record video footage. Mr. Williams, a musical artist, was making a music video for one of his songs. The respondent performed in the video. Mr. Apostolos operated the camera. Ms. Georgiou was not directly involved in the making of the video.

[8] Eventually, the Jeep was parked on Gerrard Street East. Mr. Apostolos and Mr. Williams got out of the car and were filming nearby on the sidewalk. The other two remained in the vehicle. Ms. Georgiou sat in the front passenger seat and the respondent sat in the rear seat on the driver's side.

[9] Police Constables Osman and Joyce were on patrol in the area in a marked police car. P.C. Osman testified that they drove past the Jeep at approximately 10:40 p.m. and detected an odour of marijuana. The officers decided to investigate. P.C. Osman turned his car around and stopped behind the Jeep. Mr. Williams and Mr. Apostolos walked over to the police car. Mr. Williams was smoking a joint. The

two men told the officers what they were doing. P.C. Osman recognized Mr. Williams from a wiretap project he had been involved in, which resulted in Mr. Williams being convicted of firearms offences.

[10] After Mr. Apostolos and Mr. Williams finished shooting the video, they got back into the Jeep – Mr. Apostolos in the driver's seat, and Mr. Williams in the passenger-side rear seat. At 10:43 p.m., the Jeep started to pull away. However, P.C. Osman testified that Mr. Williams still had the cannabis in his hand when he got into the Jeep. He immediately activated the lights of the police car and stopped the Jeep. He intended to conduct a search under the *CCA*.

[11] It is helpful at this point to describe the legal framework of s. 12 of the *CCA*. The relevant portions of the provision read as follows:

> **Transporting cannabis**
>
> **12** (1) No person shall drive or have the care or control of a vehicle or boat, whether or not it is in motion, while any cannabis is contained in the vehicle or boat.
>
> **Exception**
>
> (2) Subsection (1) does not apply with respect to cannabis that,
>
> (a) is in its original packaging and has not been opened; or
>
> (b) is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle or boat. 2018, c. 12, Sched. 1, s. 12 (1).

> **Search of vehicle or boat**
>
> (3) A police officer who has reasonable grounds to believe that cannabis is being contained in a vehicle or boat in contravention of subsection (1) may at any time, without a warrant, enter and search the vehicle or boat and search any person found in it. [Emphasis added.] [1]

[12] As P.C. Osman approached the Jeep, Mr. Williams attempted to get out of the vehicle. He complied with the officer's direction to get back in. P.C. Osman said that he did not realize there were four people in the Jeep until he was at the driver's side front door. He called for back-up because he did not want to be outnumbered.

[13] P.C. Osman told the occupants of the Jeep that he stopped them because they were not allowed to have cannabis inside the vehicle. As P.C. Osman stood by the driver's side door, he noticed that the respondent and Mr. Williams were "sweating profusely". Both men appeared nervous. He testified that Mr. Williams repeatedly looked around, while the respondent stared blankly at the officer and remained silent. Mr. Williams remonstrated with the officer, telling him he had "outed" (i.e., extinguished) the cannabis. P.C. Osman responded, "It's right there in your hand, brother." Evidently, Mr. Williams was not aware that his unlit joint ran afoul of s. 12(1) of the *CCA*.

[14] P.C. Osman testified that this vehicle stop was "tense". He thought something was up with the occupants. He observed what he thought was a bulge

[1] Subsection (4), which deals with medical marijuana, is not relevant to this case.

near the bottom of the respondent's sweater. He had safety concerns while he awaited back-up – he thought there might be a gun in the Jeep. He was trying to keep the situation calm.

[15] At 10:48 p.m., as back-up units arrived on the scene, Mr. Williams ran from the Jeep. Chaos ensued. One officer testified that he heard Mr. Williams yell "run", whereas another interpreted it as "gun". Mr. Williams was caught immediately and taken to the ground forcefully by several officers. Other officers removed Mr. Apostolos and Ms. Georgiou from the Jeep at gunpoint. The respondent was removed from the back seat of the Jeep and grounded with what the trial judge described as "a fair degree of force."

[16] At 10:49 p.m., P.C. Osman discovered a handgun in a satchel in the footwell of the rear driver's side passenger seat, where the respondent had been seated. He then advised all of the occupants that they were under arrest for the unlawful possession of a firearm. At 10:50 p.m., he found another satchel where Mr. Williams had been seated, which contained a second handgun. He also found an extended magazine on the backseat. At 10:52 p.m., Mr. Williams was advised of his rights under s. 10(b) of the *Charter*. At 10:58 p.m., the respondent was also advised of his s. 10(b) rights.

[17] The respondent was taken to a police station. He required his mother's assistance in contacting a lawyer. The police called the respondent's mother at 12:32 a.m. He was able to speak to a lawyer at 1:08 a.m.

## C. THE TRIAL JUDGE'S RULINGS

[18] As noted above, the respondent was successful in having the fruits of the search excluded under s. 24(2) of the *Charter*; but Mr. Williams was not. In what follows, I focus mainly on the trial judge's ruling as it pertains to the respondent.

[19] The trial judge found that s. 10(a) of the *Charter* was infringed because, while P.C. Osman advised the occupants of the reason for the stop (i.e., there was marijuana unlawfully in the Jeep), he did not tell them that they were going to be searched. As the trial judge said:

> While Officer Osman advised that the reason for the stop was because they were not allowed to have cannabis in the vehicle, he did not tell them that they were going to be subjected to a search. That was the reason for their detention. That they had an obligation to submit to a search. While there is no requirement that P.C. Osman read out the wording of the section or make a demand, I find that what was said did not comply with section 10(a) and Mr. Williams and Mr. McGowan-Morris' 10(a) rights were violated.

[20] The trial judge also found that the police infringed the respondent's s. 10(b) rights. After he stopped the Jeep and approached the driver's side door, P.C. Osman did not provide the informational component of s. 10(b) to the driver or any of the occupants. The Crown at trial invited the trial judge to apply *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, to s. 12 of the *CCA*. *Orbanski* is a case involving roadside stops to screen for impaired drivers. As discussed below,

the Supreme Court of Canada held that the right to counsel is suspended for the brief duration required for police officers to assess drivers for sobriety.

[21] *Orbanski* was applied to *CCA* stops in *R. v. Grant*, 2021 ONCJ 90. The trial judge declined to apply *Grant* because he found that stops under the *CCA* are more intrusive:

> In my view, this is a much more significant intrusion into personal liberty and security of the person than the screening of impaired drivers. Suspending the right to counsel does not in any way lessen that intrusion for the vast majority of passengers, in the same way that it does in impaired driver screening.

[22] The trial judge also observed that s. 12 of the *CCA* provides no time constraints. As will be canvassed below, compared to the impaired driving provisions at issue in *Orbanski*, s. 12 does not require the police to conduct their searches with any sense of immediacy or urgency. The trial judge found that any practical difficulties in implementing the right to counsel at roadside, even with more than one vehicle occupant, would be minor and, in any event, could not justify non-compliance with the informational component of s. 10(b) of the *Charter*. Thus, the police violated the respondent's s. 10(b) rights.

[23] However, the trial judge concluded that the police did not cause a second breach of the respondent's s. 10(b) rights after he was arrested. He found that, while the delivery of the informational component of s. 10(b) was "not a model of immediacy", he declined to find that it amounted to a violation. Similarly, the trial

judge found that the police did not fall short in their implementational obligations under s. 10(b) when dealing with the respondent at the station.

[24] The trial judge rejected Mr. Williams' claim that his rights under s. 9 of the *Charter* were infringed. After all, he attempted to run from the vehicle.

[25] However, the trial judge said: "[t]he forceful removal of [the respondent] from the vehicle is a different matter." He found that P.C Osman had no grounds to believe that the respondent had committed any offence. Rather, P.C. Osman's claim that the respondent was hiding something underneath his clothing was nothing more than a hunch. In concluding that s. 9 of the *Charter* was infringed, the trial judge said:

> Importantly, P.C. Osman testified that he had not heard anyone yell "gun" to justify a possible officer safety issue.
>
> So the only real justification for P.C. Osman's detention of Mr. McGowan-Morris was section 12 of the *Cannabis Control Act*. He certainly would have been justified in asking him to step out of the vehicle and submitting to a search of his person, but pulling him out and grounding him in the manner that he did, exceeded his authority under the *Cannabis Control Act* and was therefore unlawful.

[26] The trial judge made other *Charter* findings that are not at issue on this appeal, but for the sake of completeness, I address them briefly. He found that the respondent and Mr. Williams failed to establish that they were racially profiled that night. He also found that the search of the Jeep did not violate s. 8 of the *Charter* because it was authorized under s. 12(3) of the *CCA*. However, s. 8 was infringed

by the failure of the police to file a report to a justice under s. 489.1 of the *Criminal Code*: see *R. v. Garcia-Machado*, 2015 ONCA 569, 126 O.R. (3d) 737. The trial judge said: "while I find it to be a violation, I do not expect too much time will be spent on this issue in 24(2) submissions."

[27] At a later date, the trial judge delivered a separate ruling on s. 24(2) of the *Charter*. He found that the infringement of the respondent's ss. 9, 10(a), and 10(b) *Charter* rights had a "sufficient, contextual, and temporal connection to the firearms, ammunition, and magazine to grant a s. 24(2) analysis." In other words, the evidence was "obtained in a manner" that infringed the respondent's *Charter* rights. Having made this finding, the trial reached the following conclusions:

> The s. 9 breach is extremely serious in my view. Significant physical force was applied to Mr. McGowan-Morris without lawful authority. My ruling essentially found that he was assaulted by a police officer. Section 10(a) and (b) breaches are also made more serious by the addition of the s. 9 breach because PC Osman attempted to use the observations he made while Mr. McGowan-Morris was being detained without provision of s. 10(a) and (b) to justify the force to be applied to Mr. McGowan-Morris. In my view, the seriousness of these breaches strongly pulls towards the exclusion of the evidence.
>
> The unlawful use of force against Mr. McGowan Morris which is precisely what s. 9 is designed to prevent, combined with the s. 10(a) and (b) breaches, mean that the impact on Mr. McGowan-Morris' Charter protected interest is extremely significant. This factor also strongly favours exclusion of the evidence.

> Although the independently existing reliable evidence strongly pulls in favour of inclusion, applying the analysis set out in *McGuffie*, in my view, the admission of the guns, ammunition, and magazine in the evidence against Mr. McGowan-Morris would bring the administration of justice into disrepute.
>
> Mr. McGowan-Morris' application to exclude the evidence is granted.
>
> The guns, ammunition and magazine are excluded from evidence in relation to him. [Emphasis added.]



[28] The Crown called no further evidence against the respondent, and he was acquitted.

## D. ISSUES ON APPEAL

[29] The appellant submits that the trial judge erred in finding that the respondent's rights were infringed under ss. 9, 10(a), and (b) of the *Charter*. In the alternative, the appellant submits that the trial judge erred in his analysis under s. 24(2). The respondent contends that the trial judge's reasons reveal no errors of law that would permit this court to upset his findings under ss. 9, 10(a), and (b), or his conclusion under s. 24(2) of the *Charter*.

[30] I agree with the appellant that the trial judge erred in finding that the respondent's rights under ss. 9 and 10(a) of the *Charter* were infringed. However, I would not disturb his finding that s. 10(b) was infringed. Undertaking a fresh s. 24(2) analysis, as the circumstances require, I would not exclude the evidence discovered during the search of the Jeep.

## E. SECTION 10(A) – THE RIGHT TO BE INFORMED OF THE REASONS FOR DETENTION

[31] The appellant submits that the trial judge erred in finding that the respondent's s. 10(a) *Charter* rights were infringed. The trial judge found that, although P.C. Osman told the occupants of the Jeep that they were stopped because cannabis was unlawfully in the vehicle, they should have been told that they would all be searched pursuant to s. 12(3) of the *CCA*. The appellant argues that s.10(a) of the *Charter* does not require a police officer to advise a detainee of the investigative steps that may be taken during what is otherwise a lawful detention. Thus, P.C. Osman was not obliged to tell the occupants of the Jeep that they would be searched; rather, he satisfied the requirements of s. 10(a) by telling them that they could not have cannabis in the car.

[32] The respondent submits that the trial judge did not err in his approach. Section 12(3) furnishes police officers with "an exceptionally broad investigative power" to search a vehicle, and all occupants of the vehicle, for evidence of an offence under s. 12(1) of the *CCA*. This is unique because it is only the driver of a vehicle who may be charged with an offence under the *CCA*. In these circumstances, passengers require more information to understand the nature and implications of their detention, and whether they are required to submit to a search. I do not accept this submission.

[33] Section 10(a) of the *Charter* provides:

> **10** Everyone has the right on arrest or detention
>
> **(a)** to be informed promptly of the reasons therefor…

[34] Of all the legal rights in the *Charter* (ss. 7-14), the scope of s. 10(a) is among the least-developed in the jurisprudence. This is because, in most cases when 10(a) is triggered, s. 10(b) assumes greater prominence. There is an intimate link between these two rights: see *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424.

[35] The essential nature of s. 10(a) of the *Charter*, and its common law roots, was discussed in *R. v. Nguyen*, 2008 ONCA 49, 231 C.C.C. (3d) 541, at para. 16, where this court said:

> The right to be informed of the reasons for detention as enshrined in the *Charter* and the *Canadian Bill of Rights* is a codification of the common law described most famously in the case of *Christie v. Leachinsky*, [1947] A.C. 573 (H.L.). In *Christie*, the common law right was essentially described as follows: a person is entitled to be informed of the reason why he or she is being restrained, unless the circumstances are such that he or she knows why. The reasons do not need to be expressed in technical or precise language, but must, in substance, inform the person as to the reason why the restraint is being imposed. [Emphasis added.]

[36] The Supreme Court of Canada has explained that the purpose of s. 10(a) is "to ensure that a person 'understand generally the jeopardy' in which he or she finds herself": *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 28, citing *R. v. Smith*, [1991] 1 S.C.R. 714, at p. 728. The Court has identified two rationales for the right guaranteed by s. 10(a). First, it protects individual liberty by guaranteeing that "one

is not obliged to submit to an arrest [or detention] if one does not know the reasons for it": *R. v. Evans*, [1991] 1 S.C.R. 869, at pp. 886-887. Second, it safeguards the right to counsel because "[an] individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy": *Evans*, at pp. 886-887, citing *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 152-153.

[37] To comply with s. 10(a), the police must adequately communicate the reason(s) for the detention, and they must communicate those reasons promptly: *R. v. Roberts*, 2018 ONCA 411, 360 C.C.C. (3d) 44, at para. 63; *R. v. Gonzales*, 2017 ONCA 543, 136 O.R. (3d) 225, at paras. 122-123. These are referred to respectively as the informational and temporal components of s. 10(a).

[38] It is only the informational component of s. 10(a) that is in issue in this case – the adequacy of P.C. Osman's explanation for why the occupants of the Jeep were stopped.

[39] The informational component demands, "at a minimum", that the police advise the detainee "in clear and simple language the reasons for the detention": *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 21. If the police have multiple reasons for detaining an individual, they must disclose each reason to the detainee: *R. v. Borden*, [1994] 3 S.C.R. 145, at pp. 165-166. Moreover, the reason for the detention, whether one or more, must be "legally valid": *R. v. Beaver*, 2022 SCC 54, 475 D.L.R. (4th) 575, at para. 90. The ultimate question is "whether what the accused was told, viewed reasonably in all of the circumstances of the case,

was sufficient to permit him to make a reasonable decision to decline or submit to arrest [or detention], or alternatively, to undermine his right to counsel under s. 10(b)": *Evans*, at p. 888; *Latimer*, at para. 30.

[40] Section 10(a) of the *Charter* requires that the police only explain what they are investigating, not how they intend to investigate the matter and the steps they might take: *R. v. Kumarasamy*, 2011 ONSC 1385, at paras. 56-57; Davin Michael Garg and Anil Kapoor, *Detention, Arrest, and the Right to Counsel* (Emond Montgomery Publications Limited, 2025), at p. 304. Simply put, the "reason" that the police detain an individual is that they suspect that the individual may have committed a particular offence.

[41] These basic principles accord with the purpose of s. 10(a) and ensure that the right sits harmoniously beside s. 10(b). It is the role of counsel, not the police, to explain to a detained person the investigative steps that may be taken during a detention, should they choose to exercise their rights under s. 10(b) of the *Charter*. In the words of *Nguyen*, at para. 16, a detainee need only be told in plain, non-technical language, "the reason why the restraint is being imposed": see also *R. v. Katerberg*, 2019 ONCA 177, at para. 7. When the police inform an individual of this basic reason and give them their s. 10(b) right, that individual will have been afforded every opportunity to understand the extent of their jeopardy.

[42] Respectfully, the trial judge erred in his conclusion that P.C. Osman violated s. 10(a) of the *Charter* because he failed to advise the respondent of the

investigative steps that might be undertaken in the circumstances. Specifically, P.C. Osman was not required to inform the respondent that the police would search him, the Jeep, or any of the other occupants. It sufficed to simply tell them that they were stopped because they could not have cannabis in the vehicle.

## F. SECTION 10(B) – THE RIGHT TO COUNSEL

### (1) Introduction

[43] The appellant submits that the trial judge erred in failing to find that the right to counsel in s. 10(b) of the *Charter* was suspended during the stop authorized by s. 12 of the *CCA*. The appellant argues that *CCA* stops are analogous to roadside sobriety stops, the context in which the Supreme Court in *Orbanski* held that the right to counsel is briefly suspended.

[44] The respondent submits that there are important features of s. 12 *CCA* stops that render the analogy to *Orbanski* inapt. Thus, the right to counsel should not be suspended during *CCA* stops. However, the respondent offers nuance to the required approach:

> Police may question the driver about cannabis consumption and about whether there is cannabis in the vehicle, and make observations of the driver, passengers and items in plain view. <u>But once the police have reasonable grounds for a search, and form an intention to search the vehicle and its occupants, the occupants are entitled to their full rights under s. 10(b) of the Charter</u>. [Emphasis added.]

I return to this submission below.

**(2) The Holding in *Orbanski***

[45] In order to assess the relative merits of these submissions, it is necessary to review *Orbanski* in some detail. I will then examine how the trial courts in this province have grappled with the issue in the context of the *CCA*, followed by an analysis of the trial judge's ruling.

[46] In *Orbanski*, the Supreme Court of Canada considered whether the right to counsel was suspended during roadside sobriety stops authorized by Manitoba legislation (at the time of the events, the *Highway Traffic Act*, S.M. 1985-86, c. 3, C.C.S.M. c. H60). Based on powers granted in this legislation, the police pulled over two drivers and asked them questions to assess their sobriety; one accused was asked to perform sobriety tests. Neither driver was advised of their rights under s. 10(b) of the *Charter*.

[47] The legislation said nothing about the suspension of the right to counsel. Thus, the issue on appeal was whether the statute implied a limit on s. 10(b). The Court had to answer this question to determine whether the failure of the police to provide the accused with their right to counsel was "prescribed by law" and could therefore be justified under s. 1 of the *Charter*. If not, then the evidence stemming from the sobriety tests would be analyzed, and possibly excluded, under s. 24(2). That is also the issue in this case because s. 12 of the *CCA* does not explicitly suspend the right to counsel.

[48] The majority of the Court determined that the legislation imposed a limit, in the form of a suspension, on the right to counsel and that this limit was demonstrably justified under s. 1 of the *Charter*. However, before arriving at this determination, Charron J., writing for the majority at paras. 23-28, identified a number of contextual factors that would "govern" her analysis. The appellant submits that a number of these factors are relevant to the *CCA* context.

[49] First, Charron J. emphasized that the use of a vehicle on a highway is an inherently dangerous activity that is subject to regulation and control for the protection of life and property: at para. 24, citing *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 35. She identified the overwhelming need to ensure safety on our roads and highways: at para. 24.

[50] Second, Charron J. underscored the difficulties faced by police officers tasked with protecting the public from the "menace posed by drinking and driving": at para 25. This is due in part to the fact that driving after consuming alcohol is not always illegal. It depends on the amount consumed. The line between legal and illegal consumption is not always easy to discern. Thus, Charron J. held that "officers must be equipped to conduct this screening, though with minimal intrusion on the individual motorist's *Charter* rights": at para. 25.

[51] Third, Charron J. highlighted that impaired drivers pose an ongoing danger to others and, therefore, the police must intervene early. As she said: "The aim is to screen drivers at the road stop, and not at the scene of the accident": at para. 26.

However, she added that: “Effective screening should also be achieved with minimal inconvenience to the legitimate users of the highway”: at para. 26.

[52] Fourth, Charron J. emphasized that the regulation and control of impaired driving is achieved through an “interlocking scheme of federal and provincial legislation”: at para. 27. As she said: “The Court must carefully balance the *Charter* rights of motorists against the policy concerns of both Parliament and the provincial legislatures”: para. 27.

[53] With these factors in mind, Charron J. turned her attention to s. 1 of the *Charter*, at para. 33:

> The s. 10(*b*) right to counsel, however, is not absolute. It is subject, under s. 1 of the *Charter*, “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The analysis under s. 1 of the *Charter* involves two separate components: the proposed limit must be prescribed by law and, if it is, it must be reasonable and demonstrably justified in a free and democratic society.

[54] In terms of being prescribed by law, a limit may be explicitly addressed in legislation; alternatively, it may arise “by necessary implication from the operating requirements of the governing provincial and federal legislation”: at para. 35; see also *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 645; and *R. v. Thomsen*, [1988] 1 S.C.R. 613, at pp. 652-53.

[55] Justice Charron found that the limit on the right to counsel arose by necessary implication from the operational requirements of the Manitoba *Highway*

*Traffic Act*: at paras. 52-53. The Court concluded that a limit on the right to counsel was prescribed during the period necessary to assess sobriety in a quick manner that avoids prolonged detention. Key to the majority's analysis was the concern that requiring the police to advise a roadside detainee of the right to counsel would unduly prolong the situation, resulting in longer and unnecessary detentions.

[56] Justice Charron also found that the suspension of s. 10(b) flowed from the strict time constraints that the *Criminal Code* placed on police officers. The sobriety checks at issue in *Orbanski* were often used to determine if the police had reasonable grounds to demand a breathalyzer test. However, at the time, the police faced a two-hour time limit in which to make a breathalyzer demand.[2] Thus, providing the right to counsel could have pushed the time frame beyond those two hours and hindered the investigative purposes of the Manitoba *Highway Traffic Act*.

[57] The Court further concluded that the limit was a reasonable one, within the meaning of *R. v. Oakes*, [1986] 1 S.C.R. 103. Again, Charron J. stressed the limitation on the right to counsel has "strict temporal limits": at para. 57.

[58] Turning to proportionality, Charron J. wrote that any risk of self-incrimination during a sobriety stop was addressed by limiting the use made of an accused

[2] Section 320.27(1) of the *Criminal Code* now provides that a police officer who has reasonable grounds to suspect that a person has alcohol or a drug in their body within the preceding three hours may take certain investigative steps, including the demand for a breath sample.

person's response to police questioning. The answers may only be used to supply the grounds for making a breathalyzer demand, and not as positive proof of impairment: at para. 59, citing *R. v. Milne* (1996), 28 O.R. (3d) 577(C.A.), leave to appeal refused, [1996] S.C.C.A. No. 353.

[59] In his dissenting reasons, LeBel J. concluded that the Manitoba *Highway Traffic Act* did not impliedly limit the right to counsel. Thus, the infringement of s. 10(b) at issue could not be justified pursuant to s. 1. Although he acknowledged the serious danger posed by drunk driving, he refused to adopt "a strained legal interpretation to sidestep inconvenient *Charter* rights for the greater good": at para. 70. Justice LeBel observed that neither accused was legally required to answer police questions, participate in sobriety tests, or otherwise participate in the investigation; however, this might not have been known to them without consulting counsel. As he said, at para. 82: "There appears to be some concern that they might otherwise choose to exercise them [i.e. s. 10(b) rights] … In this manner, effective law enforcement would come to depend on individuals' ignorance of their legal rights."

[60] Over the years, *Orbanski* has been cited and applied hundreds of times, sometimes by the Supreme Court. It is not necessary to distill and summarize this jurisprudence. But for present purposes, it is worth noting the reference to *Orbanski* in *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, a case dealing with s. 9 of the *Charter* in the context of investigative detentions. The Court considered

the Crown's submission that a general suspension of the right to counsel during the course of short "investigatory" detentions was necessary and justified under s. 1 of the *Charter*. This was said to derive from the operating requirements of the common law police power to detain individuals for investigative purposes.

[61] The Court rejected this extension of *Orbanski*. McLachlin C.J.C. and Charron J. wrote, at para. 45:

> There is no question that the right to counsel, as any other right guaranteed by the *Charter* in case of detention, is subject to reasonable limitations as prescribed by law under s. 1. For example, in *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, the fact that there was a detention was not in issue. Indeed, the police directive to pull over coupled with the restrictive demand that the driver perform sobriety tests provided a clear basis to ground a detention. *Charter* rights were therefore triggered, though ultimately the breach was saved under s. 1 of the *Charter*. However, we are not persuaded, on this appeal, that a case has been made out for a general suspension of the s. 10(b) right to counsel for investigatory purposes, with or without some form of use immunity. In our view, the invitation by counsel for the Court to consider s. 1 in order to suspend the right to counsel is premised on an unduly expansive notion of the meaning of detention that is inconsistent with the purposive approach to detention taken in *Grant*. Because the definition of detention, as understood in these reasons, gives the police leeway to engage members of the public in noncoercive, exploratory questioning without necessarily triggering their Charter rights relating to detention, s. 1 need not be invoked in order to allow the police to effectively fulfill their investigative duties. [Emphasis added.]

[62] This cautious approach to the suspension of s. 10(b) *Charter* rights through the recognition of implied operating requirements in statutory or common law police powers must inform our approach to s. 12 of the *CCA*.



**(3) Section 12 of the *CCA***

[63] Although he relevant portions of s. 12 of the *CCA* are reproduced in para. 11, above, I include them here for convenience:

> **Transporting cannabis**
>
> **12** (1) No person shall drive or have the care or control of a vehicle or boat, whether or not it is in motion, while any cannabis is contained in the vehicle or boat.
>
> **Exception**
>
> (2) Subsection (1) does not apply with respect to cannabis that,
>
> (a) is in its original packaging and has not been opened; or
>
> (b) is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle or boat. 2018, c. 12, Sched. 1, s. 12 (1).
>
> **Search of vehicle or boat**
>
> (3) A police officer who has reasonable grounds to believe that cannabis is being contained in a vehicle or boat in contravention of subsection (1) may at any time, without a warrant, enter and search the vehicle or boat and search any person found in it. [Emphasis added.]

[64] As the section heading states, s. 12 regulates the transport of cannabis. In particular, it is focused on the storage of cannabis that is being transported. The clear purpose is to ensure that cannabis is not readily available to any person in a

vehicle or boat. The public safety goal is to prevent the use of cannabis by the driver or the occupants of a car or boat while it is being operated: *R. v. Sappleton*, 2021 ONSC 430, at paras. 46 and 50; *R. v. Moulton*, 2023 ONCJ 140, at para. 234.

[65] It is an offence to infringe this provision, which may result in a fine for an individual of up to $100,000, a term of imprisonment as long as one year, or both: ss. 22, 23. As noted above, only the driver or a person in care or control of the vehicle or boat may be liable; the offence does not apply to passengers. Even so, s. 12(3) empowers a police officer, on reasonable grounds, to search, without a warrant, a vehicle or boat and any person in it (i.e., passengers).

[66] As noted in *R. v. Leonard*, 2025 ONCA 63, at para. 9, there are conflicting decisions in the trial courts as to whether this provision, and a near identical provision in the s. 32(5) of the *Liquor Licence Act*, R.S.O. 1990, c. L.19 (*LLA*), permits the search of the trunk of a car: see also *R. v. Guerrier*, 2024 ONCA 838, at para. 19. This court has yet to explore the full scope of the search power in s. 12(3). It is not necessary to do so for the purposes of this appeal. Suffice it to say, this search power, without a warrant, is broad and potentially very intrusive.

**(4) Section 12 of the *CCA* in the Trial Courts**

**(a) Introduction**

[67] Numerous judges in this province have considered the interaction of s. 10(b) of the *Charter* with s. 12(3) of the *CCA*. It is helpful to review a few of these

decisions to illustrate the difficulty of the issue, as well as the different factual circumstances in which the issue may arise.

[68] Although some judges have concluded that s. 10(b) is suspended and others have not, their analyses are not necessarily in tension. Rather, a common theme emerges from the trial court case law. That is, the question of whether s. 10(b) is suspended during a *CCA* investigation depends on the circumstances of the case and looks to factors such as the length of the detention, the suspicions of the officers, the operational requirements of the investigation, and concerns for public safety.

[69] But this approach requires clarification. With respect, some trial decisions have conflated the analysis conducted in *Orbanski* with other, case-specific reasons that might justify the suspension of the right to counsel. As I will explain more fully below, a suspension of the right to counsel under s. 10(b) is only lawful in two circumstances. The first circumstance is where the police are faced with exceptional circumstances and cannot be reasonably expected to immediately provide the right to counsel. Those exceptional circumstances will require a case-specific inquiry and do not engage s. 1 of the *Charter*.

[70] The second circumstance arises where a limit on s. 10(b) is prescribed by law and justified under s. 1. That determination is *not* case-specific; it is categorical. It looks to the impact of the law, not of the situation, on the right. Thus, case-specific concerns such as officer safety, among others, do not weigh on a

s. 1 analysis. Section 1 of the *Charter* is not a tool that permits a court to arrive at different answers in different cases when looking at the same piece of legislation: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 20; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 39; and *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 36.



[71] The Supreme Court in *Orbanski* relied on the second analytical pathway, not the first. They looked at whether the statute, *not* the situation, necessarily implied a limit on s. 10(b). Their analysis was an exercise in statutory interpretation that provided a singular answer to an unqualified issue: whether s. 10(b) is *always* suspended during roadside sobriety stops under the Manitoba *Highway Traffic Act*. The same mode of analysis should govern the same question under the *CCA*.

**(b) Review of the Trial Court Decisions**

[72] I start with the Ontario Court of Justice decision in *Grant*, a decision that the trial judge declined to follow. In *Grant*, the police stopped a vehicle under the *Highway Traffic Act*, R.S.O. 1990, c. H.8. ("*HTA*"), for an expired validation tag. During this encounter, the police formed grounds to believe that there was marijuana in the vehicle, contrary to the *CCA*. A police officer advised the driver of his intention to conduct a search of the vehicle and its occupants. When the sole passenger got out of the car, the police saw that he was armed with a handgun.

Both the occupant and driver were arrested. The police soon discovered a variety of drugs in the car. Both occupants were prosecuted on gun and drug offences.

[73] The trial judge, Calsavara J., was satisfied that the officers had reasonable grounds to conduct a search under the *CCA*. In applying *Orbanski*, Calsavara J. discussed the public safety purposes of s. 12 of the *CCA*, noting the comparable problems of driving impaired by alcohol and by drugs. As she said, at para. 127:

> There is no case directly on point that I am aware of, but it would seem to me in applying the same principles that a suspension here is also justified. The exercise of the rights guaranteed by s. 10(b) would be incompatible with a brief roadside detention required to conduct a search of the occupants and vehicle for road safety purposes – assuming it is a *brief* detention. [Emphasis in original.]

[74] However, at the end of the day, it is unclear whether Calsavara J. definitively resolved the *Orbanski* issue. As she said, at paras. 130-132:

> Similarly, in this case, the extent to which a suspension of 10(b) is a justifiable limit to conduct a search pursuant to CCA and for how long need not be squarely addressed to resolve this s. 10(b) issue. From the moment the roadside stop transitioned to a search pursuant to *CCA* to the time the gun was found, was likely inside of five minutes. Once the gun was seized, the defendants were immediately arrested and immediately read their rights to counsel.
>
> I have also taken into account the cumulative effect of the suspension of 10(b) on Garnett Grant's rights at each stage of the traffic stop and find it, in totality, fell within the scope of reasonable and necessary measures for road safety purposes and a justifiable limit on his rights under 10(b) of the Charter.

> Had the gun not been found and the rights were suspended for the further 39 minutes it took to search the vehicle – if the search proceeded in the same fashion – I might have come to a different conclusion. [Emphasis added.]

[75] The last part of this passage, which I have emphasized, gets to the nub of the issue under consideration: searches under the *CCA* may not necessarily be brief. Moreover, at the beginning of this type of police-citizen encounter, it is not known how long it might last. The *CCA* purpose of the stop quickly disappeared in *Grant*, as it did in this case, and in some of the other cases discussed below. Evolving events transformed the dynamics of these encounters in important ways, giving rise to other possible reasons for suspending the right to counsel. But that will not always be the case. Sometimes a *CCA* stop will be no more than that. Thus, the question of whether the right to counsel is suspended will turn solely on the application of *Orbanski*.

[76] *R. v. Kanneh*, 2022 ONSC 5413, is another example of an *HTA* vehicle stop that morphed into a *CCA* search, leading to the discovery of firearms and drugs. After considering *Orbanski* and related cases, Petersen J. held, at para. 60: “I agree with the Crown that a roadside investigation under the *Cannabis Control Act* is analogous to an investigation under other regulatory statutes, such that a brief suspension of s. 10(b) *Charter* rights will apply.” She went on to say, at para. 63:

> The jurisprudence clearly establishes that a temporary suspension of rights to counsel is justifiable in such circumstances pursuant to s.1 of the *Charter*. But the

> suspension must be brief and is only reasonable in so far as it can be justified by concerns for officer or public safety, or by the operational requirements of the exercise of statutory and common law police powers to stop a motor vehicle for road safety purposes: *Suberu*, at para. 42; *Orbanski*, at paras. 45-60; *Wilson*, at paras. 61-66; *Graham*, at para. 51; *R. v. Grant*, 2021 ONCJ 90, at para. 127 ("Grant (ONCJ)"); and *R. v. Commisso*, 2020 ONSC 957, at paras. 36 and 44. The extent to which a suspension of s. 10(b) rights can continue to be justified under s.1 of the *Charter*, where the purpose of the roadside detention transitions from a *Highway Traffic Act* violation to the investigation of a different offence, is a context-specific issue that will need to be determined based on the specific facts of each case. [Emphasis added.]

[77] Justice Petersen concluded that the period of time that elapsed before the accused was advised of his right to counsel, 55 minutes, was not justified under s. 1 of the *Charter*. In all of the circumstances, the suspension was not a "justifiable limit" on the accused person's *Charter* rights.

[78] In *R. v. Morgan*, 2023 ONSC 6855, the police pulled over a vehicle for a suspected violation of the *HTA* (a driver using a mobile phone). Similar to the case under appeal, the applicant, who was a passenger, started to get out of the car. He was told to get back in. When a police officer approached the car, he saw what he thought to be cannabis "shake" stuck to the driver's hand. He commenced a *CCA* investigation. Both the driver and the applicant were asked to get out of the car. Both were handcuffed and searched. A firearm was discovered in the accused's jacket. He applied to exclude the evidence discovered by the police based on violations of ss. 8, 9, 10(a), and 10(b) of the *Charter*.

[79] Justice Rahman (now a justice of the Court of Appeal) found that the accused's s. 10(b) rights were infringed because the police did not discharge their informational obligations until 10 minutes after the *HTA* stop, and nine minutes after the detention under the *CCA*. He rejected the Crown's submission that the accused's s. 10(b) rights were suspended during the traffic stop that turned into a *CCA* investigation. He quoted the passage from Petersen J.'s judgment, reproduced above, also emphasizing her observation that the question of whether s. 10(b) rights are suspended is a "context-specific issue that will need to be determined based on the specific facts of each case." Rahman J. concluded, at para. 58: "Assuming that s. 10(b) rights are suspended during roadside *CCA* investigations, the delay here cannot be justified. There were no safety or operational concerns that justified the delay in advising the applicant of his s. 10(b) rights."

[80] The same factual pattern (i.e., *HTA* stop, *CCA* investigation, discovery of firearms) was evident in *R. v. Dlamini*, 2024 ONSC 6282. Justice Lucille Shaw found that the delay in advising the accused of their ss. 10(a) and (b) rights was justified by officer safety concerns. Like this case, the officer that stopped the vehicle was concerned about being outnumbered by the occupants of the vehicle; he was awaiting the arrival of other officers for back-up purposes.

[81] Justice Shaw reviewed some of the cases referred to above (and others) that support the temporary suspension of s. 10(b) rights during a *CCA*

investigation. Applying a fact-specific approach, Shaw J. found that the applicants were detained for approximately 18 minutes. There was an eight-minute delay in informing them of their right to counsel after they were informed of the *CCA* reason for their detention, which as noted above, was delayed for officer safety reasons. She found the delay reasonable; there was no breach of s. 10(b) of the *Charter*.

[82] In *R. v. Osman*, 2023 ONSC 7087, the same *CCA* issue arose in the context of a random stop as part of a R.I.D.E. program. During a search pursuant to s. 12(3) of the *CCA*, the police discovered a firearm. The search was conducted without first advising the occupants of their rights under s. 10(b) of the *Charter*. The trial judge, Agarwal J., found that the accused's rights under s. 10(b) were infringed and that the *CCA* did not impliedly limit the right to counsel, but that the evidence should not be excluded under s. 24(2). On the first issue, he said the following, at paras. 55-56:

> The Crown argues that a detainee's section 10(b) right is suspended during a roadside investigation under the *Cannabis Control Act*. See *R. v. Kanneh*, 2022 ONSC 5413, at para. 60; *R. v. Morgan*, 2023 ONSC 6855, at paras. 56-57. The right to counsel, like any other *Charter* right in case of detention, is subject to reasonable limitations as prescribed by law under section 1 of the *Charter*. This limitation may be implicit in the operating requirements of a statute. See *R. v. Orbanski*, 2005 SCC 37, at para 38. But whether those operational requirements are necessary to suspend a detainee's

> section 10(b) right is necessarily "case-specific". See *Orbanski*, at para 47.[3]
>
> On the facts here, I'm not persuaded that Osman's section 10(b) right need have been delayed (for safety concerns) or otherwise suspended (for operational reasons). When the police directed Osman to exit the car, the situation was calm. At that stage, the police didn't know about the safety risk posed by the gun. They were merely searching for an open package of cannabis. There were at least 10 other officers present, all in a relatively controlled environment. The "exigencies" of street policing didn't arise here (for example, the police weren't outnumbered or in a high-crime area). The police should've told Osman that he had a right to speak to his lawyer immediately after doing the pat-down search.

[83] As these cases demonstrate, *CCA* searches may arise in different scenarios. A *CCA* search may be authorized in circumstances where the only person in a vehicle is the driver, or in multiple occupant scenarios, where each person may be subjected to a search. As in this case, a *CCA* search may be the sole reason for stopping a vehicle. In others, grounds for a *CCA* search may develop during a stop authorized for other reasons. Indeed, a *CCA* search may well be the natural progression of a sobriety screening stop, as in *Osman*.

[3] The Court in *Orbanski*, at para. 47, explained that whether the police were authorized to use a particular sobriety screening test is a case-specific inquiry. In that paragraph, they were not addressing whether a suspension of s. 10(b) is a case specific inquiry.

## (5) Analysis

### (a) Introduction

[84] In applying *Orbanski* in this context, it is helpful to consult first principles. The trigger for all the rights under s. 10 of the *Charter* is an arrest or a detention. As noted above, in *Suberu*, the Supreme Court of Canada discussed the limits of investigative detentions and the correlative duties of police officers. McLachlin C.J.C. and Charron J. said, at para. 42: "Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention" (emphasis added). I note that several cases have more broadly concluded that "exceptional circumstances" – not just safety concerns – may warrant a suspension of s. 10(b): *R. v. Brunelle*, 2024 SCC 3, 92 C.R. (7th), at para. 83; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 74; and *R. v. Manninen*, [1987] 1 S.C.R. 1233, at p. 1242.[4] Those other exceptional circumstances, however, are not relevant to the present appeal.

[85] *Suberu* and other caselaw, therefore, make clear that suspensions of s. 10(b) will be lawful in at least two circumstances. First, where there are concerns

[4] By way of example, in *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 26, Doherty J.A. explained that the need to preserve evidence can justify a delay in providing the right to counsel.

for officer and public safety: *Suberu*, at para. 42; *R. v. Strachan*, [1988] 2 S.C.R. 980, at pp. 998-999; *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 33; *R. v. Brown*, 2024 ONCA 763, at para. 35; and *R. v. Pileggi*, 2021 ONCA 4, 153 O.R. (3d) 561, at paras. 57-63. And, second, where a limit on the relevant right is prescribed by law and justified under s. 1: *Suberu*, at para. 42; *Orbanski*, at para. 33; and *Thomsen*, at p. 650.



[86] Suspensions stemming from concerns for officer and public safety are distinct from suspensions flowing from justified limits under s. 1. Safety concerns are case-specific and do not entitle a court to declare that individuals' rights are suspended in each and every *CCA* investigation. That is because those concerns are not a limit "prescribed by law"; they cannot form the basis of a generalized suspension of individual rights under s. 1. Rather, in those exceptional circumstances, the scope of the right is limited internally, meaning that s. 10(b) accommodates a delay in furnishing access to counsel when the police and public face an imminent risk of harm.

[87] By contrast, a limit that is prescribed by law and justified under s. 1 does entitle a court to generally declare that a statute suspends a right in each and every case. That analysis is not case-specific. For present purposes, the relevant question is whether a prescribed limit arises by necessary implication from "the operating requirements of a statute". The question is not whether a limit arises from the operating requirements of a particular investigation. If it was, then the limit

would not be prescribed by law and could not be subject to s. 1. Therefore, the inquiry into whether s. 10(b) is suspended is only case-specific when there are relevant officer and public safety concerns (or other exceptional circumstances).

**(b) The *CCA* Does Not Contain an Implied Limit on Section 10(b)**

[88] I accept the respondent's submissions and I agree with the trial judge that *Orbanski* should not be extended to *CCA* searches. While there are some obvious public safety similarities between sobriety screening stops and the objects of s. 12 of the *CCA*, there are also some significant differences.

[89] I begin with the similarities. I agree with Ms. Doherty's submission that, like roadside sobriety screening, public safety considerations are at the heart of s. 12 of the *CCA*. Whether a person is impaired by alcohol, drugs, or both, the danger to the public is the same. Both are serious social problems that put other citizens at significant risk of serious bodily harm or death. This is a well-accepted proposition.

[90] The public safety purpose of s. 12 of the *CCA*, however, does not bear on the question of whether the statute limits s. 10(b) by necessary implication. When the police initiate a search pursuant to s. 12, the occupants of the vehicle are detained and no longer pose a risk to public safety. Thus, providing the right to counsel immediately upon detention does not hinder the objective of the statute because any risk to public safety is mitigated once the vehicle is stopped. Indeed,

while public safety features as a prominent theme throughout *Orbanski*, Charron J. similarly did not invoke the legislation's public safety objective in assessing whether the statute contained an implied limit on s. 10(b).

[91] Beyond public safety considerations, the similarity to *Orbanski* fades. Most importantly, I accept the respondent's submission that, in this context, we are not concerned with a mere screening procedure. The legislation at issue in *Orbanski* authorized police officers to assess the sobriety of drivers by asking questions or using other means; this procedure was necessarily brief. The brief nature of the investigation led Charron J. to conclude that the legislation must include an implied limit on the right to counsel because, otherwise, each sobriety check would "result in longer and often unnecessary detentions": at para. 45.

[92] Section 12(3), by contrast, does not create a brief sobriety screening procedure. As the trial judge recognized, s. 12(3) of the *CCA* is much more intrusive, permitting a search without a warrant, not just of a potentially liable driver, but all others in the vehicle, perhaps even minors, and the vehicle itself. Suspending the right to counsel will not avoid that result.

[93] Another significant difference from *Orbanski* relates to the temporal dimension of the relevant investigative procedure. In *Orbanski*, the Supreme Court explained that police officers must conduct their sobriety checks quickly because the police were only entitled to administer a breathalyzer test if they believed that an individual was driving while impaired during the preceding two hours. Thus, the

legislation must have implicitly permitted a brief detention and suspension of s. 10(b) so that the police could investigate these driving offences during the strict statutory time limit and before the individual's level of impairment was no longer detectable.

[94] By contrast, the *CCA* imposes no time constraints on police officers. There is no requirement that the detention be brief or that the police conduct their investigation without any delay, key factors in *Orbanski*. Indeed, depending on the circumstances, including the nature of the vehicle and the number of people involved, the police would be unable to complete a competent investigation under the *CCA* in a swift manner. As the cases demonstrate, occupants of vehicles will need to be removed from the vehicle to permit an effective search. This takes time. The vehicle itself may be searched, a procedure that may also take time.

[95] With that said, I accept the appellant's submission that practical considerations may arise if the police are required to comply with s. 10(b) of the *Charter* at roadside, especially in a multiple occupant situation. The trial judge was alive to these practicalities. Apprising the driver and passengers of the right to counsel in s. 10(b) of the *Charter* may result in further delay if a person chooses to exercise their rights. But that is a decision to be made by the rights-holder. Whether a detainee chooses to exercise their right is not a contingency that should detract from the scope of the protection afforded by s. 10(b) of the *Charter*. Moreover, as LeBel J. signalled in *Orbanski*, at para. 80, implementational

difficulties or inconveniences alone cannot permit a court to read in a rights limitation into a statute.

[96] An implied limit on s. 10(b) cannot be gleaned simply from the fact that implied limits have been found in other contexts. In her submissions, Ms. Doherty relied upon the decision in *R. v. Graham*, 2018 ONSC 6718, in which Code J. addressed the application of s. 10(b) in relation to the analogous search power in s. 32(2)(b) of the *LLA*, referred to in para. 66, above. In his thorough reasons, Code J. mused that it would be "odd" if *Orbanski* could justify limitations on the right to counsel in relation to *HTA* and *Criminal Code* drinking and driving investigations, but not searches under the *LLA*. However, Code J. was not required to decide the issue because officer safety concerns soon emerged, justifying a delay in the officers' informational duties: at para. 54, citing *Suberu*, at para. 42. Similarly, I decline to comment on the impact of s. 32(2)(b) of the *LLA* on the right to counsel.

[97] In any event, I see nothing "odd" in divergent outcomes in *Orbanski* and the *CCA* context. As noted above, the power to search places and things without a warrant is a significant point of differentiation, not just in relation to intrusiveness, but also as it relates to the length of time a driver or passenger might be detained. Consequently, I agree with the trial judge that s.1 of the *Charter* cannot operate to suspend the operation of the right to counsel before conducting a search under s. 12(3) of the *CCA*.

[98] However, this does not end the analysis. As noted above, the respondent submits that the driver and passengers need not necessarily be apprised of their s. 10(b) rights immediately. For convenience, I repeat the respondent's position:

> Police may question the driver about cannabis consumption and about whether there is cannabis in the vehicle, and make observations of the driver, passengers and items in plain view. But once the police have reasonable grounds for a search, and form an intention to search the vehicle and its occupants, the occupants are entitled to their full rights under s. 10(b) of the *Charter*. [Emphasis added.]

[99] I agree with this qualification. However, it does not impact on the outcome of this case. P.C. Osman pulled over the Jeep because he had already formed reasonable grounds under the *CCA* to search the vehicle. That was his stated intention. It supplied the authorization to pull the Jeep over for that purpose. Thus, all other things being equal, the officer should have apprised the occupants of their rights immediately upon approaching the vehicle.

[100] However, in other situations, when the police stop a vehicle for other purposes, perhaps for an *HTA* violation or at a R.I.D.E. Checkpoint, the police may ask questions about consumption and make observations of the driver and passengers and other items in plain view in the normal course. It is only when the police form reasonable grounds that the obligations under s. 10(b) of the *Charter* kick-in. This maintains consistency with *Orbanski* and subsequent jurisprudence in the area.

**(c) Officer and Public Safety Concerns**

[101] Before concluding this discussion, I return to the issue of public safety as a reason to delay or suspend the implementation of s. 10(b). As the cases from the trial courts demonstrate, public safety concerns may arise during *CCA* investigations. This case was not litigated on this basis, but it is important to clarify that my conclusions on the inapplicability of *Orbanski* in this context do not in any way impact on the operation of this body of law.

[102] As discussed above, the question of whether a delay in providing the right to counsel is warranted for reasons of officer and public safety must be decided on a case-by-case basis through a "highly factual and contextual inquiry": *Brunelle*, at para. 83; see also *R. v. Taylor*, 2014 SCC 50, 374 D.L.R. (4th) 64, at para 24; *Rover*, at paras. 26, 33. As explained by Doherty J.A. in *Rover*, at para. 27: "The police may delay access only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety … justifies some delay in granting access to counsel." By contrast, "concerns of a general or non-specific nature applicable to virtually any search" do not warrant a suspension of s. 10(b): *Rover*, at para. 27.

[103] The trial court decisions demonstrate how and when officer safety considerations may warrant a pause in administering s. 10(b) rights. Sometimes it will not be safe for an officer or officers to execute their duties under the *CCA* when they are outnumbered by the occupants of the vehicle that is to be searched: see

*Suberu*, at para. 42; *Pileggi*, at paras. 57-63. Officer safety may justify a period of delay until back-up arrives. In the meantime, the occupants of the vehicle must wait, detained. But this justification does not flow from the operational requirements of the *CCA*; it is rooted in well-settled s. 10(b) jurisprudence.

**(d) Conclusion**

[104] The trial judge was correct to find that the respondent's s. 10(b) rights were not suspended by the application of s. 1 of the *Charter*. His right to counsel was violated.

**G. ARBITRARY DETENTION**

[105] The trial judge found that the respondent's detention was arbitrary based on what he found to be an excessive use of force by pulling the respondent from the Jeep and forcing him to the ground. As far as the officers understood, he had committed no criminal offence. And while he was detained solely for the purposes of a s. 12(3) *CCA* search, he could not be charged with an offence under s. 12(1). The trial judge found that, while the police would have been justified in asking the respondent to get out of the vehicle, the police were not permitted to pull him out of the vehicle and ground him in the way that they did. In his s. 24(2) ruling, the trial judge found that the officers essentially assaulted the respondent.

[106] I agree with the appellant that the trial judge failed to engage with the totality of the circumstances that led to the respondent being removed from the Jeep. Had

the *CCA* search proceeded without incident, I agree that it would not have been appropriate for P.C. Osman to exert such force. However, the trial judge was required to consider the broader context. In his testimony, P.C. Osman expressed concern about the behaviour of the respondent and Mr. Williams while they were in the back of the Jeep. He was worried for his safety. Then everything changed very quickly when Mr. Williams attempted to flee.

[107] The incident was captured on video. It vividly demonstrates the chaos that ensued when Mr. Williams bolted from the Jeep. Whether Mr. Williams yelled “run” or “gun”, the police cannot be faulted for the steps that they took to regain control of the situation. Mr. Apostolos and Ms. Georgiou were removed from the vehicle at gunpoint. While the respondent was removed from the Jeep and forced to the ground, it was not at gunpoint. Moreover, his grounding was of brief duration. Fortunately, there is no indication that he sustained any injuries.

[108] In my view, when the entire factual matrix is considered, which required the police to make a split-second decision “in difficult and fluid circumstances”, the respondent’s rights under s. 9 of the *Charter* were not violated: *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 24.

[109] In conclusion, and with respect, the trial judge erred in finding that the police infringed the respondent’s rights under s. 9 of the *Charter*.

## H. EXCLUSION OF EVIDENCE: S. 24(2) OF THE *CHARTER*

[110] The appellant appeals the trial judge's conclusion under s. 24(2) of the *Charter* that the items seized from the Jeep should be excluded.

[111] The s. 24(2) landscape has shifted on appeal. Whereas the trial judge's analysis was predicated on four separate *Charter* violations, I have concluded that the trial judge erred in his analysis concerning the respondent's rights under ss. 9 and 10(a) of the *Charter*. This is relevant to the scope of appellate review. As Jamal J. confirmed in *Beaver*, at para. 118, when an appellate court disagrees with a trial judge's conclusion on *Charter* breaches, no deference need be shown to the s. 24(2) analysis. In these circumstances, a fresh s. 24(2) analysis is required: *R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at para. 92.

[112] My s. 24(2) analysis need not be lengthy. It proceeds on the basis of the breach of s. 10(b) of the *Charter*, as well at the trial judge's conclusion that s. 8 of the *Charter* was infringed due to the failure of the police to comply with s. 489.1 of the *Criminal Code*. The appellant did not appeal this aspect of the trial judge's ruling, in which he rightly characterized the breach as minor and inconsequential. The following focuses on the application of s. 24(2) to the violation of s. 10(b).

[113] Applying the framework in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, I would not characterize the breach as serious. The delay in advising the respondent of his rights was extremely brief. The timeline was then interrupted when

Mr. Williams ran from the Jeep. The respondent was apprised of his rights at 10:58 p.m., 10 minutes after Mr. Williams attempted to make his escape. In the meantime, the police discovered the firearms and magazine.

[114] It might be said that, on this record, there was no s.10(b) breach at all. P.C. Osman was waiting for back-up to arrive; he had concerns for his safety. But this issue appears not to have been litigated at trial. All I can do is record my observations.

[115] Turning to the second *Grant* factor, the impact of the brief s. 10(b) breach on the respondent's *Charter*-protected interests was minimal at best. Although I accept that the evidence was "obtained in a manner" that infringed the respondent's *Charter* rights, it did not contribute to the discovery of the evidence in any meaningful way. There was no causal connection. I consider this to be an important mitigating factor in evaluating the impact of the breach: see *Beaver*, at para. 125; *Pileggi*, at para. 120.

[116] Further, the evidence seized from the Jeep existed independently of the *Charter* infringement. It is unquestionably reliable. Dealing with multiple breaches, the trial judge acknowledged that this factor pulls in favour of inclusion. I agree, even more so now that we are dealing with a single, non-serious *Charter* violation.

[117] Balancing all three *Grant* factors, I would not exclude any of the evidence seized from the Jeep. The administration of justice would not be brought into

disrepute by the admission into evidence of two handguns and an extended magazine obtained in the circumstances of a minor breach of the respondent's s. 10(b) *Charter* rights.

## I. DISPOSITION

[118] I would allow the appeal and order a new trial.

Released: May 7, 2025 "G.T.T."

"Gary Trotter J.A."
"I agree. J. George J.A."
"I agree. Michael F. Brown J. (*ad hoc*)"

CITATION: *R. v. Randall*, 2025 ONCJ 337
DATE: June 16, 2025

# ONTARIO COURT OF JUSTICE



**B E T W E E N :**

**HIS MAJESTY THE KING**

**— AND —**

**SHAMARI RANDALL**

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Before Justice Berg
Released on June 16, 2025

RULING ON APPLICATION TO EXCLUDE EVIDENCE
PURSUANT TO SECTION 24(2) *CHARTER*

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**M. Savage, C. Macorin .....counsel for the Crown/PPSC**
**M. Ertel, S. Maisonneuve .....Counsel for the Applicant**

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**Berg J.:**

## Introduction

[1] On January 17, 2024, Shamari Randall was driving a motor vehicle in downtown Ottawa. Due to the heavy tinting of the windows, the vehicle drew the attention of a patrolling police officer who then ran the licence plate and learned that said vehicle was rented. That officer, Constable Doyle, then decided to conduct a traffic stop to ensure that the driver was properly licenced and to address the issue of the tinting to the windows. Upon stopping Mr. Randall's vehicle, Constable Doyle made certain observations upon which he concluded that the Applicant was in breach of the *Cannabis Control Act* and that he, the officer, therefore had the authority to conduct a search pursuant to s. 12(3) of that Act. As a result of that search, it is alleged that Mr. Randall was in illegal possession of drugs and a firearm and faces the following charges as a result:

i. s. 117.01(3) *Criminal* Code Possession of a handgun while prohibited;

ii. s. 355(b) *Criminal Code* Possession of proceeds of crime, to wit: money not exceeding $5000;

iii. s. 5(3)(a) *Controlled Drugs and Substances Act* Possession of oxycodone for the purpose of trafficking;

iv. s. 5(3)(a) *Controlled Drugs and Substances Act* Possession of buprenorphine for the purpose of trafficking;

v. s. 5(3)(a) *Controlled Drugs and Substances Act* Possession of cocaine for the purpose of trafficking;

vi. s. 86(3) *Criminal Code* Careless transport of a firearm;

vii. s. 86(3) *Criminal Code* Careless transport of a prohibited device;

viii. s. 86(3) *Criminal Code* Breach of s. 117(h) *Firearms Act;*

ix. s. 88(2) *Criminal Code* Possession of a weapon dangerous to the public peace;

x. s. 88(2) *Criminal Code* Possession of a prohibited device dangerous to the public peace;

xi. s. 90(2) *Criminal Code* Carry a concealed weapon;

xii. s. 90(2) *Criminal Code* Carry a prohibited device;

xiii. s. 91(3) *Criminal Code* Possession of a prohibited or restricted firearm without being the holder of a licence;

xiv. s. 91(3) *Criminal Code* Possession of a prohibited device without being the holder of a licence;

xv. s. 92(3) *Criminal Code* Possession of a prohibited or restricted firearm while knowingly not possessing of a licence and a registration certificate;

xvi. s. 92(3) *Criminal Code* Possession of a prohibited device while knowingly not possessing of a licence;

xvii. s. 94(2) *Criminal Code* Occupy a motor vehicle knowing that there was a firearm in it;

xviii. s. 94(2) *Criminal Code* Occupy a motor vehicle knowing that there was a prohibited device in it;

xix. s. 95(2) *Criminal Code* Possession of a loaded prohibited or restricted firearm while not possessing a licence and a registration certificate;

xx. s. 96(2) *Criminal Code* Possession of a firearm that had been obtained by the commission of an offence;

xxi. s. 96(2) *Criminal Code* Possession of a prohibited device that had been obtained by the commission of an offence.

Mr. Randall has elected to have his trial at the Ontario Court of Justice. The trial and *Charter voir* dire proceeded in a blended fashion. All Crown evidence is applicable to both hearings.

[2] Mr. Randall has brought an application pursuant to s. 24(2) *Charter* for the exclusion of all evidence seized by the police during the course of the afore-mentioned search. He pleads that his rights pursuant to sections 8 and 9 *Charter* have been breached and that the exclusion of this evidence from his trial is a just and appropriate remedy in the circumstances. He had originally also pleaded a breach pursuant to s. 10(b) *Charter* but abandoned that allegation during submissions. The matter was then adjourned to allow me to prepare my ruling and judgement. During that interlude, the Court of Appeal issued its decision in *R. v. McGowan-Morris,* 2025 ONCA 349. I then invited counsel to consider whether they wished to reopen their pleadings on the abandoned point. They did and I will deal below with s. 10(b) as well.



**The Evidence**

[3] The first Crown witness was Ottawa Police Constable Bradley Doyle. He testified that he had been a police officer for almost nine years. On January 17, 2024, he was by himself in a marked police cruiser. He explained that he was conducting “proactive patrols” of his assigned area. He explained that these patrols involved going into areas where he knew there to be higher levels of social disorder. He would run licence plates and be on the lookout for people for whom he knew there to be outstanding arrest warrants. As he was on patrol, he was passed by a blue Toyota SUV and he noticed that the front passenger window was tinted such that he could not see inside the vehicle. He queried the licence plate of that vehicle and was informed that it was registered to a car rental company. The constable then decided to conduct a traffic stop of that Toyota as he believed that the tinting of the window was in contravention of the *Highway Traffic Act* and, as well, to ensure that the person driving the SUV was properly licenced. Mr. Doyle told the Court that he will sometimes stop rental cars to confirm that the drivers are properly licenced as he has found that on occasion they are being driven by persons who are unlicenced or whose licences have been suspended or who are supposed to be driving with an ignition interlock installed in their own vehicle.

[4] The traffic stop was conducted at 4:52 p.m. The officer went over to the passenger side of the Toyota and explained why he was stopping Mr. Randall and then asked for his driver’s licence and other documentation. He received, in response, the rental agreement for the vehicle, a temporary driver’s licence as well as Mr. Randal’s passport which he had provided initially before he located the licence. When the constable queried the passport from the computer in his patrol vehicle, he learned that it had been revoked. He went back to Mr. Randall and, standing at the driver’s side window, explained that he had to make some further queries about the passport. As well, he still had to deal with the issue of the tinted window by issuing a Provincial Offences Ticket. It was at this point that he noticed that there was a pink-coloured vape pen near the gearshift area of the Toyota. He recognized a red emblem on that item to be an indicator that it was a cannabis vape pen.

[5] Constable Doyle, standing by the driver’s window, concluded that the vape pen was being stored in contravention of the *Cannabis Control Act.* He testified that “It was

cannabis being stored in a way that was readily accessible to the driver. It wasn't in its original packaging. It was ready to be consumed." He was asked about this during cross-examination. Given the importance that I assign to this evidence, I will here provide the entirety of this passage:

> A. …The way that it was being transported and stored was what was in contravention to the Cannabis Control Act.
>
> Q. Okay. And the reason for that would be because it has cannabis in it?
>
> A. It was readily available to the driver.
>
> Q. Right. How do you know it has cannabis in it?
>
> A. So, the markings on it say that it contains THC and then if you look at – there's a little glass window – or I don't know if it's called a window, but, like, a – you can see kind of by the mouth piece. Do you see what I'm referring to?
>
> Q. Yeah. A. So that, you can see that there's a little bit of a yellow colouring. That's the intoxicating substance inside that pen that when you suck on it, it's..

The vape pen was then shown to the witness and the Court.

> Q. Okay. So, when you looked into the vehicle, you could tell that there was – that there was intoxicating substance inside of that by looking through the glass window in the....
>
> A. No, I'm just pointing to your attention that you can see that there is the – I guess, what would be the intoxicating substance. What I had when I saw this pen – where it was in the car, I had grounds to believe that there was cannabis being improperly stored.
>
> Q. Oh, okay. So, you didn't examine the pen – the pen at the time to see whether you could see the intoxicating substance inside of it or not, but you did find a pink pen and it's got a THC emblem on it and I'm just going to show it to you here. Is that it there?
>
> A. That's – yeah, that's....
>
> Q. So – and sorry, you said that seeing that - what you described as a vape pen, that gave you a reasonable suspicion that there was – you go ahead and tell me what it was that it gave you. What – what suspicion that you got as a result of seeing that pen?
>
> A. I had grounds to believe that there was cannabis being improperly stored in the vehicle.

Q. Okay. And when you're talking about cannabis being improperly stored, you're talking about that pink pen, that's what you – like, you didn't have grounds to believe there was any other cannabis at this point, right?

A. I – I didn't know.

Q. You didn't know one way or another.

A. Pardon me?

Q. Like, the – like, the grounds for your search, they're based on this pen and this pen only, right?

A. For the whole traffic stop or just at this moment?

Q. No, at this point.

A. At this moment, there was cannabis improperly – improperly stored. It was readily accessible to the driver...

Q. Right.

A. ...which gave me my grounds to search the vehicle to ensure that there was no more cannabis being improperly store.

Q. These pens, like do people have to fill them up themselves with cannabis or do they come with cannabis oil in them?

A. I'm not sure.

Q. Well, can they be empty or full?

A. Can they be empty or full?

Q. Yeah.

A. I believe so. Certainly – like, it's – I don't think they're unlimited.

Q. So – so, at that time when you were conducting that search, did you turn your mind to whether or not that pen was empty or full?

A. I had no reason to believe it was empty.

Q. What reason did you have to believe it was full?

A. So, like, I – I explained, there's – you can see through that little glass window that there's....

Q. You can see that now in the picture, but you didn't see that then when you conducted the search, right?

A. I never said that.

Q. Did you examine it to see whether there was any yellow showing in the glass window on one side of it...

A. So....

Q. ...before you did your search?

A. When you say on one side of it, I don't think it's, like, a solid inside there, so it actually has the ability to move inside there.

Q. Sir, did you touch that pen at all before you conducted the search?

A. Did I touch the pen before I conducted the search?

Q. Yeah.

A. The – the first thing I did was I – I notified Mr. Randall that I would be conducting the search.

Q. Right.

A. And then I had him exit.

Q. Right. But – but the reason why he was being asked – being told to exit the vehicle was because you were going to conduct a search, right?

A. Yeah, because there was cannabis readily available to him.

Q. Right. There was cannabis readily available if there was cannabis inside that pen, right?

A. Yeah, and I had reasonable grounds to believe that there was cannabis being improperly stored. I saw a weed – a vape pen – I don't know what the proper term for it is but.... A weed vape pen that was readily accessible to Mr. Randall and that's what gave me my grounds to search.

Q. The pen was accessible to him but whether it was full or empty, you didn't know, right?

A. The pen had a THC marking on it which indicated to me that it contained cannabis, and it was readily accessible to Mr. Randall.

Q. Right. The THC marking means that, at some time, it had cannabis in it, but at this point, it might have cannabis in it or it might not, right?

A. I had reasonable grounds to believe that there was cannabis being improperly stored in the vehicle and that it was readily accessible to Mr. Randall.

Q. Right. But just to be clear, your reasonable grounds are based on your observations of this pink pen only at this time, right?

A. That's the only cannabis that I observed in the vehicle.

Q. Right. It's because of that observation that Mr. Randall is removed from his vehicle so that you can conduct a search, right?

A. Yeah, pursuant to the Cannabis Control Act.

Q. Right. And it's because of that pink pen that you can search him, the vehicle and his clothing, right?

A. Him and the contents of the vehicle, correct.

Q. Right. And the contents of the vehicle include the coat which you searched, right?

A. Yes, sir.

[6] A bit later during the cross-examination, Mr. Doyle agreed that it would not be illegal to have an empty vape pen in one's vehicle. He was then asked whether a *Cannabis Control Act* search was a broad power. He responded in the affirmative, drawing a parallel to *Liquor Licence and Control Act* searches. This led to the following exchange.

Q. Right. So, that's interesting that you raised that Liquor Licence and Control Act search. Obviously, you wouldn't be able to search a vehicle pursuant to the Liquor Licence Act if there was an empty beer bottle in the vehicle, right?

A. If there's alcohol still contained within the bottle, then it wouldn't be empty, so.

Q. So, if you saw an empty beer bottle in the car, I guess you would have to look at it and see whether there's still alcohol in it in order to determine whether you had the grounds to search for liquor in the vehicle, right?

A. I guess it would depend on the circumstances.

Q. The circumstances I just described to you is there's an empty bottle. You said there could still be alcohol in it. If it appears to be empty,

> obviously you'd have to look at it and see whether there's alcohol in it, right, before you would search under the Liquor Licence Act, right?
>
> A. Well, that would be a search.

[7] The constable advised Mr. Randall of what he had observed and its significance and then explained that he now had the authority under the *Cannabis Control Act* to search both Mr. Randall's person and the vehicle and requested that he step out of the Toyota. He was now detained pursuant to the *CCA. Mr*. Randall did so and was searched by the officer for more cannabis. None was found and so he was asked by Mr. Doyle to stand off to the side while he searched the vehicle. Mr. Randall was left unhandcuffed and in possession of his cell phone; there were no safety concerns.

[8] The exact time that the *CCA* detention occurred is not clear from the evidentiary record. The traffic stop was at 4:52 p.m. Constable Doyle ran Mr. Randall's name through his on-board computer at 4:57 p.m. At some point after that, he returned to the Toyota and observed the cannabis vape pen and detained Mr. Randall as a result. As we shall see, due to what was found during the *CCA* search, the constable first arrested the accused at 5:04 p.m. after a brief search. I would estimate that the *CCA* detention occurred at approximately 5:00 - 5:03 p.m.

[9] It was cold out and so the constable offered Mr. Randall the jacket that was draped over the driver's seat of the Toyota. He searched the jacket preparatory to handing it over and located a prescription bottle in a pocket. The part of the label that had shown the patient's name had been torn off and it contained several pills. It has been admitted that those were 16 Buprenorphine tablets. However, at the time, Mr. Doyle was unaware of their exact nature but believed that they were a substance controlled under the *Controlled Drugs and Substances Act.* He walked over to Mr. Randall and placed him under arrest for possession of a Schedule I substance at 5:04 p.m. He placed him in handcuffs and then brought him to the front of his police cruiser which was parked behind the Toyota and requested that another police unit come to assist him. He then searched his prisoner and located something that he had missed the first time he had conducted the search: five Oxycodone pills in translucent packaging in the front pouch of the hoodie sweater. It has been admitted that Police also located $1770.00 in the jacket located on the front driver's seat.

[10] Constable Sebastian Bazinet and his escort arrived on scene at 5:07 p.m. in response to Mr. Doyle's request for assistance. Mr. Doyle provided his colleague with the grounds to search the vehicle as well a search incident to arrest. At 5:07 p.m., Constable Doyle also arrested Mr. Randall for possession for the purpose and placed him in the rear of the police cruiser and provided him with his rights to counsel, *etc.* The constable understood that his prisoner wished to speak to a lawyer. It was his evidence that he was unable to provide him with that opportunity at the roadside as Mr. Randall was a prisoner and he could not offer him the privacy that would be required.

[11] After the rights to counsel and other cautions, Constable Doyle returned to continue the search of the Toyota. He entered the area of the driver's seat and noticed that the gearshift compartment was popped open. He inquired if any of the other officers who were now on scene had opened the compartment and was advised that they had

not. He then opened the compartment further and looked inside. It was there that he observed a handgun. This was at 5:20 p.m. Mr. Doyle requested that a supervisor attend the scene and then went and re-arrested Mr. Randall for the firearm and provided him with his rights to counsel at 5:21 p.m., and his cautions and his s. 524 warning at 5:22 p.m. He then examined the handgun and observed that while there was no cartridge in the chamber, the magazine did contain rounds. It was admitted by the defence that there were ten rounds of 9 mm. ammunition.

[12] The officers then had a discussion about who would perform which of the necessary tasks. Mr. Doyle then left at 5:42 p.m. with his prisoner for the central cell block. They arrived there at 5:58 p.m. Mr. Randall was then processed and ultimately put in touch with his counsel of choice at 6:26 p.m. The call was completed at 6:53 p.m. and Mr. Randall was then lodged in a cell.

[13] The last Crown witness was Constable Sebastian Bazinet, a fifteen-year veteran of the Ottawa Police Service. On January 17, 2024, he responded to Mr. Doyle's radio request of 5:04 p.m. for an additional unit to assist him. Mr. Bazinet had an escort with him: Constable Alicia Wallace. They reached Constable Doyle's position at 5:05 p.m. who then informed Mr. Bazinet that there were grounds to search the Toyota pursuant to the *Cannabis Control Act* as well as incident to arrest for possession of a Schedule I substance. Relying on what he had learned from his colleague, Constable Bazinet then began searching the vehicle beginning with the front passenger side. On the seat, he observed a black satchel. He opened its front pocket and noted a substantial amount of cash: $1535.95. In the middle pocket, he located a bundle of crack and two of powder cocaine, some baggies with white powder in them, a few pieces of torn grocery bag plastic, a digital scale, and a knife. The total weight of the powder cocaine was 41.85 gm. He also observed the cannabis vape pen that had been noted by Mr. Doyle. There was also an orange-coloured prescription pill bottle with no label on it in the centre console.

[14] At 5:07 p.m., he advised Constable Doyle of what he had located and that there were grounds to arrest Mr. Randall for possession of a Schedule I substance for the purpose of trafficking. He returned to his search of the vehicle and was searching the back seat area when he was joined by Constable Doyle at 5:20 p.m. He observed Mr. Doyle begin to search the front driver's side; Constable Wallace was searching the front passenger area. Mr. Doyle asked them if either had touched the area of the stick shift. They had not. Mr. Bazinet then observed that the cover for the stick shift area appeared to be misaligned and saw Mr. Doyle remove the cover and discover the handgun.

[15] There was no evidence called by the defence on the *Charter* application that I am here deciding.

[16] Constable Doyle was very defensive during cross-examination. At times, he would not directly answer relatively straightforward questions. That being said, there is no evidence at these proceedings that would lead me to reject the officer's evidence that he stopped Mr. Randall for the reasons he gave, that he saw the vape pen as he stated, and that the events occurred as he described. I accept his evidence and I also accept the evidence of his colleague Constable Bazinet.

**The Alleged breaches of Mr. Randall's *Charter*-Protected Rights**

[17] As I indicated earlier, Mr. Randall has pleaded breaches of his s. 8, 9 and 10(b) *Charter* rights. It is the defence position that the traffic stop detention was "a pure fishing expedition." Secondly, the search of the Toyota that occurred after the traffic stop was not authorized by the *Cannabis Control Act* as Constable Doyle did not have the requisite reasonable grounds to suspect that cannabis was being unlawfully stored in that vehicle.

[18] With respect, on the evidence before me, I find that the defence has not proven on a balance of probabilities that the traffic stop was anything but what Constable Doyle described. I accept his evidence that he noticed illegal tinting on the window as he described, learned that the Toyota was a rental vehicle, and then decided to conduct a traffic stop pursuant to and authorized by the *Highway Traffic Act* (see, *R. v. Nolet*, 2010 SCC 24; *R. v. Bzezi*, 2022 ONCA 184; *R. v. Gonzales*, 2017 ONCA 543). Thus, I find that there was no breach on this ground. This leaves the alleged s. 10(b) breach as well as the second arm of the alleged breaches of s. 8 and s. 9.

[19] In regards to the allegations of s. 10(b) breach, the evidence before me is that Constable Doyle stopped the Applicant at 4:52 p.m. He subsequently noticed the vape pen at some point between 5:00-5:03 p.m. and instructed Mr. Randall to get out of his vehicle in order that his person and the vehicle be searched pursuant to s. 12(3) of the *Cannabis Control Act*. However, the police only read out the informational component of s. 10(b) *Charter* at 5:07 p.m., three minutes after the alleged discovery of illegal drugs and some currency.

[20] With *R. v. McGowan-Morris,* 2025 ONCA 349, the Court of Appeal has now clarified that in the context of s. 12(3) *CCA* searches, the police must comply with the informational component of s. 10(b) without delay, absent any concerns for public or officer safety, and prior to conducting the *CCA* search. As stated at paragraphs 98-99 of that decision, "[b]ut once the police have reasonable grounds for a search, and form an intention to search the vehicle and its occupants, the occupants are entitled to their full rights under s. 10(b) of the *Charter*." The police in the present case delayed the performance of this duty, for a period that might be as long as seven minutes or as short as four minutes, from the moment Mr. Doyle formed the subjective belief that he had reasonable grounds and asked the Applicant to get out of the car until after the alleged discovery of the items that led to criminal charges. They thereby breached Mr. Randall's right. The Crown has conceded this breach. It is to be noted that when the police began their *CCA* search, Mr. Randall was not in handcuffs and was in possession of his cell phone.

[21] I turn now to the second arm of the alleged breaches of s. 8 and s. 9: that the warrantless search of Mr. Randall and his vehicle, and detention of Mr. Randall for that purpose, was not authorized by the *CCA.* Section 12 of that Act reads

> (1) No person shall drive or have the care or control of a vehicle or boat, whether or not it is in motion, while any cannabis is contained in the vehicle or boat.
>
> (2) Subsection (1) does not apply with respect to cannabis that,
>
> (a) is in its original packaging and has not been opened; or

> (b) is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle or boat. 2018, c. 12, Sched. 1, s. 12 (1).
>
> (3) A police officer who has reasonable grounds to believe that cannabis is being contained in a vehicle or boat in contravention of subsection (1) may at any time, without a warrant, enter and search the vehicle or boat and search any person found in it.

[22] A warrantless search is presumptively unreasonable and thus contrary to s. 8 *Charter.* As Mr. Randall has raised this issue, the Crown must establish on a balance of probabilities that the search was authorized by law, that the law itself is reasonable, and that the manner in which the search was carried out was reasonable (see, *R. v. Collins*, 1987 CanLII 84 (SCC); *R. v. Caslake*, 1998 CanLII 838 (SCC); *R. v. Nolet*, 2010 SCC 24).

[23] The search was authorized by a reasonable law. It is the manner of the search that is being questioned. Constable Doyle had stopped the vehicle being driven by Mr. Randall in order to conduct a *Highway Traffic Act* investigation. As he did so, he observed what was clearly a cannabis vape pen located right beside the driver's seat and out of its packaging. It is also clear that the constable assumed that the mere presence of that vape pen provided him with the reasonable grounds referred to in s. 12(3) *CCA.* Furthermore, I find that the first time that Mr. Doyle turned his mind to whether the vape pen in question actually still contained any cannabis was in court before me during the trial. It is to be remembered that such a device may contain its full charge of cannabis, some of that charge, or have been emptied.[1]

[24] I accept that Constable Doyle believed that the mere presence of the vape pen gave him the reasonable grounds to exercise his authority pursuant to s. 12(3) *CCA*. The issue that remains is whether that belief was objectively justifiable (see, for example, *R. v. Storrey*, 1990 CanLII 125 (SCC), *R. v. Fyfe,* 2023 ONCA 715 at para. 52). I find that it is not. The vape pen is not cannabis, it is a device by which cannabis can be consumed. In other words, it is an item of cannabis paraphernalia. When an officer observes an item of cannabis paraphernalia, they are not making an observation of cannabis. At its highest, that observation could raise a suspicion that cannabis is present. However, the reasonable grounds required for that officer to conduct a lawful warrantless search would require further investigation.

[25] Upon observing the vape pen, Constable Doyle objectively had a reasonable suspicion that Mr. Randall was in breach of s. 12(1) *CCA.* However, given that what he had observed was an item of paraphernalia and not actually cannabis, he did not yet have reasonable grounds to conduct a s. 12(3) search. At that point, a further investigation was

[1] I was shown the vape pen during the trial. I am unfamiliar with such devices and indeed, this was the first time I have ever examined one. No expert evidence was called. The chamber into which the cannabis can be loaded has a clear window by which the inside of that chamber can be observed. I observed some substance which seemed to have solidified and be adhering to the clear window. I do not doubt that the substance in question was a cannabis product. However, I have no idea a) whether that substance was in that state when the vape pen was seized or whether it had solidified between that time and the trial; b) whether the substance in its present form and quantity could be consumed.

both called for and permissible as noted by Trotter J.A. for the unanimous panel in *McGowan-Morris* at para. 98-99,

> As noted above, the respondent submits that the driver and passengers need not necessarily be apprised of their s. 10(b) rights immediately. For convenience, I repeat the respondent's position:
>
> > Police may question the driver about cannabis consumption and about whether there is cannabis in the vehicle, and make observations of the driver, passengers and items in plain view. But once the police have reasonable grounds for a search, and form an intention to search the vehicle and its occupants, the occupants are entitled to their full rights under s. 10(b) of the *Charter*.
>
> I agree with this qualification.

Constable Doyle observed the vape pen in plain sight. Objectively, he did not know whether it actually still contained cannabis. He should have investigated further to see whether its presence was actually in breach of the *CCA.* That investigation could have taken the form of questions to Mr. Randall, an examination of the vape pen itself, or both. There were no safety concerns at that point nor would such investigative techniques require much effort or time. Instead, Mr. Doyle took the mere presence of the vape pen to provide him with reasonable grounds to conduct a search. As he was wrong in that assumption, I find that he breached the s. 8 and s. 9 rights of Mr. Randall.

**Section 24(2)**

[26] The law governing the application of the remedial section 24(2) *Charter* was articulated by the Supreme Court of Canada in *R. v. Grant,* 2009 SCC 32. A trial court must assess and balance the effect of admitting the evidence on society's confidence in the justice system based on the following factors:

i. the seriousness of the *Charter*-infringing state conduct;
ii. the impact of the breach on the *Charter*-protected interests of the accused; and
iii. society's interest in the adjudication of the case on its merits.

[27] The seriousness of the *Charter*-infringing state conduct: It is to be remembered that the purpose of s. 12(3) *CCA* was not to create a new criminal search power. The clear reason for s. 12 *CCA* "is to ensure that cannabis is not readily available to any person in a vehicle or boat. The public safety goal is to prevent the use of cannabis by the driver or the occupants of a car or boat while it is being operated" (*McGowan-Morris,* at para. 64). This appellate interpretation is consistent with stated legislative intent:

> In parliamentary debates related to the enactment of the *CCA,* the Attorney General of Ontario indicated that the purpose of the *CCA* is to protect the public from the havoc caused by drug-impaired driving.

> Parliament's intent in enacting the *CCA* is to protect public health and safety, protect youth and restrict their access to cannabis, and provide law enforcement with the tools to achieve these objectives: Ontario, Legislative Assembly, Official Report of Debates *(Hansard)*, 41st Parl., 2nd Sess., No. 115 (2 November 2017), at p. 6143-6144 (Hon. Yasir Naqvi); Ontario, Legislative Assembly, Official Report of Debates*(Hansard),* 42nd Parl., 1st Sess., No. 30 (1 October 2018), at p. 1342. (Hon. Caroline Mulroney); See also *R. v. Nzita*, [2020] O.J. No. 3109, at para. 23.
>
> *R. v. Byfield,* 2023 ONSC 4308 at para. 105

[28] Constable Doyle did form a subjective belief that he had the necessary reasonable grounds and thus acted in good faith. However, it is troubling that his belief was predicated on a logic (*i.e.,* cannabis vape pen = presence of cannabis = reasonable ground) that cannot be sustained by objective analysis. As the constable did not have reasonable grounds to conduct the search, I find that this *Charter*-infringing conduct by the state is serious in nature. The fact that a simple further investigation could have possibly provided those grounds or perhaps even demonstrated then and there that the grounds did not exist underlines how egregious this conduct was. The police were negligent in not conducting a further inquiry and the seriousness of their conduct is not mitigated by the fact that they were acting in good faith. I would place this breach towards the more serious end of the spectrum. Evidence gathered on the basis of a suspicion that was nothing more than merely an unjustified reflex would bring the administration of justice into disrepute. This factor supports exclusion of the evidence in question.

[29] In the circumstances of this case, the actions of the police in the breaching of Mr. Randall's s. 10(b) right are to be seen as being at a low level of seriousness. I base this analysis entirely on the fact that the clarification of the s. 10(b) informational duty on police officers in the context of *CCA* searches has only just been clarified in *McGowan-Morris,* some sixteen months after the arrest of Mr. Randall.

[30] The impact of the breach on the *Charter*-protected interests of the accused: It was not the dwelling of Mr. Randall that was searched. Nonetheless, his right to be free from arbitrary detention and his right to be secure against unreasonable search were violated on mere suspicion. This is profoundly intrusive. The admission of the evidence found as a result of the detention and search breaches would signify that the protections of s. 8 and s. 9 count for nought. Given this high level of impact on Mr. Randall's protected interests, these breaches militate for exclusion.

[31] With respect to the breach of Mr. Randall's s. 10(b) right, I note that the importance of the informational component of that right is such that a breach will rarely be of less than moderate impact. In the case at bar, I find that impact upon his rights were indeed moderate.

[32] Society's interest in the adjudication of the case on its merits: Clearly, this factor would militate in favour of inclusion of the evidence. That society has a high level of interest in the adjudication of cases involving illegal possession of firearms and drugs cannot be gainsaid. The exclusion of the drugs and firearm, important to the Crown case

and reliable evidence, would serve to frustrate the societal interest in combatting a significant societal problem. Yet, and as stated by the Ontario Court of appeal in *R. v. McGuffie,* 2016 ONCA 365 at paragraph 63,

> In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility [cites omitted].

[33] Balancing of the Factors: The Court cannot be seen to be condoning negligent and impactful behaviour of this nature by the police even when the conduct in question was done in good faith. To be clear, I am not referring here to the s. 10(b) breach given that the constable could hardly have been expected to anticipate the recent ruling by the Court of Appeal. I find that in the present case, the s. 10(b) breach adds little to the balancing analysis.

[34] The evidence will be excluded.

**Released: June 16, 2025**

Signed: Justice Berg

# ONTARIO COURT OF JUSTICE

CITATION: *R. v. Lam*, 2025 ONCJ 338
DATE: 2025 06 20
COURT FILE No.: Oshawa 25-28100291-00



**B E T W E E N :**

**HIS MAJESTY THE KING**

**— AND —**

**JAYDAN LAM**

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Before Justice Joseph Hanna
Heard on May 1 – 2, 2025
Reasons for Judgment released on June 20, 2025

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R. Greenway **.....counsel for the Federal Crown**
D. Reeve….**……counsel for the accused**

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**HANNA J.:**

**OVERVIEW**

[1] Following a 911 call, the police stopped Jaydan Lam while he was driving along Highway 401 in Bowmanville. While the police were interacting with Mr. Lam, an officer observed a handgun through the vehicle's rear window. Mr. Lam was arrested. The police then searched his vehicle and seized a loaded firearm and a significant quantity of both fentanyl and cocaine.

[2] Mr. Lam is charged with the following offences:

1. possession of firearm knowing its possession is unauthorized, contrary to s. 92(1) of the *Criminal Code*;

2. unauthorized possession of a firearm in a motor vehicle, contrary to s. 94(1) of the *Criminal Code*;

3. possession of a loaded prohibited firearm, contrary to s. 95(1) of the *Criminal Code*;

4. possession of a prohibited device, contrary to s. 92(2) of the *Criminal Code*;

5. possessing a firearm knowing its serial number has been defaced, contrary to s. 108(1)(b) of the *Criminal Code*;

6. possession of cocaine for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*;

7. possession of p-fluorofentanyl for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*; and

8. possession of a mixture of fentanyl and p-fluorofentanyl for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

[3] He has brought an application to exclude evidence pursuant to s. 24(2) of the *Charter* for alleged violations of ss. 8, 9, 10(a) and 10(b) of the *Charter*. He argues that he was arbitrarily detained, not advised of the reason for his detention, not promptly advised of his right to counsel, improperly questioned by police, and subjected to an unreasonable search and seizure.

[4] The Crown concedes that there were violations of sections 10(a) and 10(b) but submits that the evidence should be admitted under s. 24(2) of the *Charter*.

[5] The parties agree that my ruling regarding the admissibility of the evidence seized by the police will determine the outcome of this trial. If the evidence is admitted, the defence concedes that the elements of each of the offences have been proven beyond a reasonable doubt. If the evidence is excluded, the Crown concedes that Mr. Lam must be acquitted of all charges.

**THE EVIDENCE**

**(1) Introduction**

[6] The facts in this case are largely non-contentious. A detailed agreed statement of facts was filed. It describes what was seized by police and confirms that Mr. Lam was in possession of these items. The only witnesses to testify were Police Constable Wes King and Sergeant David Phillips, the two officers involved in Mr. Lam's detention and the initial search of his vehicle.

[7] P.C. King has been a police officer since 2001. He has worked in the police K9 unit for 17 years. While he conducted many arrests as a patrol officer, since becoming a K9 officer he has not frequently made arrests.

[8] Sgt. Phillips has been a police officer since 1998 and held the rank of sergeant for 17 years. His responsibilities include monitoring calls for service, assessing resource needs, and supporting frontline officers during incidents.

[9] Audio recordings of the police dispatch communications and the officers' body worn camera footage were also filed.

**(2) The Events Leading Up to the Traffic Stop**

[10] On May 29, 2024, the Durham Regional Police received a 911 call relating to observations reportedly made near a bank in Newcastle. Shortly after, at 11:38 p.m., information from the call

was dispatched to officers. P.C. King heard the following information from the dispatcher over his radio:

> I don't have any other units available just yet, but I just wanted to make you aware of a call just west of your location at 75 King Avenue West. At the CIBC there. Complainant noticed a new BMW SUV with damage to the front end. Believed to be possibly stolen. The complainant didn't obtain the plate. She did see a male white in his 20s, wearing a hat and shorts. He ran and tried to get into the bank about 10 – 15 minutes ago. I'm assuming he's then since left. I'm just trying to get more details.

[11] P.C. King was in Newcastle when he received the information regarding the 911 call. He drove west on Highway 2 towards the bank. As he approached the bank, he observed a black BMW SUV with damage to its front end. The officer believed this vehicle to be the SUV referred to in the call. He flicked his lights to let the driver go by. He then followed the vehicle westbound.

[12] P.C. King observed the vehicle's licence plate number, which he relayed to police communications. After P.C. King provided the licence plate to dispatch, dispatch responded that the vehicle was registered to Patricia Lam and that a motor vehicle collision had been reported involving the vehicle on April 13, 2024. Dispatch did not indicate that the vehicle had been reported stolen.

[13] P.C. King requested support prior to conducting a traffic stop. He explained that he was "a little bit concerned with what was going on, the time of night." He therefore requested additional units and a police helicopter to assist in the traffic stop.

[14] Mr. Lam's vehicle was pulled over by police at 11:47 p.m., while travelling westbound on the 401 near Liberty Road.

**(3) The Decision to Stop the Vehicle**

[15] It was P.C. King's decision to stop the vehicle. When asked why he pulled over the vehicle, P.C. King testified that he relied on his experience. He stated:

> Obviously, the purpose of us responding to that call was we got a 911 call in regards to that vehicle. There was also some concern with the information provided that the vehicle was in behind the bank, the front-end damage on the vehicle, as well, you know, him mulling around the bank, we're thinking possibly stolen vehicle, or an attempt break and enter to the bank.

[16] P.C. King confirmed that he did not know anything about the complainant. He acknowledged in cross-examination the information from the 911 call he had received did not provide a reason for why the vehicle was believed to be possibly stolen. He accepted that simply driving a damaged vehicle does not mean one had stolen it. He also agreed it was possible that someone may have had an accident a month prior and simply not repaired the damage. He countered, however, that it was also possible that it could be a stolen vehicle involved in an accident.

[17] P.C. King admitted that the information he received about the vehicle having been involved in an accident on April 13th could explain its front-end damage. He stated this was a fact which needed to be considered, however it did not necessarily mean that the damage was caused by that.

[18] When asked in cross-examination if there was anything else about the vehicle that led him to believe it was possibly stolen, he responded that there had been an observation that it was possibly stolen and that there were a lot of vehicles being stolen in the region at this time. He explained that he believed he had an obligation to investigate the 911 call.

[19] P.C. King was asked in cross-examination if he suspected the vehicle was stolen notwithstanding that he had learned that the vehicle had been registered to Patricia Lam and not reported stolen. He responded:

> I didn't suspect it was stolen. I had felt I had an obligation to just pull that vehicle over and speak to the driver and determine how things were and what had happened, get a better understanding if that information reported was accurate. I think I'm kind of neglect - neglecting my duty, if I don't do that, I feel.

[20] Regarding the significance of the vehicle not having been reported stolen, P.C. King explained that often vehicles are stolen but have not been reported stolen yet.

[21] P.C. King also agreed that he did not have information about the male using tools to try and enter the bank. Nor did he have any information implying that force had been used. He did not notice any damage to the front of the bank from the road while he was driving. He clarified, however, that he could not see the back of the bank.

[22] P.C. King agreed that the CIBC had a vestibule area with ATMs. He also acknowledged that people usually have access to the ATMs at night. Defence counsel suggested to the officer that there was no basis to say the situation was anything more than someone trying to get into a bank, which was not illegal. P.C. King responded, "Right, but in many cases, once we take the time to investigate and you look further, that's when you start to see some issues."

[23] When it was put to him that he did not have a basis to believe that someone had tried to break into the bank, P.C. King testified that he had not inspected the bank. He could not "100 per cent make that conclusion." When the vehicle came out, he made a choice to follow it rather than inspect the bank.

[24] When pressed in cross-examination about whether he had a reason to pull over the vehicle, P.C. King indicated that he had information, he was responding to a 911 call, and he was trying to figure out what happened at the bank.

[25] When it was suggested to him that he needed a reason to detain someone, P.C. King replied:

> I think I had a reason. I think there was a 911 call that in the totality of the situation, I had a reason to investigate... Could that vehicle not been reported stolen? Could that person in the vehicle been involved in damage or a break and enter to the back of the building that I didn't have an opportunity to check out? Yes... and no, but that's why we try to speak to people.

[26] When P.C. King was asked if he had a particular suspicion, he answered: “At this point, I had information that was presented to me which could point towards a situation that needed to be investigated.”

[27] Later in cross-examination, counsel again questioned the officer about his belief regarding the vehicle possibly being stolen. The following exchange occurred:

> Q…you didn't actually suspect the vehicle had been stolen, right? You thought it was a possibility, but you weren't in a state of suspicion about that?
>
> A. Was I suspicious? How can I be suspicious or not be suspicious? I'm responding to information that I had, and I do my best to determine if my suspicion should grow through the investigation.

[28] Towards the end of his cross-examination, P.C. King clarified that he did not pull Mr. Lam over specifically to investigate a stolen vehicle. He explained that he was responding to a 911 call that raised multiple concerns from a citizen. Defence counsel suggested to him that the bank had not been broken into. P.C. King answered that he could not confirm that at the time. He explained that while driving slowly past the bank (10–20 km/h), while also trying to observe a BMW exiting the driveway, there was no visible damage to the bank. He said that if he had had the opportunity to inspect the building he would have, but he did not have that opportunity.

[29] P.C. King was also asked whether at the time he had pulled over Mr. Lam he had any additional information regarding a potential break-in at the bank. He responded that he had not and explained that they had not had enough manpower to have an officer inspect the scene.

**(4) The Vehicle Stop, the Observation of the Handgun, and Mr. Lam’s Removal from the Vehicle**

[30] At 11:47 p.m. Mr. Lam’s vehicle was pulled over on the 401 near the Liberty Road exit. Sgt. Phillips stopped his vehicle in front of Mr. Lam’s vehicle and P.C. King pulled in behind him.

[31] P.C. King approached the driver’s side window at 11:48 p.m. He testified that he was not concerned that Mr. Lam did not match the description from the 911 call because in his experience complainant descriptions are often inaccurate. He relied instead on the vehicle description, which he felt matched well.

[32] P.C. King told Mr. Lam to keep his hands up and asked, “what’s going on?” Mr. Lam responded that he was going home. Within seconds, P.C. King asked Mr. Lam how much alcohol he had consumed that night. Mr. Lam responded, “none.” P.C. King advised Mr. Lam that he smelled alcohol and Mr. Lam replied that he had come from a bar. P.C. King then told him that he smelled marijuana. He asked Mr. Lam whose vehicle it was, and Mr. Lam said it belonged to his mother. When asked if she knew he had it, Mr. Lam confirmed that she did. Mr. Lam provided his name when asked. P.C. King next asked Mr. Lam when he last smoked marijuana and Mr. Lam denied smoking any that day. P.C. King asked Mr. Lam when he had his last beer and Mr. Lam responded, “yesterday.” Next, P.C. King inquired whether Mr. Lam would pass a test. Mr. Lam responded, “yeah.” When asked again if he was sure, Mr. Lam replied, “no.” P.C. King repeated the question, and Mr. Lam did not respond. Mr. Lam was then asked to put the vehicle in park, to which he replied it was already off.

[33] P.C. King confirmed again that Mr. Lam's mother knew he had the vehicle. At 11:49:30 the officer asked Mr. Lam what he was doing in Newcastle. Mr. Lam said he had been visiting a friend at a bar. P.C. King asked Mr. Lam which bar he had attended and if he had consumed any drinks there. Mr. Lam said he had been at Frosty Johns. The officer again asked him if he had had any drinks there and Mr. Lam responded, "no." P.C. King then said, "really?" and Mr. Lam said, "yes sir." P.C. King testified that he asked about alcohol and marijuana because he could smell both.

[34] At 11:50:30 p.m., P.C. King walked to the front passenger side and spoke with Sgt. Phillips, advising him that Mr. Lam had come from a bar and that he could smell alcohol, though Mr. Lam denied drinking. At 11:50:41 Sgt. King stated that he did not have an ASD on him.

[35] P.C. King asked Mr. Lam about the damage to the vehicle. Mr. Lam advised that he had been in an accident about a month earlier, which he had reported. At 11:51:45 p.m. P.C. King asked Sgt. Phillips what he thought. Sgt. Phillips sought clarification from P.C. King regarding where Mr. Lam had been observed driving.

[36] Sgt. Phillips walked towards the back of the vehicle to look for tools. He testified that, based on the 911 call, he was concerned about the potential presence of break-and-enter tools. He indicated that his primary concern was safety. In cross-examination Sgt. Phillips was asked if he thought there was a possibility that a criminal offence had taken place. He responded, "No, I was trying to determine if there was one." When asked if he suspected a criminal offence had been committed, he replied, "I didn't assume." He agreed that he had been engaged in an investigative detention. Defence counsel suggested that the officer did not have grounds to believe an offence had been committed and the officer replied, "We were investigating." Sgt. Phillips agreed in cross-examination that his decision to look for tools was an investigative step to determine if there was evidence associated with a potential criminal offence at the bank rather than based on a particular safety concern. He agreed that he had not received information about tools being used at the bank.

[37] While at the back of the vehicle, Sgt. Phillips observed a handgun through the back windshield using his flashlight. His body-worn camera captured this between 11:52:24 and 11:52:29 p.m. He did not say anything upon first observing the gun.

[38] While Sgt. Phillips was observing the gun, P.C. King asked Mr. Lam if his mother knew he had the vehicle. Mr. Lam said, "yes." At 11:52:29, P.C. King said, "alright, when did you have your last drink?" He testified that the reason he continued asking about alcohol consumption was because he was "wondering how much he had drank and what his state was, as far as driving the vehicle." He did not believe Mr. Lam's denials since he could smell alcohol.

[39] At 11:52:32, Sgt. Phillips requested that P.C. King attend the back of the vehicle. He showed him the gun through the window. After this, Sgt. Phillips walked over to the driver's side door, opened it, and between 11:52:48 – 11:52:55 p.m., directed Mr. Lam to put his hands up and to step out of the vehicle.

**(5) The Circumstances of Mr. Lam's Arrest and the Initial Search of the Vehicle**

[40] Mr. Lam exited the vehicle at 11:52:55 p.m. and was immediately handcuffed. P.C. King asked what was in the back of the car. Mr. Lam responded, "just my clothes." At 11:53 p.m., P.C.

King radioed, “one in custody for a firearm in the back of the vehicle.” Mr. Lam was nearby when this was said.

[41] Sgt. Phillips performed a pat down search and asked if there was anything else he needed to know about in the car. Mr. Lam responded, “no.” Sgt. Phillips began searching the vehicle and found what appeared to be drugs. The officers asked Mr. Lam whether the substance was “crack or coke”.

[42] At 11:54 p.m., P.C. King asked, “what kind of drugs is that.” No audible response was given. Next, the officer said, “you realize you’re under arrest for the firearm, for the drugs.” He advised Mr. Lam that he did not need to say anything and told him that they were being audio and video recorded. Mr. Lam nodded. P.C. King also told Mr. Lam that if he said anything it would be used in evidence. At 11:55 p.m. Mr. Lam asked if he “could use his phone call.” P.C. King responded, “yeah, you can, that’s no problem.” Around the same time, Sgt. Phillips confirmed that the firearm was loaded.

[43] Still at 11:55 p.m., P.C. King asked Mr. Lam if he understood why he was under arrest. Mr. Lam indicated he did. P.C. King told him to continue being cooperative. He advised him that there was a dog in the back of his cruiser and that if he ran it would not end well.

[44] At 11:56 p.m., Sgt. Phillips asked Mr. Lam if there were any other firearms in the vehicle. Mr. Lam shook his head. Sgt. Phillips then asked if there were any other drugs in the car other than the ones found in the back seat. No response was captured on the body-worn camera footage. P.C. King asked Mr. Lam what kind of drugs they had found and stated, “just for our safety.” Mr. Lam responded that it was “coke.” P.C. King then said, “it’s not fentanyl or anything like that?”

[45] Between 11:56:43 – 11:56:48 p.m., there was a brief discussion about a lawyer. P.C. King asked Mr. Lam if he had a lawyer. Mr. Lam responded he did. The officer advised him that once they got a car there, they would get him connected with a lawyer. Mr. Lam indicated that he understood and thanked the officer. P.C. King advised Mr. Lam not to say anything else and told him that he had asked him about the drugs because of safety concerns. The officer told Mr. Lam he wanted him to speak with his lawyer before he spoke with him. Mr. Lam nodded. At 11:57 p.m., P.C. King walked Mr. Lam to Sgt. Phillips’ cruiser. He gave Mr. Lam another quick pat-down and asked him if he had any other weapons on him. Mr. Lam replied that he did not. Mr. Lam was placed in the cruiser at 11:59 p.m.

[46] At 12:03 a.m., P.C. King said, “I should read him his rights.” He walked to Sgt. Phillips’ cruiser but found the door locked. He asked Sgt. Phillips to unlock the door. Sgt. Phillips then reversed his vehicle, which was partially on the road and P.C. King went to his own cruiser and retrieved glasses. At 12:06 a.m. P.C. King began reading Mr. Lam his rights to counsel from his memo book. Mr. Lam replied that he understood and that he wished to speak with a lawyer. Between 12:07 a.m. and 12:09 a.m., P.C. King read the primary and secondary police cautions and confirmed that Mr. Lam understood them.

[47] P.C. King was cross-examined about not informing Mr. Lam why he was pulled over. He responded that he had been trying to figure out what was going on and that in these situations he typically explains the reason for the stop as the conversation evolves.

[48] P.C. King acknowledged that his questions about the gun and drugs found were potentially incriminating. He explained that he asked these questions because of safety concerns. He wanted to know whether he was dealing with a real gun or a fake one. Regarding the drugs, he was particularly concerned about potential exposure to fentanyl. He explained, it was not his intention to obtain an incriminating answer.

[49] Sgt. Phillips gave similar reasons for his questions to Mr. Lam. He said he was concerned about officer safety during a search of the vehicle. He did not want an accident to occur that could jeopardize someone's safety. He testified that he was also concerned about potentially handling fentanyl. He said he understood that inhaling or absorbing fentanyl could put a person into medical distress.

[50] Regarding the delay in reading Mr. Lam his rights to counsel following his arrest, P.C. King testified he understood he was supposed to provide them as soon as reasonably possible. When it was suggested to him in cross-examination that providing rights to counsel had not been his highest priority at the time, he responded:

> It wasn't - it wasn't that it wasn't a high priority. I think there was just so many pieces moving there. I was kind of being pulled back and forth. Maybe I shouldn't have been, but I was, and that wasn't my intent. So, that is why there was a delay. My intent was never to delay, but there was a delay, unfortunately, for him. If I could changed it, I would have.

**(6) Items Seized from the Vehicle**

[51] The police searched the vehicle driven by Mr. Lam and found the following items:

- 26.7 grams of fentanyl;
- 55.3 grams of p-fluorofentanyl;
- 167.5 grams of cocaine; and
- a prohibited firearm.

[52] The agreed statement of facts outlines the drugs and firearm that were seized. It confirms that the defence admits Mr. Lam possessed the drugs for the purpose of trafficking and possessed the firearm. The firearm is acknowledged to be a prohibited firearm, which was loaded, had a defaced serial number, and was equipped with a selector switch. Mr. Lam further admits that he was not the holder of a valid licence authorizing him to possess a firearm. At the commencement of the trial, I confirmed with defence counsel that Mr. Lam admitted he was aware the firearm was loaded.

**ANALYSIS**

**(1) General Assessment of the Officers' Credibility and Reliability**

[53] I found both P.C. King and Sgt. Phillips to be credible and reliable witnesses. They provided straightforward answers, and their evidence did not contain significant internal or external inconsistencies. Their accounts aligned with each other and with the body-worn camera footage. Both officers made reasonable concessions during cross-examination, and their credibility

was not undermined. Notably, defence counsel acknowledged that there was no basis to suggest either officer had been dishonest in their testimony.

[54] Overall, I found that both P.C. King and Sgt. Phillips were being truthful when describing their actions and the reasons for them. As I examine the issues raised below, I will highlight relevant factual findings from their testimony.



**(2) Were there Violations of Sections 8 and 9 of the Charter?**

*Overview of the Parties' Positions*

[55] The sections 8 and 9 issues in this case are intertwined.

[56] The defence submits that Mr. Lam was stopped arbitrarily and that the police's discovery of the firearm in the vehicle resulted from an unreasonable search. If the observation of the gun was not a search, the defence nonetheless contends that this observation was the product of an arbitrary detention. Given that Mr. Lam's arrest and the subsequent search of the vehicle flowed from the police having found the gun, the defence argues that these actions resulted in additional breaches of sections 8 and 9 of the *Charter*. The defence does not allege that any officer involved in Mr. Lam's investigation engaged in racial profiling.

[57] The Crown responds that Mr. Lam was detained pursuant to a valid investigative detention and that the firearm was observed in plain view. The Crown argues that the arrest and the search of the vehicle were therefore lawful.

[58] If the arrest was lawful, the defence does not raise an independent challenge to the search of the vehicle which followed it.

*The Initial Stop*

[59] The defence argues that the police fell short of both the subjective and objective component of the reasonable suspicion standard when they pulled over Mr. Lam.

[60] The standard for determining whether an investigative detention is justifiable is one of reasonable suspicion. The detention must be viewed as reasonably necessary on an objective view of all the circumstances informing the officer's suspicion that there is a clear nexus between the prospective detainee and a recent or ongoing criminal offence: *R. v. Mann*, 2004 SCC 52, at para. 34; *R. v. Peterkin*, 2015 ONCA 8, at para. 40. This analysis involves an assessment of the overall reasonableness of the detention, testing it against all the circumstances, particularly:

i. the extent to which the interference with individual liberty is necessary to perform the officer's duty;

ii. the liberty that is the subject of the interference; and

iii. the nature and extent of the interference.

*Mann*, at para 34; *Peterkin*, at para. 40.

[61] The reasonable suspicion standard is lower than the reasonable and probable grounds standard: *R. v. Kang-Brown*, 2008 SCC 18, at para. 75; *R. v. MacKenzie*, 2013 SCC 50, at para. 74; *R. v. Maric*, 2024 ONCA 665, at para. 190. The reasonable suspicion standard demands that the objective facts be "'be indicative of the possibility of criminal behaviour'; the evidence need not itself consist of unlawful behaviour or 'be evidence of a specific known criminal act'": *Maric*, at para. 190, citing *R. v. Chehil*, 2013 SCC 49, at para. 35.

[62] In *MacKenzie*, Moldaver J. noted that when describing the reasonable suspicion standard "there are several ways of describing what amounts to the same thing." He explained: "To the extent one speaks of a 'reasonable belief' in the context of reasonable suspicion, it is a reasonable belief that an individual *might* be connected to a particular offence, as opposed to a reasonable belief that an individual *is* connected to the offence": at para. 74.

[63] The objective reasonableness assessment should be "conducted through the lens of a reasonable person 'standing in the shoes of the police officer'": *MacKenzie*, at para. 64; *R. v. Whyte*, 2011 ONCA 24, 272, at para. 31. This does not mean, however, that police hunches or intuitions will suffice: *MacKenzie*, at para. 64; *Chehil*, at para. 47.

[64] How an officer specifically articulates their grounds for a detention, while relevant to their credibility, is not determinative of whether the subjective component of the reasonable suspicion standard has been met: *R. v. Fyfe*, 2023 ONCA 715, at paras. 53 -54; *R. v. R.M.J.T.*, 2014 MBCA 36, at paras. 60-63; *R. v. Dill*, 2009 ABCA 332, at paras. 6-7; *R. v. Messina*, 2013 BCCA 499, at paras. 25-26. It is not necessary that an officer testify that he had a "reasonable suspicion." The court is entitled to circumstantially draw inferences regarding the officer's state of mind: *R. v. Conway*, 2009 ONCJ 232, at paras. 17 – 19; *R. v. Markandu*, 2009 ONCJ 295, at paras. 27 – 30; *R. v. Bromfield*, 2007 ONCJ 36, at para. 19.

[65] P.C. King did not testify that he, "suspected" Mr. Lam had been involved in criminal activity. In fact, he resisted agreeing with the proposition that he suspected Mr. Lam had been involved in any particular crime. Having carefully reviewed his evidence, in combination with the objective facts known to him, I conclude that the only logical inference is that he thought Mr. Lam "might be connected" to a stolen vehicle or attempted break and enter offence. He stated, "we're thinking possibly stolen vehicle, or an attempt break and enter to the bank." When it was suggested that he needed a reason to detain someone he defended his actions by referring to the 911 call and said that the circumstances gave him a reason to investigate. He explained by suggesting possibilities such as the vehicle being stolen or the driver of the vehicle he was following being involved in a break and enter. I find that when P.C. King stopped Mr. Lam's vehicle, he believed Mr. Lam was possibly involved in recent criminal activity and that he had grounds to detain him. I am satisfied the subjective component of the reasonable suspicion standard was met.

[66] In assessing the objective reasonableness of the detention, I must consider all the information known to the detaining officer: *Fyfe*, at paras. 55 – 63.

[67] It is important to keep in mind that the police investigation in this case began with a 911 call, which is a distress call: *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 16; *R. v. Lee*, 2017 ONCA 654, at para. 39. Courts have consistently held that police have a duty to respond to 911 calls: *Lee*, at para. 28; *Peterkin*, at para. 61; *R. v. Dingwall*, 2013 ONSC 604, at paras. 74 and 86; *R. v. Clayton*, [2007] 2 S.C.R. 725, at para. 34.

[68] Even under the more stringent standard of reasonable and probable grounds, it has been recognized that, in certain circumstances, an officer may make an arrest based solely on a 911 call, without investigating the caller's credibility or corroborating the details of the call: *R. v. Carelse-Brown*, 2016 ONCA 943, at paras 46 – 49. "The nature of the [police] power exercised and the context within which it is exercised must be considered": *R. v. Golub* (1997), 34 O.R. (3d) 743, at para. 18, leave to appeal refused, [1997] S.C.C.A. No. 571, [1998] 1 S.C.R. ix.; *Carelse-Brown*, at paras. 28, 47 – 48.

[69] Additionally, a reasonable suspicion can be based on information that is "different in quantity and content than that required to establish probable cause" and "less reliable": *Kang-Brown*, at para. 75; *R. v. Noor*, 2022 ONCA 338, at para. 9; *R. v. Sahal*, 2020 ONSC 6924, at para. 73. See for example: *Lee*, at paras. 5 – 11, 72 - 77 and *R. v. Sabiston*, 2023 SKCA 105, at paras. 105 – 110, per Tholl J.A. (dissenting), rev'd 2024 SCC 33 substantially for the reasons of Tholl J.A. As well, in many cases, police must act quickly when deciding whether to conduct an investigative detention based on the information they receive: *Sahal*, at paras. 74 – 75.

[70] In this case, P.C. King received information from a concerned 911 caller who reported a vehicle she believed might be stolen. She described a male running and attempting to enter a bank. Given that the caller described these events in the same call it was a reasonable inference that they were related. There was a clear nexus between Mr. Lam and the call. His vehicle—a BMW SUV with front-end damage—reasonably matched the description. It was also close in time and location to the reported incident: *R. v. Bejarano-Flores*, 2020 ONCA 200, at para. 61. When P.C. King arrived, he observed Mr. Lam driving out from behind the bank. As well, P.C. King was aware of a recent increase in car thefts in the region. Although P.C. King did not observe any damage to the bank, neither he nor another officer had the opportunity to inspect the premises before stopping Mr. Lam, due to limited police resources. While it is possible that someone might enter a bank for legitimate reasons, such as using an ATM, the officer had to weigh that possibility against the fact that a member of the public had called an emergency line to report an individual running and attempting to enter the bank, and the fact that he saw Mr. Lam's vehicle leaving the rear of the building. Although the vehicle had not been reported stolen, the officer noted that, in his experience, such reports are often delayed. Considering all these factors together, I find that P.C. King had an objectively reasonable basis to stop and investigate Mr. Lam.

*Mr. Lam's Detention up Until the Firearm was Observed*

[71] To be justifiable, an investigative detention must be brief and executed in a reasonable manner: *Mann*, at para. 45; *R. v. Barclay*, 2018 ONCA 114, at para. 20. In *Barclay* the Court of Appeal, at paragraph 31, listed several factors relevant to considering whether the duration of an investigative detention was reasonable.

[72] When P.C. King approached the vehicle, it was apparent to him that Mr. Lam was not white skinned and was not wearing shorts or a hat. The officer explained that this did not concern him given his experience that 911 callers are often mistaken regarding physical descriptions. He felt confident relying on the resemblance between Mr. Lam's vehicle and the description of the vehicle provided by the 911 caller. I find that his testimony in this regard was reasonable: *Bejarano-Flores*, at paras. 61 – 66. Additionally, I find that once the officer approached Mr. Lam, he smelled alcohol and marijuana. P.C. King's evidence in this area withstood cross-examination and I accept it as credible and reliable. These olfactory observations provided him with an independent and

legitimate basis to detain Mr. Lam to assess his sobriety: *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37, at para. 41; *R. v. Gardner*, 2018 ONCA 584, at para. 21.

[73] The time between P.C. King's initial contact with Mr. Lam and Sgt. Phillips' observation of the handgun was brief—approximately five minutes. During this period, Mr. Lam was neither handcuffed nor removed from the vehicle, nor was he searched. He was simply asked to turn off the vehicle and keep his hands visible.

[74] During this brief period, Mr. Lam was asked questions primarily aimed at assessing whether he was impaired. P.C. King inquired about his alcohol and marijuana use, including how much he had consumed, when he last used, and whether he believed he would pass a sobriety test. Mr. Lam was also asked questions that were intended to confirm lawful possession of the vehicle, such as who owned it and whether his mother knew he had it. P.C. King also asked about Mr. Lam's recent activities, including what he was doing in Newcastle, which bar he had visited, and whether he had consumed any drinks there.

[75] Although the officers did not have an approved screening device with them, I do not find that they arbitrarily prolonged Mr. Lam's detention to obtain one. While Sgt. Phillips observed the firearm, P.C. King was still questioning Mr. Lam about his alcohol consumption. I accept P.C. King's explanation that he continued this line of questioning to assess Mr. Lam's fitness to drive. Questioning a motorist about alcohol consumption is an appropriate method of assessing sobriety: *Orbanski*, at paras. 48 – 49.

[76] Having reviewed the entirety of the police interaction with Mr. Lam prior to the discovery of the firearm, I find that the investigative detention was conducted reasonably and was not longer than necessary for the officers to fulfill their legitimate investigative duties.

*The Observation of the Gun*

[77] The defence argued that Sgt. Phillips' observation of the gun was the product of both an arbitrary detention and an unreasonable search. As I have just explained, I find that Mr. Lam's detention, up to the moment the firearm was observed, was lawful and not arbitrary.

[78] Section 8 of the *Charter* is only engaged if the claimant has a reasonable expectation of privacy in the place or item inspected by the state: *R. v. Reeves*, 2018 SCC 56, at para. 12; *R. v. Cole*, 2012 SCC 53, at paras. 34 and 36.

[79] It is well established in the jurisprudence that the plain view observation of an item inside a vehicle, even when aided by a flashlight, does not constitute a search: *R. v. Mellenthin* [1992] 3 S.C.R. 615, at para. 14; *R. v. Lotozky*, [2006] O.J. No. 2516, 2006 CanLII 21041, at para. 13; *R. v. Grunwald*, 2010 BCCA 288, at paras. 35 – 37, 49 - 52 (leave to appeal refused [2010] S.C.C.A. No. 299); *R. v. Ceballos*, 2014 ONSC 2281, at paras. 71 -79; *R. v. Mohamed*, [2008] O.J. No. 3145 (SCJ), at paras. 94 – 108; *R. v. Wilson*, 2015 ONSC 4135, at paras. 22 – 34.

[80] The video evidence demonstrates that the firearm could be seen from outside the vehicle through the rear window.


***Still from Sgt. King's body worn camera video while standing at the rear of the vehicle looking through the glass.***

[81] Consistent with the authorities mentioned, I find that Mr. Lam did not have a reasonable expectation of privacy regarding the observable handgun in the back of his vehicle. Sgt. Phillips's detection of this item was not a search. Once the gun was noticed, the police were entitled to seize it pursuant to the plain view doctrine: *R. v. Yusuf*, 2022 ONCA 640, at para. 67. Mr. Lam's removal from the vehicle and arrest were obviously justified at this point.

[82] The defence did not argue that the subsequent search of the vehicle was an independent *Charter* breach. Based on my review of the evidence, including the body worn camera videos, I am satisfied that the vehicle was lawfully searched incident to arrest: *R. v. Caslake*, [1998] 1 S.C.R. 51, at paras. 22 - 23; *R. v. Bakal*, 2021 ONCA 584, at paras. 53 - 55.

*Conclusion*

[83] Mr. Lam was lawfully detained for investigative purposes. That detention was brief and conducted in a reasonable manner. The police observed a handgun in plain view through the rear window of the vehicle. This sequence of events culminated in a lawful arrest and a valid search of the vehicle incident to that arrest. There was no violation of Mr. Lam's sections 8 or 9 *Charter* rights.

**(3) Section 10(a) of the Charter**

[84] To comply with s. 10(a) of the *Charter*, the police must sufficiently communicate the reason or reasons for the detention, and they must communicate those reasons promptly: *R. v. McGowan-Morris*, 2025 ONCA 349, at para. 37; *R. v. Roberts*, 2018 ONCA 411, at para. 63. "If the police have multiple reasons for detaining an individual, they must disclose each reason to the detainee": *McGowan-Morris*, at para. 39.

[85] The Crown appropriately concedes that Mr. Lam's s. 10(a) right was infringed by P.C. King's failure to inform him of the original reason for the stop. Once Mr. Lam was questioned about alcohol consumption, he would have been aware that he was being investigated related to a possible drinking and driving offence. Nothing more was required to comply with s. 10(a) regarding *that aspect* of the detention: *R. v. Kumarasamy*, 2011 ONSC 1385, at para. 52; *R v. Gomez*, 2024 ONSC 6147, at paras. 35 – 48; *contra R. v. Mueller*, 2018 ONSC 2734. The fact remains, however, that Mr. Lam was not informed of the other reason for his detention, namely the police's investigation relating to the 911 call.

[86] I am not satisfied that any further breach of section 10(a) occurred after Mr. Lam's arrest. Within seconds of him being directed to exit the vehicle, P.C. King in Mr. Lam's immediate presence, radioed "one in custody for a firearm in the back of the vehicle." Within a minute of that, P.C. King told Mr. Lam, "You realize you're under arrest for the firearm, for the drugs."

**(4) Section 10(b) of the Charter**

[87] Police are required to inform a detainee of his or her s. 10(b) rights at the outset of an investigative detention: *R. v. Suberu*, 2009 SCC 33, at paras. 2 and 41; *R. v. Mhlongo*, 2017 ONCA 562, at para. 48.

[88] The Crown correctly acknowledges that the police breached Mr. Lam's s. 10(b) rights by not informing him of his rights throughout the investigative detention. After Mr. Lam exited the vehicle just before 11:53 p.m., there was an approximately 13-minute delay until he was read his rights to counsel at 12:06 a.m. While I accept that some of that period could reasonably be accounted for by the pat-down searches aimed at police safety, I agree with the defence that there was a further unjustifiable delay following the arrest. The Crown argued that P.C. King fulfilled the informational component of s. 10(b) during his conversation with Mr. Lam about a lawyer at 11:56 p.m. There are no "magic words" that an officer needs to utter to comply with s. 10(b): *R. v. Knoblauch*, 2018 SKCA 15, at para. 29. In *R. v. Foreshaw*, 2024 ONCA 177, the Court of Appeal upheld the trial judge's finding that s. 10(b) had been complied with in circumstances where the detainee had been advised that he would have a right to speak to counsel "as soon as possible or practical" and told that there was a toll-free number he could call to speak with a lawyer: paras. 93 – 96. In this case, the conversation at 11:56 p.m. certainly addressed aspects of the informational component of s. 10(b). I am satisfied, however, that it failed to sufficiently convey all the essential information. Mr. Lam was not advised at that point that he had a "right" to contact counsel. Nor was he provided information regarding the existence of legal aid: *R. v. Taylor*, 2014 SCC 50, at para. 23.

[89] I also find that the police breached Mr. Lam's s. 10(b) right by questioning him regarding the gun and drugs found. While I accept the officers' evidence that these questions were motivated by safety concerns, they were potentially incriminating questions and there were other ways the police could address their concerns "without enlisting the accused's participation": *R. v. Palmer*, 2021 ONSC 1675, at para. 31.

**(5) Section 24(2) of the Charter**

[90] Section 24(2) of the *Charter* is engaged when the accused establishes that evidence was "obtained in a manner" that breached the *Charter*: *R. v. Beaver*, 2022 SCC 54, at para. 94; *R. v. Becessar*, 2024 ONCA 528, at para. 11. The required connection between the breach and the

evidence may be temporal, contextual, causal, or a combination of the three: *R. v. Wittwer*, 2008 SCC 33, at para. 21, *Becessar*, at para. 13. In this case, there is both a contextual and temporal connection between the breaches and the evidence sought to be excluded.

[91] The applicant seeking exclusion bears the onus of establishing that the admission of evidence would bring the administration of justice into disrepute: *R. v. Fearon*, 2014 SCC 77, at para. 89; *Becessar*, at para. 12.

[92] In *R. v. Grant*, 2009 SCC 32 the Supreme Court of Canada set out the factors to consider to determine whether the admission of evidence at trial would bring the administration of justice into disrepute:

> (a) the seriousness of the Charter infringing state conduct;
>
> (b) the impact of the breach on the Charter-protected interests of the accused; and
>
> (c) society's interest in the adjudication of the case on its merits.

*The Seriousness of the Charter-Infringing Conduct*

[93] I have found that the police breached Mr. Lam's s. 10(a) right by failing to advise him of one of the reasons for his detention, namely their investigation of him regarding the information received in the 911 call. The police also violated section 10(b) by failing to promptly inform Mr. Lam of his right to counsel and by asking him incriminating questions. I must consider the combined effect of these violations: *R. v. Mhlongo*, 2017 ONCA 562, at paras. 60-62; *R. v. Truong*, 2025 ONCA 69, at para. 42; *R. v. James*, 2025 ONCA 213, at para. 37.

[94] An accused must be fully informed of the reasons for their detention in order to meaningfully exercise their right to counsel and to determine whether to consent to the detention: *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 30; *McGowan-Morris*, at paras. 36 & 39. In this case Mr. Lam was never advised of the initial reason for the police stop.

[95] The seriousness of the s. 10(a) breach was compounded by the police's failure to properly advise Mr. Lam of his rights to counsel for a total period of approximately 18 minutes following the commencement of his detention, and by their asking potentially incriminating questions – particularly following the discovery of the firearm and drugs.

[96] I find that P.C. King was negligent in failing to inform Mr. Lam of the reason for the stop and in delaying compliance with the informational component of section 10(b). Following Mr. Lam's arrest, Sgt. Phillips was also negligent in failing to promptly advise Mr. Lam of his right to counsel.

[97] While the total delays cannot be excused, I note that neither was significantly lengthy. Mr. Lam was made aware of the reasons for his arrest approximately five minutes after the initial detention. Furthermore, after the arrest, P.C. King did demonstrate attentiveness to Mr. Lam's rights. He cautioned him multiple times, and, at 11:56 p.m. – eight minutes after the detention began – he assured Mr. Lam that he would put him in contact with counsel. Some of the total delay in advising Mr. Lam of his rights to counsel was explained by legitimate police actions such as conducting a pat-down search and walking Mr. Lam to a cruiser when the parties were at the side

of a highway with cars driving by. Some of the delay was due to genuine forgetfulness. Mr. Lam was fully advised of his rights to counsel at 12:06 a.m. Additionally, no s. 10(b) complaint has been made regarding the police's conduct while at the police station and it is agreed that, while there, P.C. King made numerous attempts to contact Mr. Lam's counsel of choice.

[98] With respect to the roadside questioning by P.C. King and Sgt. Phillips, I accept their evidence that the questions were motivated by safety concerns. That said, the officers should have been more mindful of their obligations to hold off questioning, particularly given the potentially incriminating nature of their questions.

[99] I find that the breaches in this case were the product of negligence. I do not find, however, that they demonstrate bad-faith or a systemic police problem.

[100] Overall, I would situate the police misconduct at the moderate end of the spectrum.

*The Impact of the Breaches on the Accused's Charter-Protected Interests*

[101] In assessing the impact on Mr. Lam's *Charter*-protected interests, I must consider the multiple incidents of state misconduct together: *Truong*, at para. 42; *James*, at para. 37. Having done so, I find that the impact of the breaches on Mr. Lam's *Charter*-protected interests was minimal.

[102] First, there was no causal relationship between the ss. 10(a) and 10(b) violations and the discovery of the evidence. This mitigates the impact of the breaches: *Truong*, at paras. 51 – 53; *R. v. Keshavarz*, 2022 ONCA 312, at para. 115; *McGowan-Morris*, at para. 115.

[103] Second, although Mr. Lam provided at least one incriminating response to police questioning concerning the presence of cocaine in the vehicle, the Crown has not introduced any of his statements at trial. This mitigates the impact of this breach: *R. v. Hamouth*, 2023 ONCA 518, at paras. 40 – 49; *R. v. Desilva*, 2022 ONCA 879, at para. 98; *Peterkin*, at para. 79.

[104] Third, the psychological impact of the breaches in this case was relatively minor. The delays associated with both the s. 10(a) and s. 10(b) breaches were brief. Mr. Lam was assured fairly quickly following his arrest that he would be put in contact with counsel and there is no evidence that there was an unreasonable delay in attempting to facilitate contact with a lawyer. This case is not like *R. v. Rover*, 2018 ONCA 745, or *R. v. Jarrett*, 2021 ONCA 758, both of which involved lengthy delays in implementing contact with counsel. I find that the lifeline interest associated with s. 10(b) was not significantly impacted in this case. See: *R. v. Alipourobati*, 2025 ONCA 64, at paras. 2, and 30 - 34 (involving a 26-minute delay in informing the accused of his right to counsel) and *Truong*, at paras. 24 and 56 (a delay of 2 hours and 7 minutes from the time of arrest to the opportunity to exercise his right to counsel).

[105] I find that the second *Grant* factor only weakly favours exclusion.

*Society's Interest in the Adjudication of the Case on its Merits*

[106] In assessing the third *Grant* factor, I must consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": *Grant*, at para. 79.

[107] The evidence seized in this case is very reliable – the defence agrees that its admission is conclusive of guilt. It is also crucial to the Crown's case – its exclusion would put an end to the prosecution.

[108] The charges in this case are serious. They involve a loaded gun, and large quantities of fentanyl and cocaine. These items create a significant danger to the community: *R. v. Mengesha*, 2022 ONCA 654, at para. 14; *R. v. Omar*, 2018 ONCA 975, at paras. 128 -38, per Brown J.A. (dissenting), rev'd 2019 SCC 32 for the reasons of Brown J.A.; *R. v. Ismail*, 2024 ONCA 945, at para. 17; *R. v. Tim*, 2022 SCC 12, para. 99.

[109] This factor strongly favours admission.

*The Final Balancing*

[110] The breaches in this case were moderately serious but their impact on Mr. Lam's *Charter*-protected interests was minimal. Society's interest in an adjudication on the merits is high. The first line of inquiry moderately supports exclusion, the second weakly supports it, and the third strongly pulls towards inclusion. Having balanced the three *Grant* factors, I conclude that the administration of justice would be better maintained by the admission of the evidence.

**(6) If the Initial Police Stop was Unlawful**

[111] I have found that the police stopped Mr. Lam's vehicle pursuant to a valid investigative detention. Had I found otherwise, I would still not have excluded the evidence.

[112] If the police fell short of the reasonable suspicion standard, it was by a narrow margin: *R. v. Zacharias*, 2023 SCC 30, at para. 52. Upon approaching Mr. Lam's window, P.C. King smelled alcohol and marijuana. The subsequent investigation into Mr. Lam's sobriety, the plain view discovery of the firearm, Mr. Lam's arrest, and the vehicle search would all be consequences of the initial stop rather than independent breaches: *Zacharias*, at para. 47. Accordingly, the sections 8 and 9 breaches that would flow from the unlawful stop would not significantly increase the seriousness of the *Charter*-infringing conduct: *Zacharias*, at paras. 52-53.

[113] The impact on Mr. Lam's *Charter*-protected rights would increase in this situation. There would be a causal link between the breaches and the discovery of the firearm and the seizure of the evidence. Mr. Lam's arrest would also be considered unlawful. While his expectation of privacy in the vehicle was reduced, the arrest and subsequent searches would still have a more significant effect on his privacy, liberty, and dignity. When considered alongside the breaches of sections 10(a) and 10(b), the second *Grant* factor would moderately support exclusion of the evidence.

[114] The analysis under the third *Grant* factor would remain the same.

[115] Considering all the relevant circumstances, the combined weight of the first two *Grant* factors would still be outweighed by the strong public interest in admitting the evidence: *Beaver*, at para. 135; *Zacharias*, at para. 76; *R. v. Buakasa*, 2023 ONCA 383, at para. 59; *R. v. Ajiroba*, 2025 ONCA 181.

**CONCLUSION**

[116] The defence concedes that, if admitted, the evidence establishes Mr. Lam's guilt on all counts beyond a reasonable doubt.

[117] For the reasons set out above, the application to exclude the evidence is dismissed. Mr. Lam is therefore found guilty of all charges.

**Released: June 20, 2025**

Signed: Justice Joseph Hanna

**CITATION:** *R. v. Young*, 2025 ONSC 2883
**COURT FILE NO.:** CR-23-16121-00
**DATE:** 2025-06-30

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| HIS MAJESTY THE KING | ) | *Ngai On Young*, Counsel, for the Crown |
| **– and –** | ) | |
| IVOR SHAWN YOUNG | ) | |
| Defendant | ) | *Alexa Banister-Thompson*, Counsel, for the Defendant Ivor Shawn Young |
| | ) | **HEARD:** May 13, 2025 |

**SPEYER, J.**

[1] On October 23, 2024, Mr. Young was convicted of three charges following his trial: unauthorized possession of a loaded restricted firearm, possession of a restricted firearm in a motor vehicle, and possession of cocaine.

[2] The sentencing hearing was to occur on January 24, 2025, but counsel for Mr. Young requested an adjournment to permit the preparation of an Impact of Race and Cultural Assessment ("IRCA"). The Crown consented to an adjournment for that purpose and the sentencing hearing was adjourned to March 14, 2025. On March 14, 2025, counsel for Mr. Young sought a further adjournment to bring an application to stay the sentencing proceedings because of an alleged infringement of Mr. Young's right to have a prompt bail hearing following his arrest on October 1, 2022. I granted the defence request and adjourned the sentencing hearing to May 13, 2025, to be heard together with submissions in relation to an anticipated defence application to stay the proceedings against Mr. Young.

[3] On May 13, 2025, defence counsel moved for a mistrial because the Court of Appeal's decision in *R. v. McGowan-Morris*, 2025 ONCA 349, released on May 7, 2025, came to a different conclusion than I reached in my decision in a pre-trial motion in this case: see *R. v. Justin Dyer and Ivor Shawn Young*, 2024 ONSC 4767, released September 20, 2024. After some discussion, and after Crown counsel conceded that Mr. Young's s. 10(b) right to be advised of his right to counsel was breached when he was not advised of that right after police formed grounds to conduct a search of a motor vehicle pursuant to the *Cannabis Control Act*, 2017, S.O. 2017, c. 26, Sched. 1 ("the CCA") and before the search was conducted, and that the Crown would not rely on any public safety justification for delaying

the giving of rights to counsel, defence counsel invited me to dismiss the mistrial application, re-open the trial and reconsider my s. 24(2) analysis. The defence submits that the evidence seized by the police should be excluded, resulting in an acquittal for Mr. Young. The application for a mistrial is dismissed, and I will re-open the trial to reconsider my s. 24(2) analysis.

[4] Also on May 13, 2025, counsel made submissions on the defence application for a stay of proceedings because of delay in conducting Mr. Young's bail hearing.

[5] Finally on May 13, 2025, counsel made submissions regarding a fit and proper sentence for Mr. Young if he remains convicted and the proceedings against him are not stayed.

[6] These reasons address three discrete issues:

1. An application by the defence to re-open the trial, to consider the impact of the recent decision of the Ontario Court of Appeal in *McGowan-Morris* on my pre-trial ruling regarding the admissibility of evidence, and what may flow from that.

2. An application by the defence for a stay of proceedings because of delay in conducting Mr. Young's bail hearing.

3. The sentence to be imposed on Mr. Young, if he remains convicted and the proceedings against him are not stayed.

## 1. THE APPLICATION BY THE DEFENCE TO RE-OPEN THE TRIAL

### (a) How the application arose

[7] Before I heard submissions relating to the application for a stay of proceedings and the sentence to be imposed if proceedings were not stayed, counsel for Mr. Young drew my attention to the decision of the Ontario Court of Appeal in *McGowan-Morris*. Crown and defence counsel agree that the *McGowan-Morris* decision clarifies the law in relation to when the right to counsel arises in cases involving searches conducted pursuant to the *CCA*. Crown and defence counsel also agree that in my decision in this case on the defence application to exclude evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 ("the *Charter*"), released on September 20, 2024, I got that wrong. I agree and am grateful to counsel for bringing the *McGowan-Morris* decision to my attention.

[8] In my September 20, 2024, decision, I held that, just as the operational requirements of roadside sobriety testing implicitly create a reasonable limit on s. 10(b) rights, prescribed by law, that is justified under s. 1 of the *Charter*, similarly the operational requirements of the *CCA* search power implicitly create a reasonable limit on s. 10(b) rights, prescribed by law, that is justified under s. 1 of the *Charter*.

[9] In *McGowan-Morris*, the Court of Appeal held that s. 12 of the *CCA*, which empowers the police to search motor vehicles and their occupants where the police have reasonable grounds to believe that cannabis is contained in the vehicle in breach of packaging requirements, does not by necessary implication limit the requirements imposed by s. 10(b) of the *Charter*. Therefore, s. 1 of the *Charter* cannot operate to suspend the operation of the right to counsel before police conduct a search under s. 12(3) of the *CCA*: *McGowan-Morris*, at paras. 96-97. Once the police form reasonable grounds to search and intend to search a vehicle and its occupants under the authority of the *CCA*, the occupants are entitled to their full rights under s. 10(b) of the *Charter*. These rights may be delayed or suspended only if case-specific public safety concerns exist: *McGowan-Morris*, at paras. 98-103.

[10] Counsel for Mr. Young initially moved for a mistrial. However, after the Crown conceded that a breach of Mr. Young's s. 10(b) rights occurred when he was not advised of his right to counsel before the *CCA* search began, and that the Crown would not advance any argument that a delay in providing him with his right to counsel was justified by safety concerns, Ms. Banister-Thompson invited me to dismiss the mistrial application. Both parties agree that I am not *functus* and can re-consider my decision to admit the evidence about the black backpack found under Mr. Young's legs and its contents considering the Court of Appeal's decision in *McGowan-Morris*, and the conceded s. 10(b) breach.

(b) <u>The facts relating to the s. 10(b) breach</u>

[11] For ease of reference, I will set out the facts I found at the hearing of the application to exclude evidence that bear on this issue. The facts were largely not in dispute because the two police officers involved with Mr. Young activated their body-worn cameras during their interactions with him. The quality of the audio and video recordings was very good.

[12] PC Petschenig was driving a marked police vehicle. PC Grainger was his partner. They were on uniform patrol, and before their interaction with a white KIA SUV began, they were conducting a proactive patrol in the area of the downtown Whitby bars. The Hotel Royale was one such establishment. PC Petschenig testified that they were looking for drivers leaving the hotel to check the sobriety of the drivers. His usual routine was to drive through the parking lots along the backs of the bars, and to stop cars that were driving through the parking lots to check the drivers' sobriety. He had an approved screening device ("ASD") in his police vehicle.

[13] As he approached the rear of the Hotel Royale, through a laneway to the north of the Hotel, PC Petschenig saw two vehicles leaving the parking lot behind the Hotel through an alleyway that runs south from the Hotel, through a funeral home parking lot, to Dundas Street West. One of those vehicles was the white KIA SUV. The other was a black sedan.

[14] PC Petschenig proceeded southbound in the alleyway behind the Hotel to try to catch up to the vehicles. He intended to check the sobriety of the drivers. The vehicles turned right onto Dundas Street West and proceeded westbound for one block, to Byron Street. They turned left to proceed southbound on Byron Street South. PC Petschenig saw them turn onto Byron Street South. But he encountered a red light and waited for it to turn green to

proceed. When PC Petschenig made his left turn onto Byron Street South, he could see the two vehicles proceeding southbound about ½ kilometre ahead of him. As the two vehicles travelled southbound on Byron Street South, PC Petschenig got closer. He closed the distance between the two vehicles and his police vehicle to about 100 to 200 metres. The two vehicles turned left on Arthur Street, drove for one block on Arthur Street, and then turned right to proceed southbound for one block on Brock Street South. PC Petschenig followed.

[15] PC Petschenig closed the distance between his police vehicle and the white KIA SUV as it proceeded into the left turn lane at the intersection of Brock Street South and Consumers Drive. The black sedan, which was further ahead, continued straight through the lights. At that intersection, PC Petschenig chose to follow the white KIA SUV because it was closer and was travelling slower than the black sedan.

[16] As the SUV, followed by the police vehicle, made its left turn, at 12:30:28 a.m., PC Petschenig activated the emergency lights of the police vehicle while PC Grainger, seated in the front passenger seat of the police cruiser, used the mobile data terminal (MDT) present in the vehicle. They followed the white KIA SUV as it pulled off the roadway into the parking lot of a McDonalds. At 12:30:43 a.m., PC Grainger is seen typing on the MDT keyboard. The SUV parked in a designated parking area. PC Petschenig parked the police vehicle perpendicular to, and behind the SUV. By this time, the officers had learned (in response to a licence plate query on the MDT) that the registered owner of the SUV was unlicensed.

[17] At 12:31:03 a.m., PC Petschenig approached the driver's side of the SUV on foot and PC Grainger approached the passenger's side. The driver's window was down and the driver, Mr. Dyer, looked back at PC Petschenig who asked: "Hey, sir, how's it going?" PC Petschenig told Mr. Dyer that his body-worn camera was recording. He told Mr. Dyer that the reason he pulled him over was that "you guys" were leaving the Royal, a reference to the Hotel Royale, and that he was just checking to make sure that the driver was sober. He asked Mr. Dyer if he had anything to drink that night. Mr. Dyer responded that he did not have anything to drink and that he was the designated driver. He then corrected himself and told the officer he had one beer, an hour or two earlier.

[18] As PC Petschenig spoke with the driver, PC Grainger used his flashlight to illuminate the inside of the vehicle. He could not do so through the front passenger side window, because it was tinted, so he moved to the front of the SUV, and pointed his flashlight at the front driver's side of the SUV, illuminating the driver, as PC Petschenig spoke with the driver.

[19] At 12:31:45 a.m., PC Petschenig read a demand to Mr. Dyer to provide a sample of his breath into an ASD. Mr. Dyer got out of his vehicle at the direction of PC Petschenig and stood at the rear of his vehicle while PC Petschenig retrieved his ASD from the rear of his police vehicle.

[20] While PC Petschenig was retrieving the ASD, PC Grainger told him at 12:32:05 a.m., that there was a grinder in the cupholder. PC Petschenig continued with his sobriety

investigation. He explained to Mr. Dyer what the consequences of various ASD readings could be. At 12:33:12 a.m., Mr. Dyer provided a suitable sample of his breath into the ASD. The machine produced a reading of 15, which PC Petschenig explained meant that "he was legal". Then, at 12:34:15 a.m., PC Petschenig asked Mr. Dyer if he had his driver's licence with him. Mr. Dyer indicated that he had it and walked to the passenger side of his SUV. PC Petschenig told PC Grainger that Mr. Dyer was just grabbing his stuff and that he only blew "a 15."

[21] While Mr. Dyer was out of the SUV providing a sample of his breath into the ASD, PC Grainger, having observed the marijuana grinder in the cupholder, asked Mr. Dyer if he'd had anything to smoke that night. Mr. Dyer responded "no". From 12:32:18 a.m. until 12:34:23 a.m., when Mr. Dyer returned to the SUV to retrieve his licencing documents, PC Grainger remained at the front of the SUV with his flashlight illuminating the driver's seat area. PC Grainger did not use his flashlight during this time to illuminate other parts of the interior of the SUV.

[22] At 12:34:30 a.m., Mr. Dyer opened the front passenger side door of his car and reached into the car. PC Grainger told him that he had a few questions. He said "The grinder – could you open that up for me? And the plastic bag, is that weed in the bag?" Mr. Dyer showed him a baggie, that did not contain cannabis, and produced the marijuana grinder from the front console area of the car, opened it, and showed it to PC Grainger. PC Grainger stated that there was a little bit of weed in the grinder and then asked: "How much weed is in the car?" He told Mr. Dyer that he wanted to make sure that there was not too much readily available to him.

[23] In response, Mr. Dyer walked around the front of his car, entered the driver's seat at 12:35:00 a.m., reached into the floorboard area behind the driver's seat, and into a backpack from which he pulled out a baggie containing a small amount of cannabis. At 12:35:45 a.m., PC Grainger told Mr. Dyer that the cannabis was readily available and that what they needed to do was make sure that there was less than 30 grams of cannabis in the car. He asked Mr. Dyer if there was more than that in the car, and Mr. Dyer responded that there was probably a little more. PC Grainger told him they were going to have a quick look. He asked Mr. Dyer if he had any cannabis on his person.

[24] PC Grainger conducted a quick pat down search of Mr. Dyer which was limited to patting his pockets and looking at his waistband.

[25] During the interactions between Mr. Dyer and the officers, the front driver's side door of the car was open, and the rear driver's side window was partly open. The volume of the conversations that Mr. Dyer had with the officers was conversational and no one raised their voices. But their interaction beside and inside the car would have been overheard by the passengers in the car.

[26] Mr. Dyer was instructed by PC Grainger to "hang out" at the rear of the vehicle. PC Petschenig interjected that he would also have to see Mr. Dyer's driver's licence, and Mr. Dyer returned to the front of the vehicle to retrieve his documents at about 12:37 a.m.. At

the same time, PC Grainger asked Mr. Young to step out of the vehicle so that the police could make sure that he did not have any marijuana. Mr. Young stepped out of the SUV at 12:37:10 a.m.. PC Grainger conducted a quick pat-down search of Mr. Young, and then allowed him to retrieve his cell phone and other personal items that had been removed from his pockets.

[27] At 12:38:05 a.m., PC Grainger asked the front seat passenger, Ms. Lowe, if she minded stepping out of the vehicle because of the cannabis and asked her if she had any cannabis in her possession. She responded that she did not.

[28] When Mr. Dyer appeared to be having trouble locating his documents, PC Petschenig asked him if he had a health card. At 12:37:24 a.m., Mr. Dyer produced an expired driver's licence, together with a paper licencing document and provided them to PC Petschenig at 12:37:40 a.m.. PC Petschenig took the documents, told Mr. Dyer "I'll be right back buddy", and took the documents to his police vehicle, where he conducted queries on his MDT. At 12:38:57 a.m., PC Petschenig got out of his vehicle and returned to speak with Mr. Dyer about the renewal of his driver's licence.

[29] PC Petschenig explained that he was waiting for all the returns to come in on his inquiries, but provided Mr. Dyer an opportunity to explain the process of his licence renewal. Mr. Dyer did so. PC Petschenig received information from the Ministry of Transportation that the licence had not been renewed because there was a $36 renewal fee to be paid and that the licence expired on September 21, 2022. He explained this to Mr. Dyer and told him that he was "not going to jam you up" on account of the expired licence. PC Petschenig testified that the fine for driving without a licence was much more than $36, and that he exercised his discretion not to pursue the licencing issue because Mr. Dyer had been extremely polite to him. He testified that he would have let another licenced and sober driver drive the SUV away. PC Petschenig asked the passengers if they were licenced drivers, sober, and willing to drive the car. Mr. Young had only a G1 licence. The female front seat passenger had a licence, but had something to drink, and said that she would rather not drive.

[30] At 12:38:15 a.m., PC Grainger explained to all three occupants of the SUV, who were standing in the area behind the SUV, that the officers were just going to give it a quick search "just to make sure there's no cannabis at all". Mr. Dyer then said that he had weed on him, went to the front passenger side of the vehicle, and produced a plastic bag containing apparent marijuana from a backpack. PC Grainger responded that "we'll figure it out" and told Mr. Dyer that "we appreciate the honesty". Mr. Dyer returned to stand behind his SUV while PC Grainger continued his search of the SUV.

[31] At 12:39:04 a.m., an unidentified police officer, who was standing by, asked PC Grainger: "Just open cannabis?" PC Grainger responded "yeah" and "there might be a lot of cannabis", referring to items contained in a backpack that had been located on the rear floorboard, behind the centre console. PC Grainger, referring to a bag of apparent cannabis, noted that its contents were "over 30". PC Grainger explained in his evidence that although possession of that amount is an offence under the *Cannabis Act*, S.C. 2018, c. 16, he did

not charge anyone with possession of that amount and had no interest in charging anyone with that ticketable offence. He would have exercised his discretion to issue a caution if that was all that there was.

[32] PC Grainger asked Mr. Young and Ms. Lowe to provide their identification to PC Petschenig. He removed Ms. Lowe's driver's licence from a purse located in front of the front passenger seat. He told her that he had it and told her not to let him forget that he had it. He explained that, because there was cannabis readily available in the car, everyone had to identify themselves and be searched. He told Ms. Lowe that she would not be searched. He explained in his evidence that there was no female officer present to search Ms. Lowe and that in the circumstances, he did not see a need to call for a female officer.

[33] PC Grainger continued to search the SUV. At 12:42:02 a.m., he pulled a black backpack from the back seat area. He pulled a plastic bag containing apparent marijuana out of the backpack and then said "There's a gun. There's a fucking gun." PC Grainger testified that he was surprised to find the gun, and his tone when he found it supports that evidence. He immediately left the SUV and walked to where PC Petschenig was standing with the vehicle occupants.

[34] At 12:42:20 a.m., PC Grainger advised PC Petschenig that there was a "lot of weed" in the car, and that unfortunately there was also a firearm in the vehicle. He then advised Mr. Dyer, Mr. Young, and Ms. Lowe that they were all under arrest, and told them to put their hands behind their backs. As they were being handcuffed, PC Grainger asked if someone could tell him if the firearm was real or not and said that "it'd be nice to know". In his evidence, PC Grainger explained that he asked the question, not to elicit evidence, but that it would be nice to know if it was real so that they don't accidentally shoot someone.

[35] At 12:42:59 a.m., PC Petschenig told Mr. Dyer that he was under arrest for possession of a firearm. He cautioned Mr. Dyer not to say anything because his body-worn camera was recording him. He escorted Mr. Dyer to the side of his police vehicle and conducted a pat-down search. At 12:44:30 a.m., he told Mr. Dyer that he was arresting him for possession of a firearm and possession of more than 30 grams of cannabis. He read Mr. Dyer his right to counsel from his notebook and cautioned him that he did not have to say anything, and that anything he said could be used in evidence. Mr. Dyer was asked if he wanted to call a lawyer and he responded "no". He expressed his concern that someone come to pick up his car. At 12:45:40 a.m., PC Petschenig asked Mr. Dyer whether he knew if the firearm was real and did not receive a response. PC Petschenig transferred custody of Mr. Dyer to two other officers for the purpose of transporting Mr. Dyer to 17 Division, because Mr. Young had been placed in the rear of his vehicle.

[36] At 12:43:33 a.m., after Mr. Young was handcuffed, PC Grainger escorted him to the side of his police vehicle and told him that he did not have to say anything, but that anything he said could be used against him. PC Grainger advised Mr. Young that he was under arrest for possession of a firearm and possession of more than 30 grams of cannabis. He advised him of his right to retain and instruct counsel in standard terms and asked if he understood. Mr. Young understood.

[37] Mr. Young asked if he could look in his phone to find a phone number, and PC Grainger told him that back at the station, they could go through his phone with him to find a lawyer's phone number if that is what he wanted to do. He also told him that back at the station he could provide Mr. Young with a list of lawyers. Mr. Young said that he did not want to call a lawyer right then. PC Grainger told Mr. Young to let him know if he changed his mind. He placed Mr. Young in the rear seat of his vehicle and told Mr. Young that he could change his mind at any time about a lawyer.

[38] At 12:46:19 a.m., PC Grainger, having placed Mr. Young in the rear of his police vehicle, told PC Petschenig that he was going to continue his search of the SUV. PC Grainger then proceeded to search the SUV, while other officers looked on. He found more cannabis, cocaine, and scales.

(c) Analysis

[39] When *McGowan-Morris* is applied to the foregoing evidence, it is apparent that Mr. Young's s. 10(b) right to counsel was infringed when PC Grainger formed grounds to believe that there was cannabis in the Kia that was readily available to the driver, and formed the intention to search the Kia. The Crown reasonably concedes this to be so. That occurred at, or shortly before, 12:35:45 a.m., when PC Grainger told Mr. Dyer that the cannabis was readily available and that what they needed to do was make sure that there was less than 30 grams of cannabis in the car. Mr. Young was not then given his s. 10(b) rights. The Crown concedes that in the circumstances of this case, there were no public safety reasons known to the police that could justify delay in affording Mr. Young and the other occupants of the Kia their s. 10(b) rights.

[40] Mr. Young was advised of his right to counsel at, or shortly after, 12:43:33 a.m., about eight minutes after he should have been given his s. 10(b) rights. During that time, the *CCA* search of the Kia proceeded, and a gun and drugs were found.

[41] It must be recalled, as I consider whether admission of the evidence obtained during the search of the Kia would bring the administration of justice into disrepute, that I found another breach of Mr. Young's s. 10(b) *Charter* right. I found that Mr. Young's right to speak with counsel was infringed when duty counsel did not call back within a reasonable time, and the police did not follow up to determine what was amiss and therefore were not reasonably diligent in facilitating Mr. Young's right to speak with counsel, delaying Mr. Young's ability to speak with duty counsel. The cumulative effect of the breaches of Mr. Young's s. 10(b) *Charter* rights must be considered.

[42] As during my initial consideration of the s. 24(2) application, the Crown, reasonably, does not argue that the seized evidence was not "obtained in a manner" that infringed the *Charter* rights of Mr. Young. The "obtained in a manner" threshold for the application of s. 24(2) of the *Charter* will be surpassed where the connection between the breach and the discovered evidence is causal, temporal, or contextual, or any combination of these three connections, as long as the connection is not "too tenuous or too remote": *R. v. Pino,* 2016 ONCA 389, 130 O.R. (3d) 561, at para. 72. While there was no causal connection between

the discovery of the evidence and the right-to-counsel infringements, those matters were temporally and contextually connected.

[43] It remains to consider whether Mr. Young has established, on a balance of probabilities, that, having regard to all the circumstances including the cumulative effect of the infringements of his s. 10(b) rights, the admission of the seized items into evidence would bring the administration of justice into disrepute, by applying the three factors identified in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71; R. *v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 139-142.

(a) The seriousness of the *Charter*-infringing conduct

[44] The first *Grant* factor requires that I consider whether there has been misconduct from which the court should dissociate itself, situating the misconduct on a scale of culpability and considering surrounding circumstances that exacerbate or attenuate its seriousness: *R. v. McColman*, 2023 SCC 8, 423 C.C.C. (3d) 423, at paras. 57-59.

[45] The more severe and deliberate the state conduct and the more serious the breach, the more the court will be required to dissociate itself from the state conduct by excluding the evidence linked to that conduct: see *Grant*, at para. 72; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at para. 82.

[46] I have found that Mr. Young's right to speak with counsel was infringed when duty counsel did not call back within a reasonable time, and the police did not follow up to determine what was amiss and therefore were not reasonably diligent in facilitating Mr. Young's right to speak with counsel, delaying Mr. Young's ability to speak with duty counsel.

[47] I have also found that Mr. Young's s. 10(b) rights were infringed when he was not provided with those rights when PC Grainger formed grounds to search the Kia pursuant to the *CCA* and formed his intention to conduct that search.

[48] I previously found that the failure of the police to follow up when duty counsel did not call back for Mr. Young appears to have been inadvertent. There is no evidence about why duty counsel did not return the call for Mr. Young in a timely way, or to suggest that the police had any reason to be concerned that duty counsel would not call back in a timely manner, as had occurred in relation to Mr. Dyer. While PC Grainger could, and should, have called sooner, when the delay became apparent to him, another call was placed to which duty counsel responded. The police efforts to put Mr. Young in touch with duty counsel fell short, but there is no evidence that this was anything but a one-off problem. The police did not set out to intentionally delay Mr. Young's right to speak with counsel and there was no advantage to the investigation or prosecution in doing so. These circumstances lessen the need for the court to disassociate itself from the deficient efforts to get duty counsel on the line for Mr. Young after the initial call was placed. The problem was a product of fact-specific oversight, and not systemic or intentional breaches.

[49] In *McGowan-Morris*, the Court of Appeal characterized the delay in advising the detainee of his s. 10(b) rights before a *CCA* vehicle search as "not serious". The Court noted that

the delay in advising Mr. McGowan-Morris of his rights was "extremely brief". The delay in that case occurred between 10:43 p.m., when the vehicle in which Mr. McGowan-Morris was pulled over to conduct a *CCA* search, and 10: 58 p.m., when Mr. McGowan-Morris was advised of his right to counsel. During those 15 minutes, the police first waited for backup, and then had to deal with an attempt by another occupant of the vehicle to flee. It took a minute or so for that situation to be controlled. A search of the vehicle revealed the presence of two handguns and a magazine. Ten minutes elapsed between the time when the other man tried to escape and when Mr. McGowan-Morris was apprised of his right.

[50] In the present case, what began as a motor vehicle stop to investigate the sobriety and licencing status of the driver pursuant to the *Highway Traffic Act*, R.S.O. 1990, c. H.8, morphed into a *CCA* investigation that resulted in the discovery of a firearm. These phases of the investigation were not discrete, one from the other. Rather, for several minutes, the active and ongoing investigation into the sobriety and licencing status of the driver was co-extensive with the *CCA* investigation. This created a complex rights matrix for the police to navigate. *McGowan-Morris* is the first appellate decision that provides clear direction to the police about when s. 10(b) rights must be provided when *CCA* searches are conducted.

[51] In this case, PC Grainger ought to have provided Mr. Young with his right to counsel at 12:35:45 a.m. Those rights were provided at 12:43:33 a.m., a delay of about eight minutes. Like the Court of Appeal in *McGowan-Morris*, I characterize the delay in advising Mr. Young of his s. 10(b) rights as not serious. This breach does not move the needle on the scale used to assess state culpability.

[52] In the present case, considering the delay in advising Mr. Young of his s. 10(b) rights before the *CCA* search was conducted and the delay in putting him in touch with duty counsel, it remains the case that there is no pattern of *Charter*-infringing conduct. The police officers advised Mr. Dyer and Mr. Young of the reasons for their detention and then their arrest, updating them as the circumstances, and their jeopardy, changed. The officers turned their minds to, and planned for, the transportation of the three arrestees to the police station to facilitate their contact with counsel, ensuring that those who requested immediate contact with counsel were transported first. When Mr. Young was detained at the scene longer than the others, they made arrangements for him to contact counsel at the scene, an opportunity that he declined.

[53] In all the circumstances, I remain of the view that the s. 10(b) infringements that occurred in this case are moderately serious. These infringements pull slightly in favour of exclusion.

(b) <u>The impact on Mr. Young's *Charter*-protected interests</u>

[54] The second *Grant* factor requires me to evaluate the extent to which the breaches undermined the interests protected by the right infringed: *Grant*, at para. 76; *Tim*, at para. 90. To make that determination, I must consider the interests that are protected by s. 10(b) of the *Charter* and then consider the "degree to which the violation impacted those interests": *Grant*, at para. 77.

[55] I have previously found that the breach of Mr. Young's s. 10(b) right to consult with counsel without delay arising from the delay in putting him in touch with duty counsel did not seriously impact his ability to obtain assistance in regaining his liberty or obtain protection against the risk of involuntary self-incrimination: *Suberu*, at paras. 40-41. There was no evidence before me that his liberty would have been obtained any sooner had the breach not occurred. It was always the intention of the police to put Mr. Young in touch with counsel, and he knew that: *R. v. Pileggi*, 2021 ONCA 4, at paras. 122-125.

[56] While the fruits of a s. 8-compliant seizure can be excluded under s. 24(2) of the *Charter*, provided that the fruits of that seizure are causally, contextually, or temporally connected to another *Charter* breach, I may consider the lack of a causal connection in calibrating the seriousness of the *Charter*-infringing conduct.: *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 87; *R. v. Griffith*, 2021 ONCA 302, [2021] O.J. No. 2514, at paras. 25, 33, 48, and 54. The absence of a causal connection is a factor "that weighs against the exclusion of evidence resulting from a s. 10(b) breach": *R. v. Do*, 2019 ONCA 482, [2019] O.J. No. 3018, at para. 12; *R. v. Keshavarz*, 2022 ONCA 312, at paras. 112-115; *R. v. DeSilva*, 2022 ONCA 879, 421 C.C.C. (3d) 177, at para. 97; *R. v. Hamouth*, 2023 ONCA 518, at para. 54.

[57] In this case, there was no causal connection between the breaches of Mr. Young's s. 10(b) rights and the finding of the gun. The *Charter* breaches did not contribute to the discovery of the evidence in any meaningful way.

[58] In *McGowan-Morris*, at para. 115, the Court of Appeal concluded that the "impact of the brief s. 10(b) breach on [Mr. McGown-Morris'] *Charter*-protected interests was minimal at best". The *Charter* breach did not contribute to the discovery of the evidence in any meaningful way and the court found that the absence of a causal connection was "an important mitigating factor in evaluating the impact of the breach."

[59] Likewise, the impact of the additional s. 10(b) breach in this case that occurred before the *CCA* search turned up the loaded handgun was minimal at best. This additional s. 10(b) breach does not affect my assessment of the impact of the breaches on Mr. Young's *Charter*-protected interests.

[60] I remain of the view that the impact of the s. 10(b) breaches, viewed in their totality, on Mr. Young's *Charter*-protected interests were not insignificant and pulled in favour of exclusion of the seized evidence, but the pull is not strong.

(c) Society's interest in adjudication of this case on its merits

[61] My assessment of this factor has not changed. The third *Grant* factor strongly favours the admission of the evidence in this case. The evidence is reliable physical evidence. It existed independently of the *Charter* infringements. The evidence is crucial to the Crown's case. The charges are most serious and engage significant public safety concerns. The admission of the evidence in this case is necessary to serve the truth-seeking function of the trial.

(d) Balancing

[62] My balancing of the *Grant* factors remains unchanged by the addition of the delay in providing Mr. Young with his s. 10(b) rights before the *CCA* search was conducted, a breach characterized by the Court of Appeal in *McGowan-Morris*, at para. 116, as "non-serious."

[63] The delay that occurred in this case in putting Mr. Young in touch with duty counsel was situation specific. The evidence sought to be excluded was seized in a *Charter*-compliant manner. The officers generally conducted themselves professionally and demonstrated their commitment to fulfilling their s. 10(b) obligations. They made mistakes. Apart from those mistakes, they conducted this investigation in an exemplary manner. Excluding the evidence would serve to punish the police for their mistakes and sacrifice the public interest in an adjudication of these very serious charges that implicate public safety by excluding very reliable evidence, when those mistakes did not contribute to the discovery of the evidence in any meaningful way.

[64] Balancing the factors and considering all the circumstances of this case, the evidence should not be excluded under s. 24(2) of the *Charter*. I find that exclusion of the gun, drugs, and other evidence seized from the SUV is not necessary to maintain public confidence in the administration of justice. The admission of the evidence would not damage the long-term repute of the administration of justice: *McColman*, at paras. 69-71, 73. Rather, to exclude the evidence would undermine that public confidence.

## 2. THE APPLICATION BY THE DEFENCE FOR A STAY OF PROCEEDINGS

[65] Mr. Young applies for a stay of proceedings because his bail hearing did not occur until 8 days after he was ready to proceed with the hearing. He submits that his rights under ss. 7, 9 and 11(e) of the *Charter* were infringed because the court was unable to conduct his bail hearing in a reasonable time after he was ready to proceed with his bail hearing.

[66] The court was advised for the first time on March 14, 2025, a date on which sentencing submissions were to be made, that this application would be brought. At the request of the defence, the sentencing hearing was adjourned to permit the defence to file its stay application, and to permit the Crown to file a response.

[67] It is the position of the defence that Mr. Young's bail hearing was unreasonably delayed, resulting in a breach of his s. 11(e)-protected right not to be denied reasonable bail without just cause, and his s. 9-protected right not to be arbitrarily detained. The defence further submits that the unjustified and unreasonable delay violates s. 7 of the *Charter* because it amounts to an abuse of process, and that warrants a stay of proceedings.

[68] The Crown accepts that unreasonably prolonged custody awaiting a bail hearing gives rise to a breach of s. 11(e) of the *Charter*, but argues that because the delay occurred due to measures that were in place to prevent the spread of the COVID-19 virus and because Mr.

Young could have had his bail hearing on the day of his arrest but chose not to proceed with a bail hearing until after he retained counsel, and that counsel took insufficient steps to expedite his bail hearing, no infringement of s. 11(e) occurred. The Crown points to the procedures that were in place when Mr. Young was arrested to protect prisoners from exposure to COVID-19. Those procedures challenged the capacity of the Central East Correctional Centre ("CECC") to meet the need for video suites for remote court appearances. The Crown submits that a stay of proceeding should not be granted because the procedures in place in October 2022 were not normal bail court procedures, and the delays that existed then were a product of exceptional circumstances. The Crown submits that if I find that an infringement of Mr. Young's s. 11(e) rights occurred, that the appropriate remedy, if any, is a form of enhanced credit for the time he spent in custody.

[69] The Crown also submits that there has been no abuse of process in this case and that a stay of proceedings is unwarranted.

(a) The facts relating to when the bail hearing occurred.

[70] Mr. Young was arrested on Saturday, October 1, 2022, at 12:42 a.m. He was brought before the weekend and statutory holiday bail court ("WASH court") later that day. He was assisted by duty counsel, and sought an adjournment to October 3, 2022, to permit him to retain counsel.

[71] Mr. Young retained Ms. Banister-Thompson on October 2, 2022.

[72] On October 3, 2022, duty counsel sent an email to counsel for Mr. Young and advised her that Mr. Young was scheduled to appear in a video remand court that day at 5:30 p.m. Ms. Banister-Thompson appeared for Mr. Young and asked to conduct a bail hearing the following day, on October 4, 2022. The presiding justice of the peace inquired whether counsel had been in touch with the trial co-ordinator's office yet, and counsel responded: "I have not yet, no." The justice of the peace advised counsel that Mr. Young could not have a bail hearing on October 4, 2022, because "it's already full with other contested bail matters." Counsel asked that Mr. Young's matter be spoken to on October 4, so that she could get in touch with the trial co-ordinator and the matter was adjourned to October 4, "marked to set a date for bail". Ms. Banister-Thompson emailed the trial co-ordinator after court concluded, and asked "is there any chance to have the bail hearing tomorrow (Oct. 4) and if not, on Wednesday (Oct. 5)?"

[73] On October 4, 2022, the trial coordinator responded to Ms. Banister-Thompson and the Crown to obtain an estimate as to the time required for the bail hearing. After being advised that the bail hearing would take two hours, the trial coordinator offered October 11, 12 and 13 as available dates for the bail hearing. Ms. Banister-Thompson asked that the bail hearing be set for hearing on October 12, 2022. She was not available on October 11, 2022 because she had another court commitment. When Mr. Young appeared before the justice of the peace that day by video, Ms. Banister-Thompson advised the justice of the peace that a bail hearing had been scheduled for October 12, 2022.

[74] There was no impediment to Ms. Banister-Thompson contacting the trial co-ordinator early on October 3, 2022, to secure a date for Mr. Young's bail hearing. The reason she did not do that was because she was unfamiliar with procedures in this jurisdiction. Counsel cannot be expected to know the various procedures that govern practice in all the regions of Ontario, but they can be expected to make inquiries. The evidence before me regarding the dates available for bail hearings when inquiries were made on behalf of Mr. Young's then co-accused, Mr. Dyer, demonstrates that at around noon on October 3, 2022, bail hearings could be scheduled on October 6 or 7, 2022.

[75] On October 12, 2022, Ms. Banister-Thompson emailed Crown counsel with a proposed release plan and inquired what time the bail hearing would likely take place. The bail hearing occurred on October 12, 2022, and Mr. Young was released on bail.

[76] The scheduling of bail hearings in Oshawa in October 2022 was affected by the COVID-19 pandemic. The Ontario Court of Justice had implemented a protocol that governed the scheduling of bail hearings. All reasonable steps were to be taken to ensure that accused persons who were recently arrested and were prepared to proceed with their bail hearing that same day would have their bail hearing that day, whether it was contested or not, and whether they appeared in a weekday bail court or a WASH court, without requiring that they first be remanded into custody at a correctional facility. The protocol noted that video and audio resources for in-custody accused persons "remain extremely limited". That first appearance bail court would sit until all new arrests who were ready for their bail hearings were dealt with. This often extended beyond regular court hours. Any matters that were not ready to proceed would be adjourned to a set date court. The CECC created a daily list of the prisoners who would appear by video and the time at which they would appear.

[77] The scheduling of bail hearings in Oshawa in October 2022 was affected by events that had occurred earlier during the pandemic. In May 2021, a COVID-19 outbreak was declared at the CECC. The CECC implemented new cleaning protocols and required each video suite used by inmates for their remote court appearances to be cleaned after each use. That cleaning protocol remained in place until October 2022, as the CECC experienced successive COVID-19 outbreaks.

[78] To schedule a bail hearing, Crown and defence counsel were required to confer and agree on how much time would be required for the bail hearing. Counsel would then contact the trial coordinator who would, in turn, contact the CECC for potential dates on which the bail hearing could be accommodated by the CECC.

[79] The bail court would often sit past 5:00 p.m. to maximize the number of bail hearings that could be heard each day. After each bail hearing, the cleaning protocol required that the video suite at the CECC be cleaned to minimize the potential transmission of the COVID-19 virus. The cleaning protocol was in place until October 26, 2022.

[80] On October 26, 2022, bail courts in Oshawa reverted to in-person appearances by direction of the local administrative justice of the peace. This was done to address a growing backlog

of bail hearings, and to ensure that bail appearances would not be restricted to time slots provided by correctional institutions.

(b) The issues

[81] The application raises three questions for determination:

1. Were Mr. Young's s. 11(e) and s. 9 *Charter* rights infringed?

2. Did the delay in conducting Mr. Young's bail hearing amount to an abuse of process, infringing s. 7 of the *Charter*?

3. If the answer to question 1 or 2 is "yes", should the proceedings be stayed under s. 24(1) of the *Charter*?

(a) Were Mr. Young's s. 11(e) and s. 9 *Charter* rights infringed?

[82] It is the position of the defence that Mr. Young's s. 11(e) and s. 9 *Charter* rights were infringed and that this amounts to an abuse of process, warranting a stay of proceedings.

[83] The relevant provisions of the *Charter* provide:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 11. Any person charged with an offence has the right …
>
> (e) not to be denied reasonable bail without just cause.

[84] In the context of this case, an infringement of section 9 of the *Charter* will be made out only if an infringement of s. 11(e) is established. I will not address s. 9 further because in the circumstances of this case it does not add anything to Mr. Young's position.

[85] Section 11(e) of the *Charter* confers a right to a bail hearing in a reasonable time. In *R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, at para. 39, the Court of Appeal confirmed that s. 11(e) has a temporal component:

> Unreasonably prolonged custody awaiting a bail hearing gives rise to a breach of s. 11(e) of the *Charter*. [Citations omitted.]

See also: *R v. Barletta*, 2021 ONSC 8618, at paras. 14, 20.

[86] Mr. Young's right to a bail hearing in a reasonable time was not infringed. It was not infringed because: 1) he could have had his bail hearing on October 1, 2022, but chose to adjourn his bail hearing to permit him to retain counsel; 2) had counsel taken expeditious steps to ascertain and follow the procedures in place in Durham Region to schedule a bail hearing, the bail hearing could have occurred on October 6 or 7, 2022; and 3) the procedure that existed in October, 2022 for scheduling bail hearings was necessary, and was

implemented in good faith, to address health concerns arising from the COVID-19 pandemic, which amounts to an exceptional circumstance.

(b) Did the delay in conducting Mr. Young's bail hearing amount to an abuse of process, infringing s. 7 of the Charter?

[87] The Supreme Court of Canada has identified two categories of abuse of process. The first occurs where state conduct compromises the right of an accused to a fair trial. The second, or residual, category comprises prosecutions where state conduct risks undermining the integrity of the judicial process: *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31. The defence submits that the impugned conduct in this case falls into the residual category.

[88] For the reasons I have already explained in relation to my finding that Mr. Young's s. 11(e) *Charter* rights were not infringed, I also find that the state conduct that contributed to the delay in conducting Mr. Young's bail hearing did not risk undermining the integrity of the judicial process and did not amount to an abuse of process.

(c) Is a stay of proceedings an appropriate remedy?

[89] If I am wrong, and the delay in conducting Mr. Young's bail hearing did risk undermining the integrity of the judicial process, or breach his s. 11(e) *Charter* rights, and did amount to an abuse of process, I will go on to consider whether a stay of proceedings would be an appropriate remedy.

[90] A stay of proceedings is a drastic remedy, one that is to be granted very rarely and only in the clearest of cases. In *Babos*, at para. 30, the Supreme Court explained why this is so:

> A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits.

See also: *Babos*, at para. 44.

[91] A stay for abuse of process is a forward-looking remedy. As was said in *Babos*, at para. 39,

> . . . the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will

adequately dissociate the justice system from the impugned state conduct going forward.

[92] The test for determining whether a stay of proceedings is warranted in any case where an abuse of process is found to have occurred was set out in *Babos*, at para. 32:

> The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and,
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits". [Citations omitted.]
>
> In cases involving the residual category, "the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system": *Babos*, at para. 35.

[93] In this case, evidence provided by the Crown indicates that the resource issues that affected the scheduling of Mr. Young's bail hearing were caused by steps taken to address the pressing public interest in preventing the spread of the COVID-19 virus in congregate living facilities like the CECC, to protect the health and safety of the inmates and staff at the institution. The public health emergency that existed at the time of Mr. Young's bail hearing no longer prevents in person court appearances. Evidence led by the Crown demonstrates that the Oshawa bail courts no longer experience the delays experienced by Mr. Young.

[94] The application for a stay of proceedings in this case fails at the first stage of the test because:

1. The state did not engage in conduct that is offensive to societal notions of fair play and decency. Rather, the state was faced with an unprecedented public health emergency that presented elevated risks to those in congregate living facilities, including jails. The delay in holding Mr. Young's bail hearing was, in part, the result of good faith efforts to mitigate those risks. The delay was also caused by Mr. Young's understandable wish to retain counsel for the bail hearing, and counsel's unfamiliarity with local procedures. The fact that the defence did not raise the issue of the bail hearing delay until the second date set

for the sentencing hearing "serves as a yardstick against which to measure just how serious [the state] conduct was perceived by the defence" (*Babos*, at para. 65). By that measure, the state conduct was not serious at all; and,

2. Proceeding with the sentencing of Mr. Young will not be harmful to the integrity of the justice system because the state conduct complained of ended more than two and a half years ago, when the risks of transporting prisoners to court for in person hearings had subsided. There is no need to dissociate the justice system from the impugned state conduct going forward. Continuing with Mr. Young's sentencing hearing would not lend judicial condonation to the impugned conduct.

[95] The application to stay the proceedings because Mr. Young's bail hearing was delayed is dismissed.

## 3. THE SENTENCE TO BE IMPOSED ON MR. YOUNG

### (a) The positions of the parties

[96] It is the position of the Crown that Mr. Young should receive a sentence of four years imprisonment, less credit for 11 days pre-sentence custody and a sentence reduction of four months at most to reflect *Downes* credit and consideration for *Morris* factors, for a net sentence of three and one-half years imprisonment. The Crown also seeks a s. 109 order for life, a DNA order, and a s. 743.21 order prohibiting Mr. Young from having any contact with his former co-accused, Justin Dyer, while he is in custody. The Crown relies on the decision of the Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, as establishing a range of three to five years as the appropriate sentence for possession of a loaded firearm.

[97] The defence submits that a sentence of two years less a day, to be served conditionally, followed by two years probation, would be an appropriate sentence. The defence agrees with the Crown that a six-month sentence reduction would appropriately reflect the pre-trial custody and *Downes* credit. The defence does not oppose the imposition of a s. 109 order but does oppose the making of a DNA order and a s. 743.21 order.

### (b) The facts of the offences

[98] Mr. Young chose to arm himself in a vehicle driven on a public roadway with a concealed, loaded, deadly weapon - a loaded Colt 1927 Argentine semi-automatic handgun. The gun's magazine was fully loaded and there was a round of ammunition in the chamber. The gun was ready to fire. He was also in possession of a large quantity of marijuana, scales, crack cocaine divided into two baggies and powdered cocaine divided into three baggies. The gun and the drugs were easily accessible to him as he sat in the backseat of a car in a populated urban area. Mr. Young was in possession of $750, comprising 1 x $50, 30 x $20, 3 x $10, and 8 x $5. In these circumstances, I find that the gun was a tool of the drug trade,

that was ready to be used by Mr. Young to inflict lethal force when he felt a need to use it, and that it was readily accessible to him.

(c) The background of Mr. Young

[99] Mr. Young was 29 years old at the time of the offences in 2022. He does not have a criminal record. He has a supportive family.

[100] I have the benefit of having both a pre-sentence report and an Impact of Race and Cultural Assessment ("IRCA") in relation to Mr. Young.

[101] The IRCA provided me with a well researched, comprehensive, and compelling description of the widespread and pernicious effect of anti-Black racism, and how that racism has impacted Mr. Young. It helped me understand how Mr. Young was vulnerable to influences that contributed to his possession of a loaded handgun and drugs. However, aspects of the report were unhelpful. The author, at times, advocated on Mr. Young's behalf. It also fell short by failing to consider the facts found following Mr. Young's trial, that were easily accessible in my reasons for judgment. While these shortcomings failed to comply with the direction of the Court of Appeal in *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at paras. 144-147 and undermined the general objectivity of the report, it did provide me with much useful information.

[102] Mr. Young was raised by his mother. His father lives in Trinidad and has little contact with Mr. Young. Mr. Young's mother brought him up in the Church, where he and his older brother participated in the music ministry. Mr. Young took singing classes, was a member of the church choir, and played the drums and piano during the church services. He has fond memories of singing with his brother and playing soccer and basketball. He later became a basketball coach for the youth in his community.

[103] Mr. Young's mother faces multiple health challenges, including multiple myeloma, and pneumonia. She has a pacemaker and requires dialysis. Mr. Young lives with his mother and takes care of her.

[104] It is submitted on behalf of Mr. Young that he is in a committed common law relationship, and that his common law partner is pregnant with his child. The pre-sentence report notes that Mr. Young's marital status is "single". The sources of information for the pre-sentence report do not include anyone who could be Mr. Young's pregnant common law partner. Mr. Young told the author of the pre-sentence report that although he does not live with his girlfriend, she "often visits him".

[105] Mr. Young and his brother were raised in a "very challenging neighbourhood," which was filled with negative influences, according to his youth pastor and mentor. On one occasion, Mr. Young, his brother, and their friends, were robbed at gunpoint in their apartment.

[106] Within his family, Mr. Young has "a robust support system", according to the author of the IRCA. Mr. Young and his brother received support from the church, school counselors,

and a local recreation center. His mother remains “the central figure, providing emotional support and cultural guidance”.

[107] Mr. Young graduated from high school and attended some post-secondary education but discontinued his studies due to his mother’s illness.

[108] Mr. Young worked at summer jobs, beginning when he was 14 years old. Between 2017 and 2020 he was self-employed, running a marketing company that promoted businesses. His business did not survive the pandemic. He is currently unemployed and receives social assistance. As the author of the IRCA explained: “Growing up in a low-income neighbourhood with limited access to resources, he has faced barriers in education, employment, and housing. The high cost of living, combined with racial discrimination in hiring practices, has made financial stability a persistent struggle.”

[109] Mr. Young told the author of the pre-sentence report that on the day of his arrest, he visited a strip club and consumed two to three shots and three beers, causing him to be intoxicated at the time of his arrest. He reported that he is a social drinker, typically consuming alcohol four times a week, but does not view it as a problem. Additionally, he stated that he smokes one or two marijuana (weed) joints per day.

[110] Mr. Young’s prospects for rehabilitation are diminished by his deflection of blame for his situation. The account he provided to the author of the IRCA simply does not accord with what happened:

> "I was just there... just chilling, and then suddenly the police started circling us." … He further reflected on how police tactics and racialized assumptions – particularly those affecting young Black men in his community – shaped the events of that night. (IRCA, p. 6)

[111] It is unfortunate that the author of the IRCA based his report only on an interview with Mr. Young and a review of the pre-sentence report, and not on my reasons for judgment that describe in detail what we all saw in court as the body-worn camera recordings of the police officers were played. It also appears that the author of the pre-sentence report was not aware of my finding of fact that racial profiling played no role in the police investigation in this case. To be clear, I accept without reservation the observation of the author of the IRCA that a pattern of racial profiling has disproportionately affected members of Mr. Young’s demographic. But the investigation at issue in this case was not affected by racial profiling.

(d) The applicable range of sentence

[112] Crown and defence counsel agree that where possession of a gun is associated with other criminal activity, the range of sentence is typically three to five years. Similarly, there is no dispute that sentencing ranges are guidelines, not rules.

[113] While ranges provide guidelines, every case is unique, and thus sentencing is a highly individualized exercise. This was confirmed by the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 58:

> [T]he fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.

[114] In *Nur*, the Supreme Court of Canada upheld a sentence of 40 months imprisonment, imposed on an "impressive young man" who had no prior criminal record.

[115] In *Morris*, at para. 71, the Court of Appeal explained that sentences for unlawful possession of loaded handguns in public places must emphasize denunciation and general deterrence:

> Canadian courts have long recognized that the gravity of certain kinds of offences requires sentences emphasizing denunciation and general deterrence. Gun crimes involving the unlawful possession of loaded handguns in public places fall squarely within that category. McLachlin C.J., in *Nur* (SCC), at para. 82, observed that a three-year sentence may be appropriate "for the vast majority of offences" under s. 95. [Citations omitted.]

[116] In *Morris*, at para. 68, the Court of Appeal described the dangers posed by those who possess loaded handguns in public places:

> Gun crimes involving the possession of loaded, concealed firearms in public places pose a real and immediate danger to the public, especially anyone who interacts with the gun holder. When the person with the gun is confronted by the police, who are engaged in the lawful execution of their duties, the risk increases dramatically. It increases yet again when the gun holder flees, and still again when the gun holder discards the weapon in a public

> place. A person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada is antithetical to the Canadian concept of a free and ordered society. [Citations omitted.]

[117] The Ontario Court of Appeal has repeatedly stressed that general deterrence and denunciation are the primary objectives for offences involving the possession of a concealed firearm in a public place: *R. v. Burke-Whittaker*, 2025 ONCA 142, at para. 37; *R. v. Stephens*, 2024 ONCA 793, at para. 18; *R. v. Stojanovski*, 2022 ONCA 172, 160 O.R. (3d) 641, at para. 114; *R. v. Danvers* (2005), 201 O.A.C. 138 (C.A.), at paras. 77-78; *R. v. Brown*, 2010 ONCA 745, 277 O.A.C. 233, at para. 14.

[118] In *Burke-Whittaker*, at para. 38, the Court of Appeal observed that "given the seriousness of the offence and the need for denunciation and deterrence, this court has stated that incarceration will almost always be required: *Morris*, at para. 71. In the normal course, the sentencing range begins at the low end of the penitentiary range for first-time offenders convicted of possessing a loaded prohibited firearm in circumstances where there is no other criminal activity."

(e) A just sentence

[119] "The gravity or seriousness of an offence is determined by its normative wrongfulness and the harm posed or caused by that conduct in the circumstances in which the conduct occurred. Accordingly, unlike when assessing the offender's degree of personal responsibility, an offender's experience with anti-Black racism does not impact on the seriousness or gravity of the offence": *Morris*, at para. 13.

[120] "Possession of a loaded, concealed handgun in public is made no less serious, dangerous, and harmful to the community by evidence that the offender's possession of the loaded handgun can be explained by factors, including systemic anti-Black racism, which will mitigate, to some extent, the offender's responsibility": *Morris*, at para. 76.

[121] Mr. Young's possession of a loaded, ready-to-fire, concealed handgun and cocaine, in circumstances that associated the gun to the drug trade, while riding in a vehicle on a public roadway was a very serious crime. His conduct put members of the community and police officers engaged in the lawful execution of their duties at risk of serious harm.

[122] The information provided in the IRCA about the negative effects of anti-Black racism on Mr. Young contribute to my understanding of Mr. Young as a person and member of society. What that information does not do is provide me with any explanation why Mr. Young possessed a loaded and ready-to-fire handgun, together with cocaine, as he was driven about the streets of Whitby during the early morning hours. In some cases, social context evidence may provide information that mitigates the offender's responsibility or culpability for the offence. But, as the Court of Appeal explained in *Morris*, at para. 97,

> There must, however, be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. Everyone agrees there can be no such discount. [Citations omitted.]

[123] For example, in *Morris*, the social context evidence supported other evidence that Mr. Morris, who had been the victim of a stabbing, feared the people around him in his community, demonstrating that his fears were real, justified and existed, in part, as a result of systemic racism that played a role in shaping his perception of his community, his relationship with others in the community, and his relationship with the police. The social context evidence in *Morris* provided an explanation for, and was thereby connected to, his possession of a loaded gun that mitigated his personal responsibility and culpability for the offence.

[124] I have considered the information provided in the IRCA to assess how the competing objectives of sentencing that Mr. Young's sentence must reflect, such as rehabilitation and denunciation, can best be blended to produce a sentence that is proportionate to the gravity of the offences and Mr. Young's degree of responsibility, and that addresses Mr. Young's needs and potential.

[125] Mr. Young's possession of the gun, in the circumstances of this case, falls at the "true crime" end of the spectrum of s. 95 offences. There was clear evidence that Mr. Young possessed the gun as a tool of the drug trade.

[126] There are mitigating factors in this case:

(i) Mr. Young is a first offender;

(ii) Mr. Young is young (29 years old at the time the offences were committed), though I do not characterize him as a youthful offender, and therefore he has better rehabilitative prospects than an older offender who may be less amenable to change;

(iii) Mr. Young has personal strengths that enable him to contribute positively to the community. He is intelligent and has good community supports.

(iv) Any custodial sentence served by Mr. Young will create hardship for his mother, for whose care he is responsible. The fact that Mr. Young has been assisting his

mother is a mitigating factor because it shows his good character and demonstrates his rehabilitative prospects: *R. v. Habib*, 2024 ONCA 830, at para. 47.

[127] These mitigating factors cause me to temper the sentence I would otherwise impose for Mr. Young's very serious offences.

[128] Mr. Young's possession of the loaded, ready to fire, semi-automatic handgun was a serious criminal offence that created a real risk to public safety. The sentence imposed must unambiguously denounce such conduct and deter others who would choose to arm themselves with lethal weapons in public spaces or in vehicles. The mitigating factors in this case permit me to impose a sentence at the lower end of the generally appropriate range.

[129] The sentence to be imposed in this case, before credit is given for 11 days of pre-sentence custody and *Downes* credit, is a global sentence of three years imprisonment. Crown and defence counsel agree that a six-month reduction for pre-sentence custody and *Downes* credit is appropriate. I agree. In coming to this conclusion, I have given enhanced credit for the 11 days of pre-sentence custody because Mr. Young's bail hearing was delayed, and because his time spent in custody occurred when lockdowns were especially frequent and lengthy to address the COVID-19 pandemic. While the latter issue did not amount to a *Charter* infringement, it remains the case that the conditions in which Mr. Young spent his pre-sentence custody were unusually harsh. The circumstances of the *Charter* infringements that I found occurred in relation to Mr. Young's right to counsel do not amount to the type of state misconduct that warrants a sentence reduction.

[130] The sentence will be apportioned to the offences of which Mr. Young has been convicted as follows:

1. Count 1: Unauthorized possession of a firearm in a motor vehicle contrary to s. 94(1) of the *Criminal Code*: 3 years less credit for 6 months, to reflect 11 actual days of pre-sentence custody and restrictive bail conditions;

2. Count 2: Possession of a prohibited or restricted firearm with ammunition contrary to s. 95(1) of the *Criminal Code*: 3 years less credit for 6 months, concurrent with Count 1;

3. Count 3: Possession of cocaine contrary to s. 4(1) of the *Controlled Drugs and Substances Act*: 6 months concurrent with Counts 1 and 2.

The net sentence remaining to be served is a total sentence of 2 years and 6 months.

[131] In addition, it is ordered, pursuant to s. 109 of the *Criminal Code*, that Mr. Young is prohibited from possessing any firearm or other weapon specified in the order, for life.

[132] The firearms offences of which Mr. Young was convicted are secondary designated offences for the purpose of the DNA databank provisions of the *Criminal Code*. I may order that Mr. Young provide a sample of a bodily substance for the purpose of forensic

DNA analysis only if I am satisfied that it is in the best interests of justice to do so. I must consider that Mr. Young had no prior criminal record, the nature of the offence and the circumstances of its commission, and the impact such an order would have on Mr. Young's privacy and security of the person. While Mr. Young has no criminal record, the offences of which he has been convicted are extremely serious. While no violence was used in the commission of those offences, the offences reflect a willingness and ability on the part of Mr. Young to use lethal violence. The impact of an order on Mr. Young's privacy and security of the person would be insignificant. The considerations that favour making the order sought by the prosecution outweigh those that militate against making the order. I am satisfied that it is in the best interests of justice that a DNA order be made. It is ordered that Mr. Young provide a sample of a bodily substance for the purpose of forensic DNA analysis.

[133] I decline to make an order prohibiting Mr. Young from communicating with Mr. Dyer while Mr. Young is serving the custodial portion of his sentence. Mr. Dyer was acquitted following his trial. There is no evidence before me that his antecedents are a cause for concern or that he will undermine Mr. Young's rehabilitation, which is the reason why the Crown submits that a s. 743.21 order should be made.

The Honourable Justice J. Speyer

**Released:** June 30, 2025

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

HIS MAJESTY THE KING

**– and –**

JUSTIN DYER and IVOR SHAWN YOUNG

**REASONS FOR JUDGMENT**

The Honourable Justice J. Speyer

**Released:** June 30, 2025