



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Zacharias, 2023  
SCC 30

**APPEAL HEARD:** May 15, 2023  
**JUDGMENT RENDERED:**  
December 1, 2023  
**DOCKET:** 40117

**BETWEEN:**

**George Zacharias**  
Appellant

and

**His Majesty The King**  
Respondent

- and -

**Attorney General of Ontario and Attorney General of Alberta**  
Intervenors

**CORAM:** Côté, Rowe, Martin, Kasirer and O’Bonsawin JJ.

**JOINT REASONS:** Rowe and O’Bonsawin JJ.  
(paras. 1 to 76)

**CONCURRING REASONS:** Côté J.  
(paras. 77 to 105)

**JOINT DISSENTING** Martin and Kasirer JJ.

**REASONS:**

(paras. 106 to 161)

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**George Zacharias**

*Appellant*

v.

**His Majesty The King**

*Respondent*

and

**Attorney General of Ontario and  
Attorney General of Alberta**

*Interveners*

**Indexed as: R. v. Zacharias**

**2023 SCC 30**

File No.: 40117.

2023: May 15; 2023: December 1.

Present: Côté, Rowe, Martin, Kasirer and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

*Constitutional law — Charter of Rights — Search and seizure — Arbitrary  
detention — Consequential breaches — Remedy — Exclusion of evidence — Police  
suspecting illegal drug activity following lawful traffic stop of accused — Police*

*detaining accused and conducting several searches — Accused arrested and charged with drug related offences — Trial judge finding initial search and investigative detention breached accused's Charter rights but declining to exclude evidence — Whether arrests and searches consequential to initial violation further breached Charter — Whether breaches warrant exclusion of evidence — Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).*

Z was pulled over in a traffic stop because of a burnt-out light and illegally tinted windows. The police officer made several observations that resulted in placing Z under investigative detention and calling for a sniffer dog to scan for drugs. After a pat-down search, the officer placed Z in a police vehicle until the sniffer dog arrived. The dog signalled that drugs were present and Z was arrested for possession of a controlled substance. The police then searched Z's truck, including duffel bags located in the truck box under a tonneau cover. The police discovered a large quantity of cannabis and cash. Z was arrested for possession for the purpose of trafficking, handcuffed, and driven to a police detachment. He was then searched and arrested for possession of proceeds of crime over \$5,000.

Z alleged that the police had breached his rights under ss. 8 and 9 of the *Charter* during the investigation and that the drug evidence seized by the police should be excluded under s. 24(2) of the *Charter*. The trial judge found that the sniffer dog search and investigative detention breached Z's ss. 8 and 9 *Charter* rights but held that the evidence should not be excluded under s. 24(2) because excluding the evidence

would bring the administration of justice into disrepute. Z was convicted of possession of 101.5 pounds of marijuana for the purpose of trafficking. He appealed, arguing that the trial judge erred by failing to consider the consequences that flowed from the unlawful investigative detention and sniffer dog search. A majority of the Court of Appeal dismissed the appeal.

*Held* (Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

*Per* **Rowe** and **O'Bonsawin** JJ.: The arrests and the searches incident to arrest following the sniffer dog search and investigative detention constituted breaches of Z's rights under ss. 8 and 9 of the *Charter*. They must be considered when determining whether the evidence should be excluded under s. 24(2) of the *Charter*. However, absent additional or independent state misconduct, a breach that is entirely consequential on an initial violation is unlikely to significantly increase the overall seriousness of the *Charter*-infringing state conduct. In the instant case, additional *Charter* breaches occurred in a sequence of events: an arrest followed as a consequence of the sniffer dog search, searches followed incident to arrest, and additional arrests followed. These additional consequential breaches do not raise the seriousness of the state conduct as these breaches were breaches only because of the officer's miscalculation in assessing the grounds for suspicion; the focal point under s. 24(2) remains the initial breaches that set the sequence of state conduct into motion. Balancing the *Grant* factors applicable to determine whether evidence should be excluded under s. 24(2), the evidence should not be excluded.

The *Criminal Code* sets out strict standards for when police may exercise powers of arrest. The police must demonstrate reasonable and probable grounds to believe that the person arrested committed an offence. Where the arrest is without a warrant, the arresting officer must honestly believe that the suspect committed the offence in question and those subjective grounds must be justifiable from an objective point of view. Reasonable grounds however cannot be supplied by actions that involved violations of the *Charter*. Where grounds for arrest are based on evidence that was unlawfully obtained, the court must excise this evidence from the factual matrix and determine whether the police had reasonable and probable grounds for arrest having regard to the totality of the circumstances known to the officer based on the remaining evidence. Warrantless arrests are often carried out in dynamic situations and police are not required to inquire into the constitutionality of prior investigative steps before acting on the information they yielded. However, they are required to consider whether they are acting within constitutional limits when they act. Canadians have a legitimate expectation that the police will know and comply with the law, especially the *Charter*. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate they had reasonable and probable grounds for the arrest.

In a situation of linked or cascading *Charter* breaches, a subsequent arrest may be unlawful only as a consequence of the initial breach or breaches that preceded it. An arrest that can be viewed only as a consequential breach is distinct from state action that is characterized by additional or independent misconduct. An unlawful arrest that is a consequential breach must be factored into the first and second stages of

the s. 24(2) *Grant* analysis, but is unlikely to significantly impact the overall seriousness of the *Charter*-infringing state conduct absent additional state misconduct. The first *Grant* factor asks whether the *Charter*-infringing state conduct is so serious that the court must dissociate itself from it. In the absence of additional state misconduct, the focal point for evaluating seriousness is likely to remain the initial breach. In these circumstances and where the police honestly believed they were proceeding lawfully, subsequent state conduct should be situated on the less serious end of the scale of culpability. The second *Grant* factor looks to the *Charter*-protected interests of the accused engaged by the infringed right and the degree to which the violation impacted on those interests. A consequential breach will be most relevant at this stage. When additional rights and breaches of those rights are factored into the analysis, there will necessarily be a more significant impact. Consideration of all breaches is necessary to get an accurate picture of the effects of the breaches. To fail to have regard to the impact of an arrest that occurred as a consequence of a preceding *Charter* breach would fail to take into account all the circumstances. The third *Grant* factor examines society's interest in an adjudication of the case on the merits. Consideration of additional breaches may not change the analysis for this *Grant* factor.

In the instant case, the state cannot rely on the evidence unlawfully obtained from the sniffer dog search to satisfy the reasonable and probable grounds requirement for Z's subsequent arrests. The police breached ss. 8 and 9 of the *Charter* in conducting the sniffer dog search and by holding Z in investigative detention while waiting for a sniffer dog to arrive. The arresting officer's subsequent subjective belief

that Z was in possession of a controlled substance relied primarily on the results of the sniffer dog search; therefore, the first arrest for possession was unlawful. Because the first arrest was unlawful, the subsequent searches breached s. 8 of the *Charter* and the second and third arrests constituted breaches of s. 9 of the *Charter*. The placement of Z in the police vehicle in handcuffs and at the police detachment were continuations of the s. 9 breaches.

Even considering the consequential breaches, the first *Grant* factor does not strongly favour exclusion of the evidence. The consequential *Charter* breaches are not characterized by additional or independent misconduct and were not intentional. The focal point remains the initial breach, which was inadvertent, not wilful, and which does not show a pattern or attitude of disregard for *Charter* rights or the law. The second *Grant* factor moderately favours exclusion. The sniffer dog search was brief, minimally intrusive and followed a lawful stop and detention for traffic infractions. However, as a result, Z was arrested, handcuffed, brought to the police station, detained for several hours and the police obtained significant evidence against him. The arrests and searches incident to arrest resulted in more significant impact on Z's *Charter*-protected interests. The third *Grant* factor strongly favours admission of the evidence. The evidence was real, reliable, and crucial to the Crown's case. Given the large quantity of cannabis, the offence is serious and there is a strong societal interest in adjudication of the case on its merits. Balancing the *Grant* factors, the first two are insufficient to outweigh the third; thus, overall the circumstances favour admission of the evidence.



*Per Côté J.:* There is agreement that the appeal should be dismissed. However, the proposition that the state cannot rely on unlawfully obtained evidence to satisfy the reasonable and probable grounds requirement for arrest is difficult to reconcile with the longstanding s. 24(2) *Charter* jurisprudence and the framework for warrantless arrests set out in *R. v. Storrey*, [1990] 1 S.C.R. 241. A *Charter* breach that leads to incriminating evidence being uncovered will inevitably result in an arrest or other investigative steps by the police. Absent independent or additional police misconduct, the Court has never treated such arrests or investigative steps as separate *Charter* breaches in its s. 24(2) analysis. A decision to arrest must be made quickly in volatile and rapidly changing situations based on available information which is often less than exact or complete. In the instant case, the circumstances known to the arresting officer at the time of the arrest included the sniffer dog's clear and unequivocal indication of controlled substances in Z's vehicle. The focus of the s. 24(2) analysis should be on the investigative detention while awaiting the arrival of the dog for the sniffer search. The presence of additional breaches was not argued at trial and has little, if any, impact on the s. 24(2) analysis.

The reasonable and probable grounds standard for a warrantless arrest is based on the totality of the circumstances known to the officer at the time of the arrest. The analysis under s. 24(2) must be conducted from the perspective of a reasonable person standing in the shoes of the arresting officer. Operating after-the-fact, automatic excision of unconstitutionally obtained information would nullify the subjective focus by artificially altering the information on which the arresting officer relied at the time.

It is artificial and inconsistent with the reasonable and probable grounds standard to hold that an arrest made based on clear and reliable evidence of a crime is unlawful. This understanding is why the Court has declined to apply the logic behind excision to the context of warrantless arrests. To classify all subsequent police conduct as *Charter*-infringing merely because it flows from the results of an initial breach comes dangerously close to the fruit of the poisoned tree doctrine eschewed by s. 24(2).

In the instant case, all police conduct subsequent to the sniff search was based on an intervening discovery of incriminating evidence. The focus of the first *Grant* factor is on misconduct from which the court should be concerned to dissociate itself. An arrest made on the basis of clear and reliable evidence of a crime is not misconduct from which the court should be concerned to dissociate itself. To hold otherwise artificially distorts the s. 24(2) analysis and represents a shift towards automatic exclusionary rules that have been rejected. The trial judge correctly characterized the arresting officer's failure to meet the reasonable suspicion standard as miniscule. That conduct only weakly favours exclusion; its impact on Z was moderate; and the evidence is highly reliable and integral to the Crown's case. On balance, the drug evidence should not be excluded and Z's conviction should be upheld.

*Per Martin and Kasirer JJ.* (dissenting): The appeal should be allowed. Section 24(2) of the *Charter* directs courts to have regard to all the circumstances in determining whether admitting evidence would bring the administration of justice into disrepute. Consequential, linked or cascading breaches necessarily result in more

significant impacts on the *Charter*-protected interests of an accused. All such breaches must be given weight under the *Grant* analysis. Section 24(2) mandates assessing the cumulative, and potentially compounding, seriousness of all of the conduct related to each of the violations at issue. Applying this approach, s. 24(2) directs that the evidence should be excluded.

The first line of inquiry mandated by *Grant* is an evaluation of the seriousness of the state conduct. Seriousness is focused on the rule of law. All state action that violates the *Charter* necessarily deviates from the rule of law. However, not all conduct that violates the *Charter* deviates from the rule of law to the same extent. There is a sliding scale or spectrum. Relevant considerations that may inform the assessment of the gravity of the offending conduct include the extent to which the conduct reflects deliberate disregard for *Charter* standards, whether the conduct was part of a pattern and the social values that underlie the *Charter* rights that were violated. The full range of relevant values entrenched in the *Charter* should be considered, and where multiple rights are violated, the court must consider how the state conduct implicates each underlying value and how those values interact. All *Charter*-infringing state conduct must be factored into the analysis, therefore the seriousness of conduct related to all breaches must be considered even if some of them may be said to have been caused by earlier *Charter* violations. To treat consequential breaches as having an inconsequential effect on the seriousness inquiry would be a departure from settled law. Breaches that, in isolation, may appear minor or technical can contribute meaningfully to the seriousness of the misconduct that a judge must consider when deciding whether

to admit or exclude evidence under s. 24(2). Thus, it would be an error of law to decline to analyze the extent to which each consequential breach reflects serious *Charter*-infringing state conduct. A cumulative approach is mandated by the emphasis that the *Grant* analysis gives to the totality of the circumstances. The Court's jurisprudence has never suggested that a relationship between two breaches eliminates the need to assess their cumulative seriousness. A sequence of state conduct may undermine the rule of law more gravely than would each action, considered individually. The analysis is not a mathematical exercise and there is no necessary requirement that the seriousness of the whole be the sum of the constituent parts.

In the instant case, with respect to the first *Grant* line of inquiry, the initial unreasonable search may not have been in itself grave: the sniffer dog search and initial investigative detention breached *Charter* standards but inadvertently and without negligence, and a systemic failing was not evident in the record. However that does not exhaust the relevant considerations. Increasingly invasive steps, which represent progressively more serious ways in which the state conduct undermined the rule of law, were taken at each stage of the police action. The subsequent breaches at issue in this case include the pat down search and the search of the truck and of the duffle bags. In addition, the initial detention and each of the three arrests violated s. 9. Further, confinement in a police vehicle, handcuffing, and being taken to the detachment constituted arbitrary detentions. Thus, while the subsequent breaches did not deliberately violate *Charter* rights, the entire course of conduct does reflect serious state misconduct. On the spectrum of seriousness, the conduct at issue pulls between

moderately and strongly towards exclusion, resting closer to a strong pull than a moderate one.

The second *Grant* line of inquiry considers the seriousness of the impact of the *Charter* breaches on the *Charter*-protected interests of the accused. Under this line of inquiry, the cumulative seriousness of the impacts on the accused's *Charter*-protected interests flowing from the same state conduct considered under the first line of inquiry should be assessed. In the instant case, the impacts were substantial and they increased in severity at each stage of interference. The privacy-compromising impact of an unreasonable vehicle search will generally militate in favour of exclusion, notwithstanding the fact that a vehicle attracts a lesser expectation of privacy than a dwelling house. More substantial was the impact of police officers' opening of Z's duffel bags. Opening duffel bags covered by a tonneau in the box of the truck significantly intruded upon Z's privacy interests. Moreover, the breaches of s. 9 were substantial and prolonged. Z was handcuffed, confined to a police vehicle, and arrested three times. He was unlawfully detained for approximately seven hours, including several hours in the police detachment. These sustained deprivations had substantial impacts on Z's liberty, autonomy and bodily integrity. Accordingly, the second line of inquiry pulls strongly in favour of exclusion of the evidence.

Finally, the third *Grant* line of inquiry considers whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. In the instant case, the evidence is highly reliable and is

undoubtedly critical to the Crown's case. The offences are serious, in view of the very large quantity of drugs at issue. Accordingly, the third line of inquiry strongly favours the admission of the evidence.

On balance, however, the third factor is not enough to overwhelm the cumulative seriousness of the *Charter*-infringing conduct along with the impact on Z's *Charter*-protected interests. In these circumstances, the administration of justice would be brought into disrepute by the admission of the evidence. The evidence should therefore be excluded.

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By Rowe and O'Bonsawin JJ.

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*Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335; *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643; *R. v. Lambert*, 2020 NSPC 37, 472 C.R.R. (2d) 1, aff'd 2023 NSCA 8; *R. v. Lauriente*, 2010 BCCA 72, 251 C.C.C. (3d) 492; *R. v. Kossick*, 2017 SKPC 67, 392 C.R.R. (2d) 250, aff'd 2018 SKCA 55, 365 C.C.C. (3d) 186; *R. v. White*, 2022 NSCA 61, 419 C.C.C. (3d) 123; *R. v. Loewen*, 2018 SKCA 69, [2018] 12 W.W.R. 280; *R. v. Reilly*, 2021 SCC 38; *R. v. Au-Yeung*, 2010 ONSC 2292, 209 C.R.R. (2d) 140; *R. v. McColman*, 2023 SCC 8; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

By Côté J.

**Considered:** *R. v. Storrey*, [1990] 1 S.C.R. 241; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. McColman*, 2023 SCC 8; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Love*, 2022 ABCA 269, [2023] 1 W.W.R. 296; *R. v. Jennings*, 2018 ONCA 260, 45 C.R. (7th) 224; **referred to:** *R. v. Tim*, 2022 SCC 12; *R. v. Beaver*, 2022 SCC 54; *R. v. Golub* (1997), 34 O.R. (3d) 743; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Lafrance*, 2022 SCC 32; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. Kang-Brown*,

2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335; *Frey v. Fedoruk*, [1950] S.C.R. 517; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Reilly*, 2021 SCC 38.

By Martin and Kasirer JJ. (dissenting)

*R. v. Plaha* (2004), 188 C.C.C. (3d) 289; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Tim*, 2022 SCC 12; *R. v. Beaver*, 2022 SCC 54; *R. v. McColman*, 2023 SCC 8; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Sharma*, [1993] 1 S.C.R. 650; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *Hamel v. R.*, 2021 QCCA 801, 72 C.R. (7th) 132; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Reilly*, 2021 SCC 38; *R. v. Jennings*, 2018 ONCA 260, 45 C.R. (7th) 224; *R. v. Love*, 2022 ABCA 269, [2023] 1 W.W.R. 296; *R. v. Lauriente*, 2010 BCCA 72, 251 C.C.C. (3d) 492; *R. v. Boudreau-Fontaine*, 2010 QCCA 1108; *R. v. Poirier*, 2016 ONCA 582, 131 O.R. (3d) 433; *R. v. Kossick*, 2018 SKCA 55, 365 C.C.C. (3d) 186; *R. v. Culotta*, 2018 ONCA 665, 142 O.R. (3d) 241, aff'd 2018 SCC 57, [2018] 3 S.C.R. 597; *R. v. Adler*, 2020 ONCA 246, 388 C.C.C. (3d) 114; *R. v. White*, 2022 NSCA 61, 419 C.C.C. (3d) 123; *R. v. Greffe*, [1990] 1 S.C.R. 755; *R. v. Vu*, 2013 SCC



60, [2013] 3 S.C.R. 657; *R. v. Lafrance*, 2022 SCC 32; *R. v. Huynh*, 2013 ABCA 416, 8 C.R. (7th) 146; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Shinkewski*, 2012 SKCA 63, 289 C.C.C. (3d) 145; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631.

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*Traffic Safety Act*, R.S.A. 2000, c. T-6.

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APPEAL from a judgment of the Alberta Court of Appeal (Wakeling, Crighton and Khullar JJ.A.), 2022 ABCA 112, 44 Alta. L.R. (7th) 5, [2022] 8 W.W.R. 231, 506 C.R.R. (2d) 174, [2022] A.J. No. 400 (QL), 2022 CarswellAlta 772 (WL), affirming the conviction of the accused for possession of cannabis for the purpose of trafficking. Appeal dismissed, Martin and Kasirer JJ. dissenting.

*Rubinder Dhanu, Rebecca J. K. Gill and Uphar K. Dhaliwal*, for the appellant.

*Amber Pashuk and Kyra Kondro*, for the respondent.

*Jeremy Streeter and Jacob Millns*, for the intervener the Attorney General of Ontario.

*Tom Spark*, for the intervener the Attorney General of Alberta.

The following are the reasons delivered by

ROWE AND O'BONSAWIN JJ. —

I. Overview

[1] The appellant, George Zacharias, was pulled over on the highway for a traffic stop. After a sniffer dog gave a positive indication for drugs in the appellant's vehicle, police searched the vehicle and seized over 100 pounds of marijuana. The appellant was convicted of possession of marijuana for the purpose of trafficking. The trial judge found that the police had breached the appellant's rights under ss. 8 and 9 of the *Canadian Charter of Rights and Freedoms* in conducting a sniffer search and investigative detention. This appeal is about the lawfulness of the state actions which followed those initial *Charter* breaches and whether the various breaches warrant exclusion of the evidence under s. 24(2).

[2] In our view, the arrests that followed the sniffer search in this case were also in violation of the *Charter*. The state cannot rely on unlawfully obtained evidence to satisfy the reasonable and probable grounds requirement for arrest. Where the court finds a breach of the *Charter* has occurred, the breach must be considered in the s. 24(2) analysis. However, absent additional or independent state misconduct, a breach that is entirely consequential on an initial violation is unlikely to significantly increase the overall seriousness of the *Charter*-infringing state conduct under the s. 24(2) analysis. Rather, a consequential breach will be most relevant to the impact on the *Charter*-protected interests of the accused.

[3] For the reasons that follow, while we accept that the arrests and searches incident to arrest in this case constituted additional violations of the *Charter*, we would

affirm the decision not to exclude the evidence under s. 24(2) of the *Charter*. Accordingly, the appeal is dismissed.

## II. Facts

[4] On February 17, 2017, the appellant was pulled over on Highway 1 near Banff by Constable MacPhail of the Royal Canadian Mounted Police (“RCMP”). The stop was a traffic stop initiated as a result of a burnt-out light and illegally tinted windows on the appellant’s truck. After pulling over the appellant, Constable MacPhail made several observations that resulted in him placing the appellant under investigative detention and calling for a sniffer dog to scan for drugs.

[5] During the initial stop, Constable MacPhail asked the appellant questions about where he was travelling and why. When he requested the appellant’s driver’s licence and registration, the appellant responded that his wallet had been stolen and offered his passport instead. Constable MacPhail described the appellant as “extremely nervous” and noted that his hands were shaking. This nervousness diminished over time. He also observed a large amount of luggage in the truck and a commercial grade tonneau cover concealing the contents of the truck box.

[6] When Constable MacPhail ran the appellant’s name and identification through the police database, he discovered an entry from 2014 related to drugs. The file was locked down and he had to call the Real Time Information Centre for further information. The Information Centre informed Constable MacPhail that the appellant

was the subject of “a complaint of unknown reliability but was said to be an individual tied to the distribution of large quantities of marihuana and cocaine” (A.R., vol. I, at p. 14).

[7] According to Constable MacPhail, the information from the Real Time Information Centre confirmed his suspicions that the appellant was transporting drugs. In addition to the 2014 entry on his record, he made the following observations and inferences: (i) Highway 1, the route the appellant was travelling, was a known drug corridor and Calgary a known destination for drugs; (ii) the appellant’s story of visiting his sister for “a couple of days” was inconsistent with the large amount of luggage; (iii) it was suspicious that the luggage was in the cab of the truck rather than the box; (iv) the type of tonneau cover on the truck bed was often used by drug couriers; (v) “Back the Blue” stickers like the one the appellant had on his window were often used to avoid being pulled over; (vi) the appellant’s claim that his son had purchased the truck with the decal on it was inconsistent with the fact that the truck was registered in the appellant’s name; and (vii) the appellant was extremely nervous, albeit less so over time.

[8] Constable MacPhail placed the appellant under investigative detention and called for a sniffer dog. The appellant declined the opportunity to speak to counsel. Constable MacPhail conducted a pat-down search of the appellant’s front pocket area and placed him in a police vehicle. After around 20 minutes, the sniffer dog arrived with its handler and signalled that drugs were present. Constable MacPhail concluded

that he had reasonable and probable grounds to arrest the appellant for possession of a controlled substance and did so.

[9] Upon placing the appellant under arrest, Constable MacPhail conducted a search of the appellant's truck, including of duffel bags located in the truck box. He discovered 101.5 pounds of cannabis, some cannabis pastries or edibles, a jar with a substance he took to be cannabis, and \$12,600 in cash. Constable MacPhail re-arrested the appellant for possession for the purpose of trafficking. The appellant was then removed from the first police car, handcuffed, and driven to the Banff police detachment in a second police vehicle. At the detachment, the appellant was required to strip to one layer of clothing and remove his shoes. He was arrested for a third time for possession of proceeds of crime over \$5,000. He was released from police custody at 1:37 a.m., approximately six hours after arriving to the detachment and seven hours after being pulled over.

[10] At the *voir dire*, Constable MacPhail testified that he had been an RCMP officer for 14 years. At the time of the appellant's arrest, he was part of the Roving Traffic Unit, which specializes in detecting and intercepting criminals travelling on the highway. Constable MacPhail had been a member of this unit for 8½ years and, in that time, had conducted between 12,000 to 15,000 traffic stops. Constable MacPhail had also acted as an RCMP instructor for the past 3 years and taught over 15 courses on traffic enforcement investigations.

### III. Judicial History

A. *Alberta Court of King's Bench*

[11] The trial judge identified the primary issue before her to be whether Constable MacPhail had reasonable suspicion to enter into an investigative detention and deploy a sniffer dog. She concluded he did not, as the only objective element for suspicion was a police database entry from 2014 which was unconfirmed and of unknown reliability. As a result, the trial judge found that the police had breached the appellant's ss. 8 and 9 *Charter* rights by virtue of the sniffer dog search and investigative detention.

[12] However, the trial judge went on to conclude that the evidence should not be excluded under s. 24(2). First, with respect to the seriousness of the state conduct, there was no evidence of a deliberate or systemic breach of the *Charter*. Constable MacPhail's failure to meet the reasonable suspicion standard was "miniscule" and not the result of negligence. While he did not meet the requisite standard, "he was extremely close to crossing it" (A.R., vol. I, at p. 21). Second, with respect to the impact of the breach on the *Charter*-protected interests of the appellant, the trial judge noted that the search was of a vehicle on a public highway. This did not attract a high expectation of privacy, as would be so in the case of a home or computer. The search also did not demean the appellant's dignity. Finally, with respect to society's interest in an adjudication on the merits, the trial judge found that the evidence was both highly reliable and the only evidence for the prosecution's case. She also noted that the offence was serious despite the legalization of marijuana, given the quantity. After conducting

her s. 24(2) analysis, she concluded that excluding the evidence would bring the administration of justice into disrepute.

B. *Alberta Court of Appeal, 2022 ABCA 112, 44 Alta. L.R. (7th) 5*

[13] The appellant appealed his conviction, arguing that the trial judge erred in her s. 24(2) analysis on the *voir dire*. In particular, he argued that the trial judge erred by failing to consider the consequences that flowed from the unlawful investigative detention and sniffer dog search.

[14] A majority of the Court of Appeal dismissed the appeal (per Wakeling and Crighton JJ.A.). The majority agreed with the Crown that trial judges are not required to consider conduct that might be relevant to a *Charter*-protected interest if that conduct was not argued by the parties and no findings were made in respect of it. It was not surprising that the trial judge only made findings on the investigative detention and sniffer dog search, as these were the only assertions set out in the appellant's *Charter* notice. The majority concluded that entertaining the new arguments raised on appeal would undermine the role of the trial judge.

[15] The majority also concluded that while the trial judge had failed to consider the s. 9 breach — the investigative detention — under the second factor of the s. 24(2) test, this did not affect the result.



[16] Khullar J.A. (as she then was), dissenting, would have allowed the appeal, excluded the evidence, set aside the conviction, and entered an acquittal. She agreed with the trial judge that the first and third factors of the s. 24(2) test did not pull toward exclusion of the evidence. However, after a fresh analysis of the second factor, she concluded that, on balance, the evidence should be excluded.

[17] In Khullar J.A.'s view, the record was sufficient to consider the new *Charter* breaches alleged by the appellant and the Crown would not be prejudiced by the court doing so. She concluded that the trial judge had failed to consider several breaches of the appellant's ss. 8 and 9 rights: the pat-down search; the search of the truck and its contents; the three arrests; and the detention which continued when the police placed the appellant in the police vehicle, handcuffed him, and detained him at the police detachment. Khullar J.A. considered these breaches at the second stage of the s. 24(2) test and determined that the impact of the breaches on the appellant's *Charter*-protected interests strongly favoured exclusion of the evidence. On balance, the factors pulled toward exclusion.

#### IV. Issues

[18] This appeal raises the following two issues.

[19] First, should this Court consider the new issues raised by the appellant for the first time at the Alberta Court of Appeal?

[20] Second, did the trial judge properly consider all of the relevant *Charter*-infringing state conduct? Answering this raises two further questions. First, did the police commit further breaches of the appellant's *Charter* rights by relying on the results of the unlawful sniffer dog search? And second, if so, how are these breaches to be factored into the s. 24(2) analysis?

## V. Analysis

### A. *New Issues on Appeal*

[21] The trial judge, based on the arguments before her, found two breaches of the *Charter*: s. 8 was breached, by virtue of the unlawful sniffer dog search, and s. 9 was breached, by virtue of the roadside investigative detention leading up to and during the sniffer dog search. On appeal before the Alberta Court of Appeal, the appellant argued that the trial judge had failed to consider several other breaches of ss. 8 and 9 of the *Charter* (paras. 43-44). These arguments engaged new issues beyond those raised at the *voir dire*.

[22] The appellant asks this Court to consider the new issues which the majority below declined to address, arguing that there is a sufficient record, no prejudice to the respondent, the Crown, and that a purposive and generous approach to the *Charter* requires the court to consider whether other state action constituted a breach of the appellant's *Charter* rights. The Crown, on the other hand, argues that the record is insufficient to address the new issues because it "could have elicited additional

evidence” in order “to flesh out the record” on several points, including the scope of the pat-down search, the reasons why Constable MacPhail placed the appellant in the back of the police car, and the circumstances of the appellant’s detention at the station (R.F., at para. 47). In addition, the Crown argues it would be unfair to allow the appellant to shift so far from his trial strategy and that there is no broader interest served by addressing the new issues.

[23] This Court has made clear that such new issues should be entertained only in “exceptional circumstances” (*R. v. J.F.*, 2022 SCC 17, at para. 40, citing *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3). Nevertheless, we conclude that the issue of whether police conduct in this case breached s. 8 or 9 of the *Charter* should be considered by this Court. The legal question on which the Court of Appeal diverged requires this Court to consider the dissenting judge’s path of reasoning.

[24] Like Khullar J.A., we are of the view that addressing this issue would not result in unfairness to the Crown. The appellant, in making his argument, alleges “nothing further other than the fact that [the arrests, searches, and detention in question] occurred” (A.F., at para. 70). The Crown does not dispute that these events occurred. At the *voir dire*, the Crown adduced evidence from the arresting officer Constable MacPhail, the backup officer, and the dog handler. In the Court of Appeal, the Crown did not suggest it would have called any further evidence, except in relation to the strip search, which is no longer at issue (C.A. reasons, at para. 48). With respect to the legal

issues before this Court, the Crown has had ample opportunity to respond to the positions taken in the reasons for the majority and the dissent in the Court of Appeal.

[25] The appellant's arguments rely on undisputed facts relating to his arrest; they can therefore be fairly considered on appeal. Given that no further evidence was given on these events, however, the Court will only consider the bare fact that this police conduct occurred. In other words, while it is appropriate for this Court to consider the *fact* of the appellant's arrest after the sniffer search, there were neither submissions nor evidence seeking to establish any circumstances of the arrest that were improper. In this way, no prejudice results to the Crown. Given the absence of prejudice, the importance of having the issue resolved by this Court, and with the benefit of the dissenting reasons below, we would exercise our discretion to address this new issue (see *Guindon*, at para. 20; see also *J.F.*, at paras. 40-41).

#### B. *Arrests Made as a Consequence of a Charter Breach*

[26] This appeal raises the question of whether the police breached the appellant's *Charter* rights by arresting him based on the results of an unlawful search. Lower courts across the country have reached divergent conclusions on the question of whether such arrests are lawful. As we will explain, a principled approach to the *Charter* mandates that police cannot rely on unlawfully obtained evidence in order to conduct a warrantless arrest. Where the grounds for arrest are based on evidence that is subsequently found to have been unlawfully obtained, the court must excise this

evidence from the factual matrix in order to determine whether the police had reasonable and probable grounds for arrest.

[27] In *R. v. Storrey*, [1990] 1 S.C.R. 241, this Court explained that in order to safeguard the liberty of Canadians, the *Criminal Code*, R.S.C. 1985, c. C-46, sets out strict standards for when police may exercise powers of arrest. In order to obtain a warrant for arrest, the police must demonstrate that they have reasonable and probable grounds to believe that the person they are seeking to arrest has committed an offence. Section 507 of the *Code* provides for a review mechanism whereby a justice, upon receipt of an information, determines whether the requisite grounds for arrest have been made out.

[28] The same standard of reasonable and probable grounds applies where the police arrest an individual without a warrant (*Storrey*, at p. 249). Section 495(1)(a) of the *Code* grants police the power to arrest individuals without judicial authorization if, on reasonable grounds, the police believe the person has committed or is about to commit an indictable offence. The test for whether the police were acting within their authority to conduct a warrantless arrest has both a subjective and an objective component (pp. 250-51). Subjectively, the arresting officer must honestly believe that the suspect committed the offence in question. In addition, those subjective grounds must be justifiable from an objective point of view. In evaluating whether the officer had reasonable and probable grounds for arrest, the court must conduct the analysis

from the perspective of a reasonable person standing in the shoes of the arresting officer (*R. v. Beaver*, 2022 SCC 54, at para. 72).

[29] In considering whether the police had reasonable and probable grounds to arrest the appellant in this case, Khullar J.A. concluded that “reasonable and probable ground[s] cannot be supplied by the results of an unlawful sniffer dog search” (para. 54). We agree.

[30] The conclusion that reasonable grounds for lawful arrest cannot be supplied by actions that involved violations of the *Charter* accords with principle and policy. Indeed, this conclusion is a logical extension of the applicable principles in other contexts where an initial *Charter* breach forms the basis for subsequent state action. An unlawful search, for example, cannot furnish the requisite grounds for a search warrant (*R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 59). Similarly, a lawful arrest is a pre-requisite for any search conducted incident to it (*R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 27; *R. v. Caslake*, [1998] 1 S.C.R. 51, at paras. 13-14; *R. v. Tim*, 2022 SCC 12, at paras. 49-50).

[31] This Court in *R. v. Grant*, [1993] 3 S.C.R. 223, explained the rationale that animates this rule in the search warrant context: in excluding justification for state conduct that is itself unconstitutional, “the state is prevented from benefiting from the illegal acts of police officers” (p. 251). In the same vein, a search incident to arrest is invalid if the arrest was not lawful because “the legality of the search is derived from

the legality of arrest [and] if the arrest is later found to be invalid, the search will be also” (*Caslake*, at para. 13).

[32] The need to ensure that the state cannot rely on conduct that violates the *Charter* applies regardless of whether the police are knowingly in breach of the law. The policy rationale is two-fold.

[33] First, respect for the *Charter* and robust protection of civil liberties mandates that the state not be permitted to minimize the impact of earlier unconstitutional actions that lead to a cascading series of well-meaning investigative steps. To allow the police to rely on their misconduct in such a way would fail to give meaningful effect to rights protected under the *Charter*.

[34] Furthermore, allowing the state to rely on *Charter* violations “through the back door” could incentivize police to be less careful in adherence to the law. For example, as this Court held in *Tim*, at para. 30:

Allowing the police to arrest someone based on what they believe the law is — rather than based on what the law actually is — would dramatically expand police powers at the expense of civil liberties. This would leave people at the mercy of what particular police officers happen to understand the law to be and would create disincentives for the police to know the law. Canadians rightly expect the police to follow the law . . . .

While the fact that the police erred unknowingly or in good faith will be considered at the s. 24(2) stage, it has no bearing on whether there has been a further violation of the *Charter* as a consequence of the initial misconduct.

[35] This conclusion is also supported by the preponderance of the jurisprudence. In *R. v. Monney* (1997), 153 D.L.R. (4th) 617 (Ont. C.A.), rev'd on other grounds [1999] 1 S.C.R. 652, the Court of Appeal for Ontario analogized the warrantless arrest context to search warrants. Rosenberg J.A., writing for the majority of the court, concluded that, similarly, when considering the validity of a warrantless arrest, "facts obtained as a result of a breach of the *Charter* . . . are excised from the [grounds for arrest]. The court must then determine whether the [arrest would have been valid] without the improperly obtained facts" (para. 98).

[36] In *R. v. MacEachern*, 2007 NSCA 69, 255 N.S.R. (2d) 180, the Nova Scotia Court of Appeal accepted the Crown's concession that the arrest in question was unlawful in light of it being based on an earlier breach of s. 10(b) of the *Charter*. In that case, a sniffer dog detected drugs in the appellant's backpack. The police detained and questioned the appellant without informing him of his right to counsel. In response to his answers to police, the appellant was arrested for possession. The Crown conceded in its factum on appeal that without the appellant's responses to the police, the officer did not have a subjective belief that the appellant was illegally in possession of drugs and had thereby committed an offence. The court agreed with the Crown that as a result, the arrest was unlawful.



[37] In *R. v. Blanchard*, 2011 NLCA 33, 308 Nfld. & P.E.I.R. 91, the Newfoundland and Labrador Court of Appeal agreed with the court below that as the initial sniffer dog search of the appellant's car was unlawful and led to a further search and arrest, the subsequent search and arrest were also in violation of the *Charter* (para. 34). Both the search warrant and the warrantless arrest were based on the results of the illegal sniff search (para. 13). The Court of Appeal characterized these breaches as a "cascade of *Charter* violations" (para. 34).

[38] Similarly, in *R. v. Pelucco*, 2015 BCCA 370, 327 C.C.C. (3d) 151, the majority of the British Columbia Court of Appeal agreed with the trial judge that the arrest at issue was unlawful, given that it was based on evidence that had been discovered unlawfully. In that case, unbeknownst to the appellant, the police had seized the cellphone of the person to whom he was arranging to sell cocaine. When the appellant arrived to complete the sale, he was arrested and drugs were found in his truck as well as, following execution of a search warrant, his home. The trial judge concluded that the search and seizure of the original buyer's cellphone was unlawful, as was the search of the appellant's vehicle and backpack. Therefore, the arrest, which was "based on" evidence uncovered from these unlawful searches, was also unlawful (para. 23). The Court of Appeal agreed (para. 72).

[39] Finally, we note that this Court has endorsed similar reasoning. In *R. v. Chaisson*, 2006 SCC 11, [2006] 1 S.C.R. 415, a police officer became suspicious when he noticed the appellant and a passenger sitting in a dark car behind a closed service

station. When he approached the vehicle, he saw the occupants react with shock and thought he saw the appellant throw something to the other side of the car. He ordered the occupants to exit the vehicle, detaining them, and arrested the appellant after seeing a bag of marijuana in the car. The trial judge concluded that the appellant's rights under ss. 8, 9 and 10(b) of the *Charter* had been violated: "... 'but for the [arbitrary] detention the marijuana [found by the police officer] on the floor [of the appellant's automobile] would not have been discovered and but for the marijuana on the floor being discovered, there would have been no right to arrest these men'" (para. 4). This Court held that the trial judge was entitled to conclude on the facts as stated that the appellant's ss. 8, 9 and 10(b) rights had been violated (para. 7).

[40] While some courts have reached the opposite conclusion on this question, we do not find their reasoning persuasive. The intervener the Attorney General of Alberta points to the recent decision of *R. v. Love*, 2022 ABCA 269, [2023] 1 W.W.R. 296, in which the Alberta Court of Appeal declined to apply the automatic excision rule to grounds for arrest premised on unlawful searches. The Court of Appeal based its decision on criticism of the automatic excision rule in the search warrant context and its conclusion that automatic excision in the arrest context "would nullify the subjective focus [and objective aspect] of the *Storrey* test" (para. 94).

[41] The rule that reasonable and probable grounds for arrest cannot be supplied by the results of unconstitutional state conduct does not conflict with the test set out in *Storrey*. As set out above, the *Storrey* test requires that the police have a subjective

belief, that is also objectively reasonable, that the arrestee has committed an offence. The onus is on the state to establish that these grounds exist (*Storrey*, p. 250). In order to ensure that the state is not able to rely on violations of the *Charter*, the reviewing judge must excise evidence that has been unconstitutionally obtained at the outset of this inquiry. Once this evidence has been removed from the factual matrix, the court applies the *Storrey* test to determine whether reasonable and probable grounds exist, having regard to both the subjective and objective components. In this inquiry, the court considers the totality of the circumstances known to the officer at the time of the arrest, but does not include evidence found to have been unconstitutionally obtained.

[42] Both the Attorney General of Alberta in its intervener submissions and the Alberta Court of Appeal in *Love* emphasize that unlike when drafting an information to obtain a search warrant, warrantless arrests are often carried out in dynamic situations (I.F., at para. 37; *Love*, at paras. 91-92). This is true. Nonetheless, the purpose of preventing police from being able to rely on unlawful conduct is not to prevent them from acting in the dynamics of the moment. The same constraint that should guide police in their interactions with individuals continues to apply: such actions must comply with the *Charter*. Thus, police are not required to take an additional step “to inquire into the constitutionality of prior investigative steps before acting on the information they yielded” (*Love*, at para. 92; see also I.F., Attorney General of Ontario, at para. 18, arguing this suggests police should be “required to stop their investigation”). Rather, police have been and continue to be required to consider whether they are acting within constitutional limits when they act. In short, the police

need to respond to exigencies, but in doing so must be mindful of the authority that the law confers and also the constraints that the law imposes.

[43] Canadians have a legitimate expectation that the police will know and comply with the law, especially the *Charter* (*Tim*, at para. 30; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, at para. 6; *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 67). This applies no less in dynamic situations. As this Court highlighted in *Storrey*, “[i]n the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest” (p. 249 (emphasis added); see also S. Coughlan and G. Luther, *Detention and Arrest* (2nd ed. 2017), at p. 91). This rule is also consistent with the principles that apply in the search warrant and search incident to arrest contexts.

[44] Before turning to how breaches of the *Charter* resulting from earlier breaches are to be factored into the s. 24(2) analysis, we pause to note the important difference between excision and exclusion. Where grounds for arrest are based on unconstitutionally obtained evidence, that evidence is to be excised from the factual matrix. However, we leave open the possibility of situations where, even after this evidence is excised, the arresting officer still meets the standard of reasonable and probable grounds for arrest. For example, if police arrest an individual after conducting an unlawful search, but the evidence uncovered from the search is only one contributing

factor to the decision to arrest, the arrest will still be lawful if the balance of the evidence suffices to establish reasonable and probable grounds.

[45] The automatic excision rule also does not, as suggested by the Attorney General of Ontario, create “categorical rules of exclusion” (I.F., at para. 16). The question of whether there has been a violation of the *Charter* is distinct from whether the evidence obtained as a result of that violation should be excluded from trial. The latter question is dealt with at the s. 24(2) stage, where the court considers the totality of the circumstances in order to determine, on balance, whether admission of the evidence will bring the administration of justice into disrepute.

[46] We turn now to how this analysis is to be undertaken, with a brief note on terminology.

C. *An Unlawful Arrest as a “Consequential” Breach in the Section 24(2) Analysis*

[47] Where an arrest is unlawful because it is premised on the results of a *Charter* breach, it is the initial *Charter* breach that renders what follows unlawful. In other words, there is a situation of linked or “cascading” *Charter* breaches (see *Blanchard*, at para. 34). We use the term “consequential” to refer to such breaches in the s. 24(2) analysis because the subsequent arrest is unlawful only as a consequence of the “initial” breach or breaches that preceded it.

[48] Importantly, an arrest that can be viewed *only* as a consequential breach is distinct from state action that is characterized by additional or independent misconduct, including conduct that can be considered an “independent” breach of the *Charter* (such as failing to give an arbitrarily detained accused their right to counsel upon arrest). In those circumstances, the subsequent state action is of a different character and will be factored into the s. 24(2) analysis differently.

[49] A pattern of *Charter* breaches, for example, may cumulatively increase the seriousness of the *Charter*-infringing state conduct (see *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (“*Grant* 2009”), at para. 75). Some factual scenarios will raise the issue of cumulative breaches, which may evidence a pattern of misconduct, rather than consequential ones alone, which will likely not (see *R. v. Lambert*, 2020 NSPC 37, 472 C.R.R. (2d) 1, at paras. 361-65, aff’d 2023 NSCA 8, at paras. 92-103 (CanLII); *R. v. Lauriente*, 2010 BCCA 72, 251 C.C.C. (3d) 492, at paras. 12 and 30; *R. v. Kossick*, 2017 SKPC 67, 392 C.R.R. (2d) 250, at paras. 97-98 and 126, aff’d 2018 SKCA 55, 365 C.C.C. (3d) 186; *R. v. White*, 2022 NSCA 61, 419 C.C.C. (3d) 123, at paras. 44-61; *Monney*, at para. 120; M. Asma and M. Gourlay, *Charter Remedies in Criminal Cases* (2nd ed. 2023), at p. 51).

[50] Having set out the foregoing distinction, we now address how such an unlawful arrest — which is a breach *only* by consequence of its connection to an unlawful search, and which demonstrates no additional state misconduct — should be factored into the s. 24(2) *Grant* analysis.

(1) The Section 24(2) Grant Analysis

(a) *The Seriousness of the Charter-Infringing State Conduct*

[51] The first line of inquiry under s. 24(2) asks whether the *Charter*-infringing state conduct is so serious that the court must dissociate itself from it. The spectrum of seriousness involves, at one end, “inadvertent or minor violations of the *Charter*” and, at the other, “wilful or reckless disregard of *Charter* rights” (*Grant* 2009, at para. 74; see also *Beaver*, at para. 120).

[52] An unlawful arrest that is a consequential breach must be factored into the first and second stages of the s. 24(2) analysis, but is unlikely to significantly impact the overall seriousness of the *Charter*-infringing state conduct. In the absence of additional state misconduct, the focal point for evaluating seriousness is likely to remain the initial breach: in this case, the preceding unlawful search. Where, as in this case, the police conduct is only off the mark to a “miniscule” degree, the seriousness of the initial breach will tend to be on the lower end of the scale. However, in other cases, the initial misconduct may be characterized as more serious; for example, if the police conduct was still inadvertent but further off the mark. In the latter case, while the consequential arrest would still be unlikely to significantly *increase* the overall seriousness of the misconduct, the seriousness would already be more severe given the focus on the initial breach.

[53] This is consistent with the approach followed in other cases. For example, where a search incident to arrest has been found unlawful *only* by virtue of the unlawfulness of the preceding arrest and the arrest evidences no other misconduct, greater emphasis is likely to be placed on the arrest itself rather than the “unremarkable” or “normal consequences of the arrest” that follow (see *R. v. Loewen*, 2018 SKCA 69, [2018] 12 W.W.R. 280, at paras. 77-78; see also *Tim*, at paras. 49-50 and 84-87). Where it is only the connection to the initial *Charter* breach that is the source of the misconduct, and where the police honestly believe they are proceeding lawfully, subsequent state conduct is unlikely to meaningfully increase the seriousness of the *Charter*-infringing state conduct.

[54] At the same time, we do not rule out the possibility that where the initial breach involves deliberate, intentional, or flagrant state misconduct, subsequent actions taken as a consequence of that initial breach may increase the overall seriousness of the *Charter*-infringing state conduct. The s. 24(2) analysis, of course, will depend on the facts of the case, and all cases will require “an evaluation of the seriousness of the state conduct that led to the breach” (*Grant* 2009, at para. 73). But where the police honestly believe that they have not committed any initial breach, actions taken on the basis of that initial breach are, to their mind, lawful, and do not demonstrate any heightened disregard for *Charter* rights or the law. In such a case, the subsequent state action or consequential breach is not deliberate, and therefore should be situated on the less serious end of the scale of culpability (see *Tim*, at para. 82).



(b) *The Impact on the Charter-Protected Interests of the Accused*

[55] The impact on the *Charter*-protected interests of the accused is distinct from the seriousness of the *Charter*-infringing conduct. As this Court stated in *Grant* 2009, in order to assess this factor, the court must “look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests” (para. 77).

[56] When additional rights and breaches of those rights are factored into the s. 24(2) analysis, there will necessarily be a more significant impact on the accused that is therefore relevant to the analysis of the second *Grant* factor. Consideration of all breaches as found is necessary to get an “accurate picture of the effects of the breaches” (C.A. reasons, at para. 51). Section 24(2) of the *Charter* requires “regard to all the circumstances”. To fail to have regard to the impact of an arrest on an accused where it occurred as a consequence of a preceding *Charter* breach would fail to take into account “all the circumstances”. The arrest here was unlawful and, therefore, must form part of the s. 24(2) analysis.

[57] Accordingly, we reject the Crown and interveners’ view that we should adopt the approach set out by the Court of Appeal for Ontario in *R. v. Jennings*, 2018 ONCA 260, 45 C.R. (7th) 224. In *Jennings*, the court in *obiter* reasoned that, for s. 8 breaches in breath sample cases, it would be incorrect in the s. 24(2) analysis “to consider not just the impact of the administration of the breath sample procedure, which is itself minimally intrusive, but the entirety of the procedure faced by the accused after

arrest” because that would create a categorical rule of exclusion (paras. 27 and 32). Thus, we would not adopt the approach suggested in *Jennings* in this case. Rather, where a court finds that an arrest is made in breach of the *Charter*, it will be necessary to consider such a breach in the s. 24(2) analysis, including the impacts on the accused’s *Charter*-protected interests (see *R. v. Reilly*, 2021 SCC 38, at para. 3; see also *R. v. Au-Yeung*, 2010 ONSC 2292, 209 C.R.R. (2d) 140, at paras. 41, 50 and 59). This will be the case whether or not the unlawful arrest can be considered to be a “consequential” breach.

(c) *Society’s Interest in an Adjudication on the Merits*

[58] The third factor looks to society’s interest more broadly, focusing on the truth-seeking function of a criminal trial (*Grant* 2009, at para. 79). The court considers factors such as the reliability of the evidence, the importance of the evidence to the Crown’s case, and the seriousness of the alleged offence (*R. v. McColman*, 2023 SCC 8, at para. 70). In our view, and in the absence of arguments on this point, consideration of conduct like the additional breaches in this case would not change the analysis for the third *Grant* factor.

(2) Summary

[59] The foregoing is meant to offer guidance in specific situations. A “consequential” breach is not a new “type” of *Charter* breach. It will not be necessary or useful in every case to determine whether the sequence of state conduct presents a

“consequential” breach. But this operates as guidance for cases where an arrest follows as a consequence of a search, and both are viewed as unlawful on judicial review. In these cases, the court must assess the seriousness of both the search and the arrest. The arrest, given that it is expected in the circumstances, is unlikely to significantly increase the overall seriousness of the *Charter*-infringing state conduct, but it will often result in a more significant impact on the individual’s *Charter*-protected interests. In this way, the s. 24(2) analysis does not become a rule of automatic exclusion, while at the same time, the court takes fully into account the impact on the *Charter*-protected interests of the accused.

## VI. Application

[60] Having set out the relevant principles, we now apply those principles in the circumstances of this case.

### (1) The Additional *Charter* Breaches

[61] Turning first to the violation stage, it is useful to recall the three arrests that took place in this case: (i) the first arrest for possession, based on the results of the sniffer dog search; (ii) the second arrest for possession for the purpose of trafficking, based on the searches (incident to arrest) of the interior of the vehicle and the duffel bags; and (iii) the third arrest for possession of proceeds of crime, also based on the search incident to arrest of the vehicle and its contents.

[62] Constable MacPhail testified to his grounds for the first arrest on the *voir dire*: “I was told by [the officer who deployed the sniffer dog] that I could place the accused under arrest for possession of a controlled substance, as his sniffer dog had provided a positive indication and sit confirmation to an odour of a controlled substance inside the vehicle” (A.R., vol. II, at p. 38). In other words, Constable MacPhail’s subjective belief that the appellant was in possession of a controlled substance relied primarily on the results of the sniffer dog search. As the trial judge’s conclusion that this sniffer search was unlawful is not at issue, we conclude that the subsequent arrest for possession was also unlawful. Without the sniffer dog search, the police would not have had reasonable and probable grounds for arrest.

[63] It is settled law that a lawful arrest is a prerequisite to a valid search incident to arrest (*Stillman*, at para. 27; *Caslake*, at paras. 13-14; *Tim*, at paras. 49-50). Therefore, in light of our conclusion that the first arrest was unlawful, we agree with Khullar J.A. that the searches of the cab of the truck, the box of the truck, and the duffel bags inside the vehicle incident to arrest were also unlawful and constituted a further breach of s. 8 of the *Charter*.

[64] Finally, given our conclusion that an unlawful search cannot provide the requisite grounds for an arrest, the second and third arrests are also unlawful. They were based on the results of these unlawful incidental searches. Without the unlawful searches, the police would not have had the requisite grounds for either arrest. The three arrests in this case therefore constituted further breaches of s. 9 of the *Charter*. The

placement of the appellant in the police vehicle (with handcuffs after the first arrest) and at the police detachment are further continuations of the s. 9 breaches occasioned by the arrests and investigative detention.

(2) The Section 24(2) *Grant* Analysis

[65] Having determined that the arrests and the incidental searches constituted breaches of ss. 8 and 9 of the *Charter*, those breaches must be factored into the s. 24(2) analysis. In addition, the Court of Appeal was correct to note, unanimously, that the trial judge erred in failing to consider in her s. 24(2) analysis the s. 9 breach she found, relating to the investigative detention. Where the trial judge has failed to consider a relevant factor, it is necessary to perform a fresh s. 24(2) analysis (*R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 67). Within this fresh analysis, the trial judge's findings of fact remain relevant and warrant deference, absent palpable and overriding error (see *Grant* 2009, at para. 129; *Beaver*, at para. 118).

(a) *The Seriousness of the Charter-Infringing State Conduct*

[66] The trial judge found that Constable MacPhail knew the applicable standard and sought to apply it, and that he was only off the mark to a “miniscule” degree. In her words, there was “no evidence of a deliberate or systemic breach” (A.R., vol. I, at p. 20). Although the trial judge failed to include the investigative detention in her s. 24(2) analysis, her findings on the sniffer search remain relevant, given that both state actions share the requisite standard of “reasonable suspicion”. This finding — that

Constable MacPhail was “extremely close” to the standard of reasonable suspicion — reduces the seriousness of both the unlawful sniffer search and the investigative detention, the two *Charter* breaches she found (see, e.g., *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250).

[67] On appeal, this Court has recognized that additional *Charter* breaches occurred in the sequence of events: the arrest which followed as a consequence of the sniffer search; the searches that followed incident to arrest; and the additional arrests that followed from those searches. There was nothing to indicate that those breaches were state misconduct, save that they were consequential on the sniffer search being unlawful. It was entirely unremarkable, for example, that the police would arrest the appellant after finding over 100 pounds of cannabis in his vehicle. The arrests (and searches incident) were not characterized by additional or independent misconduct.

[68] Further, the *Charter* breaches identified by the trial judge were not found to be intentional; it could not be said the police knew from the outset that they were acting beyond their lawful authority. Importantly, these additional breaches were breaches only because of the officer’s miscalculation in assessing the grounds for suspicion. These additional “consequential” breaches, therefore, do not raise the seriousness of the state conduct in this case; the focal point of this analysis remains the initial breaches that set the sequence of state conduct into motion.

[69] The *Charter*-infringing state conduct in this case was inadvertent and not wilful; it does not show a pattern or attitude of disregard for the appellant’s *Charter*

rights or the law. Therefore, even considering the additional breaches on appeal, this factor does not strongly favour exclusion.

(b) *The Impact on the Charter-Protected Interests of the Accused*

[70] First, in terms of the breaches found by the trial judge, the sniffer dog search was of a relatively “brief and non-intrusive” nature (*MacKenzie*, at para. 133, per LeBel J., dissenting). Where a s. 8 violation has occurred, this inquiry focuses on “the protected interests of privacy, and more broadly, human dignity” (*Grant 2009*, at para. 78; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 91; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 136). This Court has found that sniff searches are “minimally intrusive” (*Chehil*, at paras. 1 and 28; *MacKenzie*, at para. 86). As the trial judge noted, this search of the exterior of the appellant’s motor vehicle occurred on a public highway, which is a relevant factor.

[71] The s. 9 violations engage concerns over protecting the appellant’s “individual liberty from unjustified state interference” (*Grant 2009*, at para. 20; *Le*, at para. 152; *Beaver*, at para. 127). While the investigative detention unlawfully restricted the appellant’s liberty and movement, the appellant was first lawfully detained for the traffic infractions (see *Tim*, at para. 92). While the sniffer dog search prolonged this detention, the fact that the appellant was lawfully stopped in the first place remains relevant.

[72] Second, while the additional breaches found on appeal did not heighten the seriousness of the *Charter*-infringing state conduct under the first *Grant* factor, they necessarily result in a more significant impact for the second *Grant* factor, the *Charter*-protected interests of the accused. As in *McColman*, as a result of the investigative detention and sniffer dog search, the appellant was arrested, and then brought to the police station, where he was detained for several hours. The undisputed circumstances of this arrest (including the fact that he was handcuffed) are relevant to assessing the impact on his liberty. In terms of his privacy interests, the police obtained significant evidence against the appellant. Unlike in *McColman*, the police in this case went further and conducted a search of the appellant's vehicle and its contents (including duffel bags). This Court has held that motorists have a reduced expectation of privacy in their vehicles (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 30; *Tim*, at para. 93). The search of the duffel bags involves a greater intrusion on the appellant's privacy interests.

[73] Taken together, the arrests and searches which flowed from those arrests resulted in a more significant impact on the appellant's privacy, liberty, and dignity. The second *Grant* factor, therefore, moderately favours exclusion.

(c) *Society's Interest in an Adjudication on the Merits*

[74] The evidence in this case — the drugs, drug paraphernalia, and cash — was real, reliable, and crucial to the Crown's case. Given the large quantity of cannabis (over 100 pounds), this is a serious offence. Both of these elements mean that there is



a strong societal interest in adjudication of the case on its merits. This remains so even when the additional breaches are factored in. This third *Grant* factor, therefore, strongly favours admission of the evidence.

(d) *Balancing*

[75] The first two *Grant* factors favour exclusion, albeit not strongly for the first and moderately for the second. We pause to note, briefly, that it was incorrect for the dissenting judge to state that either of the first *Grant* factors would favour *admission* (C.A. reasons, at para. 63). The first two branches never favour admission — at most, they can weakly favour exclusion (see *Le*, at para. 141).

[76] As mentioned, the third *Grant* factor tends strongly in favour of admission of the evidence. The pull of the first two factors in this case is insufficient to outweigh the third; thus, overall the circumstances favour admission. This conclusion is consistent with other decisions of this Court that involved a less serious *Charter* breach, a significant or moderately intrusive impact, and evidence that was real, reliable, and crucial to the Crown's case (see, e.g., *Grant* 2009, at para. 140; *Vu*, at para. 74). Thus, having balanced the factors, we would affirm the decision to admit the evidence and dismiss the appeal.

The following are the reasons delivered by

CÔTÉ J. —

## I. Introduction

[77] I agree with my colleagues Rowe and O’Bonsawin JJ. that the appeal from the Alberta Court of Appeal’s decision (2022 ABCA 112, 44 Alta. L.R. (7th) 5) should be dismissed. However, I do not agree with their proposition that the state “cannot rely on unlawfully obtained evidence to satisfy the reasonable and probable grounds requirement for arrest” (para. 2; see also Martin and Kasirer JJ.’s reasons, at para. 107). While this Court has never directly considered the issue, my colleagues’ position is, in my respectful view, difficult to reconcile with both (1) this Court’s longstanding jurisprudence on s. 24(2) of the *Canadian Charter of Rights and Freedoms*, and (2) the framework for warrantless arrests set out in *R. v. Storrey*, [1990] 1 S.C.R. 241.

[78] First, a *Charter* breach that leads to incriminating evidence being uncovered will inevitably result in an arrest or other investigative steps by the police. Absent independent or additional police misconduct, this Court has never treated such arrests or investigative steps as separate *Charter* breaches in its s. 24(2) analysis.

[79] Second, the objective judicial assessment of a police officer’s subjective grounds for a warrantless arrest must be based on the “totality of the circumstances known to the officer at the time of the arrest” (*R. v. Tim*, 2022 SCC 12, at para. 24, citing *Storrey*, at pp. 250-51). In evaluating the officer’s objective grounds for arrest, “courts must recognize that, [o]ften, the officer’s decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available

information which is often less than exact or complete” (*R. v. Beaver*, 2022 SCC 54, at para. 72, quoting *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 750, per Doherty J.A.).

[80] In this case, my four colleagues’ view of whether Cst. MacPhail had reasonable and probable grounds for arrest is not based on the circumstances known to him at the time of the arrest, which included the sniffer dog’s clear and unequivocal indication of controlled substances in the appellant’s vehicle. Rather, it hinges entirely on a retroactive judicial assessment of the lawfulness of the sniff search. However, the focus of this Court’s s. 24(2) analysis should be — and always has been — on that initial search (and in this case, the accompanying investigative detention while awaiting the arrival of the dog). The presence of additional “breaches” was not argued at trial and has little, if any, impact on Rowe and O’Bonsawin JJ.’s s. 24(2) analysis, with which I am in substantial agreement. I would dismiss the appeal and uphold the appellant’s conviction.

## II. Analysis

[81] My colleagues Rowe and O’Bonsawin JJ. restate their conclusion as follows: “. . . reasonable [and probable] grounds for lawful arrest cannot be supplied by actions that involved violations of the *Charter* . . .” (para. 30; see Martin and Kasirer JJ.’s reasons, at para. 107, where this “sound proposition” is endorsed). They view this conclusion as a “logical extension” of the principles applicable in other contexts where an initial *Charter* breach forms the basis for subsequent state action,

referring in this regard to search warrants and searches incident to arrest (Rowe and O'Bonsawin JJ.'s reasons, at para. 30, citing *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Caslake*, [1998] 1 S.C.R. 51; *Tim*).

[82] To understand why these contexts are distinguishable, it is necessary to review this Court's s. 24(2) jurisprudence and its jurisprudence relating to *Storrey* in some detail. I consider each in turn below before discussing the implications of my colleagues' approach.

A. *Section 24(2) of the Charter*

(1) Our Court's Section 24(2) Jurisprudence

[83] If, as my colleagues conclude, a lawful arrest cannot be based on unlawfully obtained evidence, then this Court has neglected or failed to consider a host of additional *Charter* breaches throughout its s. 24(2) jurisprudence. The accused's arrest — made directly on the basis of unlawfully obtained evidence — would have been a *Charter* breach in, among others, *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (“*Grant 2009*”); *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Lafrance*, 2022 SCC 32; and *R. v. McColman*, 2023 SCC 8. More particularly, *Grant 2009*, *Harrison*, and, most recently, *McColman* serve to illustrate this point.

(a) *Grant 2009*

[84] In *Grant 2009*, the accused was arbitrarily detained by the police at the side of the road. During his unlawful detention, he admitted to having a firearm. He was then arrested and searched by the police, who seized a loaded revolver (paras. 7-8). Writing for the majority of the Court, McLachlin C.J. and Charron J. identified two *Charter* violations: the initial arbitrary detention (s. 9), and the corresponding breach of the accused's s. 10(b) right to counsel while the police officer was "probing for answers that would give him grounds for search or arrest" (paras. 135-36). Though it did not explicitly consider the issue, the Court did not treat the police's subsequent arrest or search as unlawful in its s. 24(2) analysis (paras. 131-40).

(b) *Harrison*

[85] In *Harrison*, the companion appeal to *Grant 2009*, the police arbitrarily detained the accused during an unlawful traffic stop. The accused was unable to provide his driver's licence. The police ran a computer check and learned that he was driving while his licence was suspended, for which he was arrested. The police then searched the vehicle "incident to arrest", ostensibly for the appellant's missing driver's licence, even though its whereabouts was irrelevant to the charge of driving while suspended" (para. 8). During that search, the police found two boxes of cocaine and arrested the appellant on drug charges as well (para. 9). Writing for the majority of the Court, McLachlin C.J. held that "[t]he *Charter* breaches in this case are clear": (1) the initial detention on the side of the road, and (2) the search of the vehicle, which was not

incidental to the appellant's arrest for driving with a suspended licence (para. 20). As in *Grant* 2009, McLachlin C.J. did not factor in either of the accused's arrests as separate or additional *Charter* breaches in her s. 24(2) analysis, although she ultimately excluded the cocaine evidence.

(c) *McColman*

[86] Most recently, in *McColman*, the police unlawfully detained the accused on his driveway. "As a result of the unlawful stop, Mr. McColman was arrested and brought to the police station, where he was detained for several hours [and] [t]he police obtained significant evidence against him" (para. 68), including the inculpatory results of two breathalyzer tests. The sole *Charter* breach identified by Wagner C.J. and O'Bonsawin J., writing for a unanimous Court, was the accused's arbitrary detention prior to his arrest (see paras. 51-52). While the Court considered the circumstances of the subsequent breathalyzer tests and arrest of the accused in its analysis of the factors outlined in *Grant* 2009 (see para. 68), it did not treat those breathalyzer tests or that arrest as *Charter* breaches.

(d) *Section 8*

[87] In each of *Grant* 2009, *Harrison*, and *McColman*, the incriminating evidence flowed from an initial unlawful detention. The approach of my four colleagues in the instant case is also inconsistent with how our Court has treated unlawful searches that uncover evidence of a crime. In their view, every s. 8 breach

would become a breach of both s. 8 and s. 9 if the search resulted in an arrest. This is not supported by our Court's jurisprudence; for example, in *Paterson*, the Court treated an unlawful search that uncovered a firearm and drugs and resulted in the accused's arrest solely as a breach of s. 8 (see paras. 2 and 41-57).

[88] That being said, it may happen that the police commit additional or independent *Charter* breaches during their investigation. If so, those breaches must and will be considered in the s. 24(2) analysis; this will be the case, for example, if an accused is subsequently denied the right to counsel upon arrest or is unreasonably searched incident to their arrest.

(2) Sniff Searches

[89] Our Court has considered the legality of sniffer dog searches on multiple occasions. It has affirmed that sniff searches are a minimally privacy intrusive form of search (see *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 1 and 28; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 86). Indeed, it is because of the “minimally intrusive, narrowly targeted, and highly accurate nature” of sniff searches that only a “reasonable suspicion” of criminal activity is required to justify their use (*Chehil*, at para. 28, citing Binnie J. in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 60; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, at paras. 81-84).

[90] A unanimous Court in *Chehil*, and a majority of the Court in *MacKenzie*, held that the sniff searches at issue were lawful and did not breach s. 8. The Court therefore did not need to consider s. 24(2) or the issues arising in this appeal. However, in *MacKenzie*, the four dissenting judges who did find the sniff search to be a breach of s. 8 (LeBel J., together with McLachlin C.J. and Fish and Cromwell JJ.) did not treat the accused's arrest or any subsequent police conduct as unlawful. As in this case, the police arrested the accused and searched his car following a positive indication by the sniffer dog (paras. 19-21). LeBel J. identified two *Charter* breaches: the sniff search and the accompanying investigative detention (paras. 128-36).

[91] Under the approach of my four colleagues in this case, LeBel J. should also have found that the appellant's arrest, his ongoing detention, and all searches subsequent to the unlawful sniff search were *Charter* breaches. According to my colleagues Martin and Kasirer JJ., these additional "breaches" — all of which turn on whether the initial sniff search was lawful — would materially alter the result of the s. 24(2) analysis. I will consider the jurisprudential difficulties as well as the implications of this approach in more detail below.

#### B. *Storrey*

[92] The reasonable and probable grounds standard for a warrantless arrest was recently summarized in *Tim*, at para. 24, referring to *Storrey*, at pp. 250-51:



A warrantless arrest requires both subjective and objective grounds. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint. The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer. [Emphasis added.]

[93] In *Beaver*, the Court affirmed that the analysis must be conducted “from the perspective of a reasonable person ‘standing in the shoes of the [arresting] officer’” (para. 72, citing *Chehil*, at paras. 45 and 47; *MacKenzie*, at para. 63). Writing for the majority, Jamal J., at para. 72, cited with approval part of the following passage from *Golub*, per Doherty J.A.:

The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer’s decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant. [p. 750]

[94] In *R. v. Love*, 2022 ABCA 269, [2023] 1 W.W.R. 296, the Court of Appeal of Alberta directly considered whether the logic behind the excision of unconstitutionally obtained information, in the search warrant context, should be applied to warrantless arrests. The Court of Appeal concluded that the automatic excision rule, if applied to the context of warrantless arrests, would conflict with *Storrey*:

Automatic excision, operating after-the-fact, would nullify the subjective focus of the *Storrey* test by artificially altering the information on which the arresting officer relied at the time. It would distort the objective aspect of the test by shifting the focus away from the factual basis for the officer's action. It would conflict with the Supreme Court's direction that an officer exercising a warrantless power "is entitled to disregard only information which he has good reason to believe is unreliable": *Chehil* at para 33. [para. 94]

[95] I agree. On my colleagues' approach, the assessment of an officer's grounds for arrest would no longer be based on the "circumstances known to the officer at the time of the arrest" (see *Tim*, at para. 24; *Storrey*, at pp. 250-51; *MacKenzie*, at para. 33; *Beaver*, at paras. 72 and 88; and *Golub*, p. 750). Rather, their approach hinges entirely on a retroactive judicial assessment of the underlying sniff search.

[96] This Court has made it clear that the reasonable and probable grounds standard relates to the facts, not to the existence in law of the offence in question (see *Tim*, at para. 28, quoting *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, at para. 78; *Frey v. Fedoruk*, [1950] S.C.R. 517, at p. 531). Judicial reflection is not a luxury an officer can afford. It is artificial and inconsistent with the reasonable and probable grounds standard to hold that an arrest made based on clear and reliable evidence of a crime is unlawful. If that evidence is later determined to have been obtained through an unlawful search or detention, that search or detention will be properly evaluated in the s. 24(2) inquiry.

[97] With this in mind, I would respectfully submit that it is understandable why this Court has declined, in the three decades since *R. v. Grant*, [1993] 3 S.C.R. 223, to

apply the logic behind excision to the context of warrantless arrests. Similarly, and with respect, my colleagues' reliance on searches incident to arrest (see Rowe and O'Bonsawin JJ.'s reasons, at paras. 30-31; Martin and Kasirer JJ.'s reasons, at para. 128) is misplaced. Because the common law power to search incident to arrest is derived solely from the legality of the arrest, "if the arrest is later found to be invalid, the search will be also" (*Caslake*, at para. 13; see also *Golub*, at pp. 753-54, per Doherty J.A.). By contrast, the legality of an arrest made based on the results of an unlawful search or detention is not derived solely from the basis for the underlying search or detention. The arrest is based on an additional factor — the discovery of the incriminating evidence itself. Again, if the underlying search or detention is subsequently found to be invalid, that breach will be properly assessed in the s. 24(2) inquiry.

C. *Implications for the Exclusion of Evidence Under Section 24(2)*

[98] Inevitably, an unlawful search or detention that uncovers evidence of a crime will result in an arrest or other investigative steps by the police. On my colleagues' approach, what transforms the initial *Charter* violations — in this case, the unlawful sniff search and accompanying investigative detention — into a series or "cascade" of additional *Charter* breaches has nothing to do with any subsequent police misconduct. Rather, it depends entirely on whether the unlawful search or detention yields incriminating evidence and thus naturally results in an arrest. With respect, to classify all subsequent police conduct as *Charter*-infringing merely because it flows

from the results of an initial breach comes dangerously close to the “fruit of the poisoned tree” doctrine eschewed by this Court’s s. 24(2) jurisprudence.

[99] In this regard, in *R. v. Jennings*, 2018 ONCA 260, 45 C.R. (7th) 224, the Court of Appeal for Ontario considered the *Charter*-protected interests at stake for those who provide a breath sample to police. Writing for the court, Miller J.A. (Watt and Hourigan JJ.A. concurring) reasoned that in *Grant* 2009, this Court expressly chose the breath sample procedure as an example of a minimally intrusive form of search (para. 29, citing *Grant* 2009, at paras. 106-11). He went on to state that this Court “assuredly did so in the knowledge that most formal demands for breath samples would be accompanied by an arrest”, i.e., for drivers who test above the legal limit (*Jennings*, at para. 29). Drivers in such cases are “almost invariably arrested and taken to the police station to provide further breath samples” (para. 32).

[100] Like the breath sample procedure, this Court has characterized sniff searches as a minimally intrusive form of search, and it has assuredly done so with the knowledge that a positive indication from a sniffer dog will lead to an arrest or other investigative steps by the police (see, e.g., *Cehil*, at para. 55). In their s. 24(2) analysis, my colleagues Martin and Kasirer JJ. do not refer to any of this Court’s jurisprudence on sniff searches or address the relatively minimal impact of this form of search. With respect, their analysis runs contrary to a sound characterization of the *Charter*-protected interests at stake for an individual subject to a sniff search (see *Cehil*, para. 19; see also *Kang-Brown; A.M.*).

[101] My colleagues Martin and Kasirer JJ. rely primarily on *Tim and R. v. Reilly*, 2021 SCC 38, for the undisputed proposition that all *Charter* breaches must be considered in the s. 24(2) analysis. But this proposition does not establish that certain police conduct constituted a *Charter* breach in the first place. Their approach is not “consonant” with *Grant 2009*, in which this Court did not treat the accused’s arrest and search as *Charter* violations by virtue of their connection to the initial breach. Likewise, the need to consider “all the circumstances” under s. 24(2) (see Martin and Kasirer JJ.’s reasons, at paras. 111-15 and 129-33) — which, in my view, refers to the three avenues of inquiry set out in *Grant 2009* (see para. 71) — does not mean that “all” of those circumstances amount to *Charter* breaches.

[102] Martin and Kasirer JJ.’s emphasis on the seriousness of the *Charter*-infringing state conduct in this case ignores the fact that all police conduct subsequent to the sniff search was based on an intervening factor — the discovery of incriminating evidence. The question at the first stage of the *Grant 2009* analysis may be framed as follows: “Did [the police conduct] involve misconduct from which the court should be concerned to dissociate itself?” (*McColman*, at para. 57, quoting McLachlin C.J. in *Harrison*, at para. 22). In my view, an arrest made on the basis of clear and reliable evidence of a crime is not “misconduct” from which the court should be concerned to dissociate itself. The relevant misconduct in this case, from which the Court should be concerned to dissociate itself, is Cst. MacPhail’s initial decision to deploy a sniffer dog without lawful authority to do so.

[103] To hold otherwise artificially distorts the s. 24(2) analysis and, I would respectfully submit, represents a shift towards automatic exclusionary rules that have been rejected in our jurisprudence. At the very least, the issues raised in this appeal merit attention by a full Court in a case where the additional breaches were argued and considered at trial.

### III. Disposition

[104] In the result, labelling all police conduct subsequent to the sniff search in this case as unlawful does not change the outcome of Rowe and O’Bonsawin JJ.’s s. 24(2) analysis, with which I substantially agree. The trial judge correctly characterized Cst. MacPhail’s failure to meet the reasonable suspicion standard as “miniscule” (A.R., vol. I, at p. 20). At the first stage of the *Grant* 2009 analysis, the seriousness of the *Charter*-infringing state conduct only weakly favours exclusion. At the second stage, I agree with my colleagues Rowe and O’Bonsawin JJ. that the impact on the appellant was moderate, bearing in mind the “minimally intrusive” nature of a sniff search and the reduced expectation of privacy in a motor vehicle (see *Chehil*, at para. 28; *MacKenzie*, at paras. 31, 86 and 133). The investigative detention was brief, necessary to facilitate deployment of the sniffer dog, and accompanied by the right to counsel. At the third stage, the evidence is both highly reliable and integral to the Crown’s case, which strongly favours admission.

[105] On balance, I would affirm the decision to admit the drug evidence, dismiss the appeal and uphold the appellant’s conviction.

The following are the reasons delivered by

MARTIN AND KASIRER JJ. —

I. Overview

[106] We have had the advantage of reading the reasons of our colleagues Rowe and O’Bonsawin JJ. We agree with much of their reasons but, most respectfully, we disagree in the result. For the reasons that follow, we would allow the appeal, order the exclusion of the evidence, set aside the appellant’s conviction and enter an acquittal.

[107] First, we agree with our colleagues that in the circumstances of this case it is appropriate for the Court to exercise its discretion and consider the new issues raised on appeal, contrary to the reasoning of the majority at the Court of Appeal of Alberta. Second, we accept the sound proposition that a lawful arrest cannot be based on unlawful grounds, as Khullar J.A. (as she then was), dissenting at the Court of Appeal, would have held (2022 ABCA 112, 44 Alta. L.R. (7th) 5). More specifically, reasonable and probable grounds for arrest cannot be based on unconstitutional police misconduct. Third, we accept that the evidence at issue in this case was “obtained in a manner” that infringed each of the *Charter* rights that our colleagues recognize as violated, including each of the arrests and searches to which Mr. Zacharias was subject. Thus, like our colleagues and Khullar J.A. below, we conclude that the “threshold requirement” of the s. 24(2) analysis is met (see *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.), at para. 44, per Doherty J.A.).

[108] We respectfully disagree, however, with both the courts below and our colleagues on the legal framework that governs how multiple, connected breaches factor into the evaluative stage of the s. 24(2) analysis governed by *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. We observe that neither the trial judge nor the majority judges in the Court of Appeal properly subjected all breaches of the accused's *Charter* rights to complete scrutiny under s. 24(2). In fairness to the trial judge, we recognize that the additional breaches identified by Khullar J.A. and by this Court were not before her. However, the trial judge identified a breach of Mr. Zacharias's s. 9 right, resulting from an unlawful investigative detention, and erred in law by not considering this breach within her s. 24(2) analysis. This approach is incompatible with the legal principles this Court articulated in *Grant*. All state conduct that undermines the rule of law by violating the *Charter* must be subject to proper judicial scrutiny under all three branches of that test. In our respectful view, our colleagues carry this error forward when they conclude that consequential breaches are unlikely to increase the overall seriousness of *Charter*-infringing state conduct unless those breaches reflect a "pattern" of misconduct or an "independent" wrong. Less exclusionary weight should not be attached to a breach in respect of any of the branches of the *Grant* test merely because a court has determined that it was "consequential" to another, earlier breach.

[109] The fact that a consequential or cascading breach may be seen to be caused by an initial breach cannot obviate the need to factor it into the analysis and give full consideration to whether it reflects conduct from which courts must disassociate themselves (*Grant*, at para. 72). Even when a consequential breach discloses no



independent misconduct it is nonetheless a breach of the rights that the *Charter* protects. As such, it contributes to the measure of seriousness of the state misconduct relevant to s. 24(2) pursuant to *Grant*. Each consequential breach serves to undermine the rule of law and necessarily contributes, to a greater or lesser extent, to the risk that admitting the evidence in question in the proceedings would bring the administration of justice into disrepute. For that reason, all state conduct that violates the *Charter* must be weighed carefully in the balancing that s. 24(2) demands. Ignoring the fact that consequential breaches add to the cumulative, and potentially compounding, measure of the seriousness of state misconduct is, in our respectful view, an error of law under s. 24(2) of the *Charter* as interpreted by this Court in *Grant*. There is no basis to discount its seriousness, either from the outset or at the end of the analysis, as advanced by the respondent and the intervening attorneys general.

[110] When this principle, which we take to be settled law, is duly recognized, a correct application of the s. 24(2) framework mandated by *Grant* compels exclusion of the evidence in this case, given the seriousness of the state misconduct that would otherwise be discounted. It is of course true that no single consideration can be allowed to overwhelm the flexible, contextual balancing exercise that s. 24(2) demands. The approach that s. 24(2) entrenched in the Constitution “rejected the American rule excluding all evidence obtained in violation of the Bill of Rights and the common law rule that all relevant evidence was admissible regardless of the means by which it was obtained” (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 280, per Lamer J. (as he then was)); see also *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 532, per Dickson C.J.; *Grant*, at

paras. 61-65). The approach mandated by s. 24(2) is different: courts must take proper account of the societal interests that can, on balance, favour either the admission or the exclusion of unconstitutionally obtained evidence.

[111] In this case, the conclusion that Mr. Zacharias's *Charter* rights were breached cannot in itself compel exclusion — but neither can the existence of real, reliable and crucial evidence compel inclusion. Rather, as s. 24(2) of the *Charter* itself makes plain, “all the circumstances” are relevant and must be considered at each stage of the test in *Grant*. Taking into account the seriousness of all of the state conduct that violated s. 8 and s. 9 of the *Charter*, the impact of that conduct on the accused and society's interest in proceeding to trial on the merits, we conclude that the administration of justice would be brought into disrepute by admitting the evidence. For that reason, it must be excluded.

## II. Analysis

### A. *The Law in Relation to Section 24(2)*

[112] The Court is called upon to consider the legal framework that governs the analysis under s. 24(2) of the *Charter*, which provides:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[113] This provision directs courts to have regard to “all the circumstances” in determining whether admitting evidence obtained in a manner that violated the *Charter* would bring the administration of justice into disrepute. If admitting the evidence would do so, then s. 24(2) directs that courts *shall* exclude it. Rather than asking whether to exclude the evidence, the question to be decided is “whether the administration of justice would be brought into disrepute by its admission” (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 139). As a matter of settled law, the tripartite framework that this Court articulated in *Grant* structures courts’ answers to this question.

[114] Here, the Court must identify the legal principles that govern how “all the circumstances” factor into the analysis when “consequential”, “linked” or “cascading” breaches of the *Charter* are at issue, that is to say breaches of the *Charter* that flow from an initial breach of an accused’s *Charter* rights by the state. We agree with our colleagues that the presence of additional, consequential breaches will “necessarily” result in more significant impacts on the *Charter*-protected interests of an accused and are “therefore relevant to the analysis of the second *Grant* factor” (para. 56). Thus, all such breaches must be given weight under the second line of inquiry mandated by *Grant*, which assesses the *impact of the state misconduct on the accused*.

[115] However, we respectfully reject the view that consequential breaches of constitutional rights can be characterized as unlikely to significantly affect the overall *seriousness of the state misconduct* simply because they are “expected” to occur (Rowe

and O’Bonsawin JJ.’s reasons, at para. 59). We disagree that under the settled *Grant* framework, the “focal point” for evaluating seriousness is the initial breach (para. 68). Further, we are unable to accept that “subsequent state conduct is unlikely to meaningfully increase the seriousness of the *Charter*-infringing state conduct” merely because of the connection of that conduct to earlier misconduct and the police’s honest belief that they are acting lawfully (para. 53). To the contrary, s. 24(2) and the *Grant* analysis mandate assessing the cumulative, and potentially compounding, seriousness of all of the conduct related to each of the violations at issue, whether or not they are consequential or cascade from an initial breach, and whether or not the police had such an honest belief. Two principles governing the assessment of the seriousness of *Charter*-infringing state conduct lead to this view: (1) seriousness is focused on the rule of law; and (2) the measure of seriousness is cumulative, necessarily taking into account all circumstances and all of the state’s misconduct.

(1) Seriousness Is Focused on the Rule of Law

[116] The first line of inquiry mandated by *Grant* is “an evaluation of the seriousness of the state conduct” that is at issue, viewed “in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*” (para. 73).

[117] In *Grant*, this Court recognized that the seriousness of state conduct is one factor to be balanced in the s. 24(2) analysis because the courts cannot be seen to “condone state deviation from the rule of law by failing to dissociate themselves from

the fruits of that unlawful conduct” (para. 72; see also *R. v. Tim*, 2022 SCC 12, at para. 82; *R. v. Beaver*, 2022 SCC 54, at para. 120). In other words, the first line of inquiry mandated by *Grant* flows from the concern “to preserve public confidence in the rule of law and its processes” (para. 73). Commentators have rightly observed that this “condonation theory” relating to the rule of law is the “key concept” that drives the law in relation to s. 24(2) (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 469; see also H. Parent, *Traité de droit criminel*, vol. IV, *Les garanties juridiques* (2nd ed. 2021), at para. 584). This point is settled in our jurisprudence: seriousness is to be evaluated based on “the extent to which the state conduct at issue deviates from the rule of law” (*R. v. McColman*, 2023 SCC 8, at para. 57, citing *Grant* and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22).

[118] All state action that violates the *Charter* necessarily deviates from the rule of law. The *Charter* functions to “constrain” and “limi[t]” all state actions inconsistent with the rights it enshrines (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, per Dickson J. (as he then was)). Indeed, the legal rights protected by ss. 7 to 14 of the *Charter* have been described by this Court as “essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law” (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 512, per Lamer J. (as he then was)). Thus, instances where police officers surpass these limits and violate the *Charter* undermine the rule of law and must be seen

as increasing the serious character of the state misconduct. There is accordingly a risk that public confidence in the administration of justice will also be thereby diminished.

[119] As this Court has repeatedly affirmed, “in a society founded on the rule of law, it is important that there always be a legal basis for the actions taken by police officers” (*Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, at para. 38, citing *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at pp. 28-29; *R. v. Sharma*, [1993] 1 S.C.R. 650, at pp. 672-73). This point bears repeating: there is no instance in which a breach of the rights guaranteed by the *Charter* does not undermine the rule of law.

[120] The circumstances here provide a case in point. While the conduct related to the initial unreasonable search may not have been in itself grave, the seriousness of the subsequent state misconduct — however “consequential” it may have been — was both relevant and significant. Police acted without lawful authority in subjecting the accused to further searches, and by detaining him for several hours, part of which was in handcuffs; the fact that these breaches of s. 8 and s. 9 of the *Charter* were consequential or cascading from the initial breach cannot mean that they should be discounted under the first branch of *Grant*. A breach is a breach. The consequential conduct was state conduct that violated the constitutional right to be free of arbitrary detention. It was conduct that undermined the rule of law.

[121] Of course, not all conduct that violates the *Charter* deviates from the rule of law to the same extent. As this Court recognized in *Grant*, violations may undermine

public confidence in the rule of law to a greater or lesser degree, depending on the gravity of the offending conduct that is at issue (paras. 73-74). There is a sliding scale or spectrum. We will not exhaustively review all of the considerations that may validly inform the assessment of the gravity of such conduct. Instead, we will focus on certain factors that require discussion in the circumstances of this case.

[122] One relevant factor is the extent to which the conduct reflects a deliberate disregard for *Charter* standards. It is for this reason that the Court has recognized a scale from “inadvertent” violations to those that display a “wilful or reckless disregard of *Charter* rights” (*Grant*, at para. 74). This scale is significant because it informs how gravely the rule of law is undermined. For instance, the rule of law is necessarily undermined, and the seriousness of the state misconduct is affected, when agents of the state wilfully disregard the fundamental constitutional constraints on their actions. By contrast, the Court has consistently recognized that state conduct at the less serious end of this scale will generally weigh less heavily in favour of the view that admitting the evidence would undermine the rule of law (see, e.g., *Grant*, at para. 74; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 43; *Le*, at para. 143). But even inadvertent breaches may still weigh in favour of exclusion (see, e.g., *Tim*, at paras. 84-89). As appellate jurisprudence has recognized, a deliberate breach is not the only form of serious breach (see, e.g., *Hamel v. R.*, 2021 QCCA 801, 72 C.R. (7th) 132, at para. 131, per Cournoyer J.A.). This is because a breach based on an honest and unintentional mistake is nonetheless a state action taken in the absence of legal authority.

[123] The extent to which state actors deliberately violate *Charter* standards is not the only consideration that is relevant to assessing how gravely the rule of law has been undermined. For instance, as our colleagues rightly recognize, in *Grant* this Court noted that “evidence that the *Charter*-infringing conduct was part of a pattern of abuse” will increase the exclusionary weight that flows from the first line of inquiry (para. 75). This consideration reflects the reality that “for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge” (*ibid.*). The recognition that a pattern may increase the seriousness of the state conduct is significant. It implies that police officers may believe they are proceeding lawfully, yet there may still be a serious departure from the requirements of the rule of law. Thus, it is an error to proceed as if the seriousness inquiry may only consider police officers’ states of mind. This is because the focus of the seriousness inquiry, like the s. 24(2) analysis as a whole, is “societal” rather than aimed at determining the blameworthiness of the particular police officers whose actions resulted in a *Charter* violation (para. 70).

[124] The societal focus of s. 24(2) also implies that the assessment of the seriousness of state misconduct that undermines the rule of law must take account of the values that underlie the *Charter* rights that were violated. As Dickson C.J. wrote in another context, “[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter*” (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136). These values and principles therefore inform the assessment of how seriously *Charter*-infringing state conduct undermines the rule



of law. They inform the key consideration of the nature and character of the police conduct that is at issue, viewed from a societal perspective. While *Charter* rights should never be trivialized, some violations may be more “minor” than others when these underlying values are accounted for (*Grant*, at para. 74). By contrast, other violations may show “a major departure from *Charter* standards” in light of the values the relevant rights were meant to protect (*Tim*, at para. 82). Thus, the Court’s reference in *Grant* to whether a breach was “minor” referred to a breach at the low end of the sliding scale or spectrum for the assessment of the nature and character of police conduct, viewed in light of the values the *Charter* protects.

[125] The full range of relevant values entrenched in the *Charter* should be considered. As this Court has said, the values reflected in the *Charter* “are not insular and discrete” (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326, per La Forest J.). Thus, where multiple rights are violated, the court must consider how the state conduct that is at issue implicates each underlying value, and how those values interact in the circumstances of the case. For instance, there is every reason to believe that state misconduct that undermines both the privacy interests protected by s. 8 and the liberty interests protected by s. 9 will be more serious than misconduct implicating only one of these underlying values, because the social interests in protecting privacy and liberty are intertwined and mutually reinforcing. But they are distinct breaches, whether or not one is consequential on the other.

[126] When this Court has discussed these considerations and others that inform the seriousness inquiry, it has properly refrained from suggesting that some breaches are sufficiently unremarkable, normal or routine that they will not significantly affect the seriousness of the state conduct. We would decline the invitation from the respondent and intervener Crowns to do so in this case. As this Court unanimously held in *R. v. Reilly*, 2021 SCC 38, all *Charter*-infringing state conduct must be factored into the analysis. In that case, Moldaver J. wrote: “Regardless of whether the [subsequent] breach was caused by [earlier] breaches, and regardless of the fact that it was considered necessary . . . , it was nonetheless a breach of Mr. Reilly’s s. 8 *Charter*-protected rights and must be considered under the first *Grant* factor. Trial judges cannot choose which relevant *Charter*-infringing state conduct to consider” (para. 3).

[127] The seriousness of conduct related to all breaches thus must be considered even if some of them may be said to have been “caused” by earlier *Charter* violations. It is irrelevant to the principle stated in *Reilly* that the Crown had conceded the subsequent breaches in that case.

[128] This Court recently assessed the seriousness of the state action related to the “consequential” breaches of s. 8 of the *Charter* in *Tim*. These unreasonable searches were consequential breaches in the sense that they were unlawful only as a consequence of the initial breach (in that case an unlawful arrest) that preceded them (see paras. 48-50). The s. 8 breaches were “caused” by the breach of s. 9. Nevertheless, in

the first stage of the *Grant* analysis, Jamal J. expressly considered the extent to which these violations of s. 8 undermined the rule of law (see paras. 82-89; see also para. 102, per Brown J., dissenting, but not on this point).

[129] The approach applied in *Reilly* and *Tim* is consonant with *Grant* and should be applied in this case as a matter of settled law. In our respectful view, to treat consequential breaches as having an inconsequential effect on the seriousness inquiry is a departure from *Grant*, *Reilly* and *Tim* and, in respect of the mandate that falls to the Court under s. 24(2), an error in law. Thus, the Attorney General of Ontario is wrong to suggest that the post-*Grant* jurisprudence reflects a pattern whereby this Court has “not once considered the chain of events that flowed from a single, original breach” (I.F., at para. 20). Prior to the case at bar, the Court has not been squarely called upon to decide the relevance of consequential breaches to the s. 24(2) analysis. But, as this Court’s recent jurisprudence makes plain, subsequent conduct consequential to an initial breach is part of “all the circumstances” to which s. 24(2) requires courts have regard.

[130] It is of course true that the relationship between each stage of the events may inform the analysis of how seriously the state conduct undermined the rule of law. For instance, when an unconstitutional search uncovers incriminating evidence, police officers may subjectively believe that they have the legal authority to detain, search or arrest a suspect. However, a subjective belief of this kind would be mistaken: when unconstitutionally obtained evidence forms the basis for a subsequent detention, search

or arrest, then those subsequent actions will also generally violate the *Charter*. It may well be true that, if these subsequent actions do not disclose misconduct that is independent from the initial breach, then they do not reflect a deliberate violation of constitutional rights. But as this Court's existing jurisprudence in respect of s. 24(2) demonstrates, a conclusion that a violation was not deliberate does not dispense the court from the requirement of measuring the seriousness of each breach in assessing the gravity of the state misconduct at issue (see, e.g., *Tim*). Nor can the weight it will carry be dismissed or discounted, from the outset or categorically. Conduct that did not deliberately breach the *Charter* may nonetheless have some exclusionary weight. Society has a stake in considering the seriousness of "all the circumstances", as the *Charter* directs. Indeed, even breaches that, when looked at in isolation, appear "minor" or "technical" can nevertheless contribute meaningfully to the seriousness of the misconduct that a judge must consider when deciding whether to admit or exclude evidence under s. 24(2).

[131] Thus, in our respectful view it would be an error of law for a court to decline to analyze the extent to which each consequential breach at issue in the evaluative stage of the s. 24(2) analysis reflects serious *Charter*-infringing state conduct, viewed from the perspective of how gravely the conduct undermines the rule of law. To suggest otherwise would trivialize the importance of fundamental constitutional rights and undermine the rule of law that the *Charter* protects. In so doing, it would inadvertently accept what we see, with due regard for opposing views, as the flawed premise of *R. v. Jennings*, 2018 ONCA 260, 45 C.R. (7th) 224, and *R. v.*

*Love*, 2022 ABCA 269, [2023] 1 W.W.R. 296, by treating “consequential” breaches as inconsequential at the seriousness stage of the analysis. And it would prevent s. 24(2) from fulfilling its purpose of “maintaining the rule of law and upholding *Charter* rights in the justice system as a whole” (*Grant*, at para. 67).

(2) Seriousness Is Cumulative

[132] As a number of appellate courts have properly recognized, it is the cumulative seriousness of the *Charter*-infringing state conduct that factors into the *Grant* analysis (see, e.g., *R. v. Lauriente*, 2010 BCCA 72, 251 C.C.C. (3d) 492, at para. 30; *R. v. Boudreau-Fontaine*, 2010 QCCA 1108, at para. 59 (CanLII); *R. v. Poirier*, 2016 ONCA 582, 131 O.R. (3d) 433, at para. 91; *R. v. Kossick*, 2018 SKCA 55, 365 C.C.C. (3d) 186, at paras. 58-59; *R. v. Culotta*, 2018 ONCA 665, 142 O.R. (3d) 241, at para. 62, *aff’d* 2018 SCC 57, [2018] 3 S.C.R. 597; *R. v. Adler*, 2020 ONCA 246, 388 C.C.C. (3d) 114, at para. 39; *R. v. White*, 2022 NSCA 61, 419 C.C.C. (3d) 123, at para. 61). This approach assesses the entire chain of events relevant to the *Charter* violations and considers how seriously the state conduct — taken as a whole — undermined the rule of law.

[133] In our view, a cumulative approach is mandated by the emphasis that the *Grant* analysis gives to the totality of the circumstances (see J. A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada* (12th ed. 2021), at pp. 1711-12). It bears noting that even before *Grant*, this Court’s jurisprudence employed a cumulative approach (see *R. v. Greffe*, [1990] 1 S.C.R. 755, at pp. 795-97,

per Lamer J. (as he then was)). This Court has never suggested that a relationship between two breaches, as in the case of “consequential” violations, eliminates the need to assess the cumulative seriousness of the state conduct. To do so would be to ignore “all the circumstances” that s. 24(2) directs courts to consider, in favour of a narrower focus on only one of the state actions taken without legal authority. Once again, to do so would lead, by another path, to the incorrect result that *Jennings* and *Love* reach. It would wrongly focus courts’ analysis on whether state conduct is “consequential” (itself a question of fact) rather than on whether the long-term reputé of the administration of justice requires the courts, as mandated by the *Charter*, to disassociate themselves from the unconstitutional state actions.

[134] In our view, this principle in conjunction with the focus of the seriousness inquiry on the rule of law implies that the intervener the Attorney General of Ontario is wrong to assert that consequential or subsequent breaches only have “value to the *Grant* analysis” if they disclose “independent wrongdoing” (I.F., at fn. 1). The respondent and the Attorney General of Alberta are also wrong to adopt similar approaches. Conduct that does not deliberately violate the *Charter* may nonetheless undermine the public’s confidence in the administration of justice and pull in favour of excluding the evidence. Even if a breach that is not deliberate will sometimes only pull weakly towards exclusion, courts cannot discount the possibility that a chain of such breaches will, when assessed cumulatively, demonstrate more serious state misconduct. Thus, it may be that the whole sequence of state conduct undermines the rule of law more gravely than would each action in isolation. The analysis of the seriousness of

state conduct, like the *Grant* analysis as a whole, is not a mathematical exercise (para. 86). For that reason, there is no necessary requirement that the seriousness of the whole be the sum of the constituent parts.

B. *Application of Section 24(2)*

[135] Because we have come to a different conclusion than the trial judge on the relevant *Charter* violations, we owe no deference to her overall conclusion in respect of s. 24(2) (see, e.g., *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 67; *Grant*, at para. 129; *Le*, at para. 138; *Beaver*, at para. 118). Conducting the analysis afresh and considering all the circumstances of this case, and with respect for other views, we conclude that the administration of justice would be brought into disrepute by admitting the evidence. Accordingly, s. 24(2) compels exclusion of the evidence. This result flows from balancing the three factors this Court identified in *Grant*: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breaches on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.

(1) Seriousness of the *Charter*-Infringing Conduct

[136] We begin by assessing the seriousness of the state conduct at issue in light of how gravely that conduct undermined the rule of law, in line with the principles articulated above. The extent to which the police officers deliberately violated *Charter* standards is one relevant consideration. Here, the trial judge concluded that in

conducting the initial sniffer dog search the police officer “acted honestly”, “was well trained”, “knew the applicable standard”, and sought to apply it (A.R., vol. I, at p. 20). She concluded that the breach this conduct occasioned was not deliberate or systemic and did not reflect negligence. Thus, she concluded that the initial error was “on the low end of the scale” (p. 21).

[137] We find no reversible error in the trial judge’s determination that the officer initially breached *Charter* standards inadvertently and without negligence, nor in her conclusion that there was not a systemic failing evident in the record. It bears emphasizing, however, that the reasonable suspicion standard that was to be applied is a “well-established constitutional nor[m]” (*Paterson*, at para. 53). This was not a case where there was legal uncertainty at the time that the police officer acted (see, e.g., *McColman*). The public is entitled to expect that police officers will apply the reasonable suspicion standard that flows from the jurisprudence of this Court. The seniority of the officer in question only reinforces this expectation: an officer who has served for 14 years and conducted between 12,000 to 15,000 traffic stops should know the law. Thus, while the initial error was on the low end of the deliberateness scale, in our view it was not at the absolute lowest end. In addition, because the other, subsequent breaches were not argued before the trial judge, she did not assess their seriousness. Within the fresh assessment this Court is called to conduct, the subsequent breaches must factor into the analysis, which is necessarily cumulative.



[138] The subsequent breaches at issue in this case include the pat down search and the search of the truck and the duffle bags that were inside it. These searches violated s. 8 of the *Charter*, which is intended to protect against unjustified intrusions on privacy interests (see, e.g., *Hunter*, at p. 159). Yet, in spite of the constitutional protection for these interests, increasingly invasive steps were taken at each stage of the police action at issue. Adopting the broad, social perspective that *Grant* mandates, these increasingly invasive steps represent progressively more serious ways in which the state conduct undermined the rule of law.

[139] The unreasonable searches were not, however, all of the unlawful conduct that occurred in this case. The initial detention without reasonable grounds and the three subsequent arrests each violated the constitutionally distinct s. 9 protections for individual liberty (*Grant*, at para. 54). Further, confinement in a police vehicle, handcuffing, and being taken to the detachment to be detained there, all also constituted arbitrary detention.

[140] There is no suggestion that these subsequent violations were deliberate or systemic. They arose from actions taken based on the honest but mistaken understanding that the initial search had furnished lawful grounds for the police to search, arrest and detain. But it must be stressed that, objectively, the police had no legal authority to interfere with privacy and liberty. Respect for these interests lies at the core of Canadian society's commitment to the rule of law. So, while there was no intention to undermine the rule of law, it was nevertheless undermined.

[141] The respondent is wrong to assert that there is no need for the Court to disassociate itself from the state conduct that is at issue in this case. Far from being unremarkable events, police officers conducted a series of increasingly invasive searches, arrests and detentions in the absence of lawful authority. There is a strong social interest in denouncing a course of conduct that disregards both individual privacy and liberty, thereby undermining the rule of law. Thus, while the subsequent breaches did not deliberately violate *Charter* rights, in our view the entire course of conduct does reflect serious state misconduct. On the spectrum of seriousness this Court identified in *Grant*, the conduct at issue in this case pulls between moderately and strongly towards exclusion, resting closer to a strong pull than a moderate one.

(2) Impact on the *Charter*-Protected Interests of the Accused

[142] The second line of inquiry mandated by *Grant* is to consider the “seriousness of the impact” of the *Charter* breaches on the *Charter*-protected interests of the accused (para. 76). As this Court has affirmed, “[t]he more serious the impact on the accused’s protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute” (*ibid.*; see also *Le*, at para. 151; *Tim*, at para. 90; *R. v. Lafrance*, 2022 SCC 32, at para. 96; *Beaver*, at para. 123). Thus, the task is to “situate the impact on the accused’s *Charter*-protected interests on a spectrum, ranging from impacts that are

fleeting, technical, transient, or trivial, to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed” (*Tim*, at para. 90).

[143] While the first and second lines of inquiry mandated by *Grant* are distinct, the seriousness of the impact [TRANSLATION] “complements to some degree [the factor] of the seriousness of the Charter-infringing state conduct” (M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2023* (30th ed. 2023), at para. 28.208). This is because the second line of inquiry [TRANSLATION] “is meant to take into consideration the impact of the Charter violation, as opposed to its inherent seriousness” (*ibid.*). In this sense, it is settled law that the two lines of inquiry “work in tandem” (*Le*, at para. 141; see also *Lafrance*, at para. 90; Paciocco, Paciocco and Stuesser, at p. 486). The two lines of inquiry cannot be artificially disconnected by weighing different state conduct at different stages of the analysis. To say otherwise creates, in our respectful view, an incoherent disjuncture between the first two branches of *Grant*. Under the first line of inquiry, the cumulative seriousness of the state conduct that led to each of those violations should be considered from a broad, social perspective; under the second, the cumulative seriousness of the impacts on the specific accused’s *Charter*-protected interests flowing from that same conduct should be assessed.

[144] Applying this approach and weighing the impacts flowing from the same conduct we have considered under the first branch of the analysis, we respectfully disagree with our colleagues’ conclusion that the impacts of the *Charter* breaches on

Mr. Zacharias's *Charter*-protected interests only moderately favour exclusion (Rowe and O'Bonsawin JJ.'s reasons, at para. 72). In light of the fact that the impacts on Mr. Zacharias were substantial — increasing in severity at each stage of the state's interference with his rights — we conclude instead that this factor pulls strongly in favour of exclusion.

[145] First, we consider the impacts of the searches. Where non-bodily physical evidence is targeted, privacy is the primary interest engaged by searches that violate s. 8 (*Grant*, at para. 113). Here, the cumulative impacts of the s. 8 breaches on Mr. Zacharias's privacy interests were significant and became more invasive with each step.

[146] While we acknowledge that a dwelling house attracts a higher expectation of privacy than a vehicle (*Grant*, at para. 113), privacy interests in vehicles and their contents are not trivial. The privacy-compromising impact of an unreasonable vehicle search will still generally militate in favour of exclusion, notwithstanding the comparatively reduced expectation of privacy in that context (see, e.g., *R. v. Huynh*, 2013 ABCA 416, 8 C.R. (7th) 146, at para. 7). Indeed, when assessing the impact of roadside *Charter* breaches on an individual's protected interests, courts must not lose sight of the fact that, beyond the scope of a valid highway traffic stop, the individual rightly "has every expectation of being left alone" (*Harrison*, at paras. 30-31, citing *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 56). That observation should remain the starting point of the analysis.

[147] More substantial was the impact of police officers' opening of Mr. Zacharias's duffel bags, which were covered by a tonneau in the box of the truck. This conduct amounted to a significant intrusion upon his privacy interests. Mr. Zacharias's concealment of the box of his truck with a tonneau cover evinces a clear intention to assert privacy over its contents. His intent in this regard makes the search of Mr. Zacharias's truck unlike cases of "reduced expectation" vehicle searches where no steps were taken to conceal the subject matter of the search (see, e.g., *R. v. Shinkewski*, 2012 SKCA 63, 289 C.C.C. (3d) 145, at para. 35).

[148] Second, we now turn to the impacts that flowed from the arrests and detention Mr. Zacharias was subjected to. The purpose of s. 9 is "to protect individual liberty from unjustified state interference" (*Grant*, at para. 20). Here, the restrictions imposed on Mr. Zacharias's liberty by the breaches of his s. 9 rights were substantial.

[149] The majority below concluded that the investigative detention that ensued after the initial valid traffic safety stop was "necessary to facilitate deployment of the sniffer dog relative to a vehicle in which Mr. Zacharias' expectation of privacy is low" (para. 7). We respectfully disagree. That assessment justifies the impacts of a breach of s. 9 — an unlawful investigative detention — by reasoning that it was "necessary" to effect a breach of s. 8. Such reasoning trivializes the impacts of these *Charter* breaches. Absent any reasonable suspicion to justify a further investigative detention, Mr. Zacharias ought to have been free to go once the matters related to the *Traffic Safety Act*, R.S.A. 2000, c. T-6, had been addressed. Instead, he was unlawfully

detained for approximately seven hours, handcuffed, confined to a police vehicle, arrested three times, and detained for several hours in the police detachment. We place little weight on the trial judge's finding that the arresting officers were respectful and courteous over the course of these interactions. The fact that a police officer is appropriately courteous when interacting with a citizen is not relevant to the lawful character of their conduct.

[150] These sustained deprivations had substantial impacts on Mr. Zacharias's liberty, autonomy and bodily integrity. They were not momentary but prolonged. Khullar J.A. properly accounted for these impacts (para. 58). By contrast, because they did not consider the subsequent breaches, in our respectful view the majority below inappropriately discounted their impacts. And while our colleagues do recognize the other breaches of Mr. Zacharias's constitutional rights, we respectfully disagree with their assessment that seven hours of arbitrary detention, physical restraint, relatively invasive searches, and other associated impacts only moderately favour exclusion (Rowe and O'Bonsawin JJ.'s reasons, at para. 72).

[151] In sum, the impacts of the state conduct on Mr. Zacharias's liberty and privacy interests, when taken together and considered cumulatively as the law requires, were considerable. Accordingly, this factor pulls strongly in favour of exclusion of the evidence.

(3) Society's Interest in Adjudication of the Case on Its Merits

[152] The third line of inquiry mandated by *Grant* is to consider “whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (para. 79). In essence, this inquiry is directed at assessing “society’s ‘collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law’” (*ibid.*, quoting *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20). Several considerations may be relevant.

[153] First, the reliability of the evidence factors into the third line of inquiry (*Grant*, at para. 80; see also *Paterson*, at para. 51; *Le*, at para. 297; *Tim*, at para. 96; *Beaver*, at para. 129; *McColman*, at para. 70). Nevertheless, this Court has been clear that “[t]he view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, [1971] S.C.R. 272) is inconsistent with the *Charter*’s affirmation of rights” (*Grant*, at para. 80). For instance, even though real evidence may be highly reliable, that fact alone is not determinative of whether the evidence’s admission would bring the administration of justice into disrepute. To adopt a contrary approach that gives overriding importance to the reliability of real evidence [TRANSLATION] “is at odds with the consideration of all the circumstances required by subsection 24(2) of the *Charter*” (*Vauclair, Desjardins and Lachance*, at para. 28.217).

[154] Second, the importance of the evidence to the Crown’s case is a relevant consideration (*Grant*, at para. 83; see also *Paterson*, at para. 51; *Le*, at para. 297; *Tim*, at para. 96; *Beaver*, at para. 129; *McColman*, at para. 70). The Court has recognized that exclusion may more adversely affect “the repute of the administration of justice

where the remedy effectively guts the prosecution” (*Grant*, at para. 83). Nevertheless, this Court has rightly been willing to exclude even “critical evidence, virtually conclusive of guilt on the offence charged” where the admission of that evidence would — having regard to all circumstances — bring the administration of justice into disrepute (*Harrison*, at para. 34; see also para. 42).

[155] Third, courts are also to consider the seriousness of the offence at issue (*Grant*, at para. 84; see also *Paterson*, at para. 52; *Le*, at para. 297; *Tim*, at para. 97; *Beaver*, at para. 129; *McColman*, at para. 70). The seriousness of the offence, however, may “cut both ways” (*Grant*, at para. 84). As this Court has affirmed, “[w]hile society has a greater interest in seeing a serious offence prosecuted, it has an equivalent interest in ensuring that the judicial system is above reproach, particularly when the stakes are high for the accused person” (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 53; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 80; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 38; *Le*, at para. 159; *McColman*, at para. 70). The fact that an offence is serious “must not be permitted to overwhelm the s. 24(2) analysis” (*R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 95; see also *Harrison*, at para. 40). This is because, at minimum, [TRANSLATION] “the rights guaranteed by the Charter are also guaranteed to all persons who are in Canada, regardless of the crime” (*Vauclair, Desjardins and Lachance*, at para. 28.216). There is a danger “that if the seriousness of the offence is treated as . . . determinative it will become a bright line to admission of evidence obtained in violation of the *Charter*” (D. Stuart, “Uncertainty on Charter Section 24(2) Remedy of Exclusion of Evidence”



(2023), 86 C.R. (7th) 255, at p. 257). Such an approach would be contrary to s. 24(2) and its requirement for a careful balancing in light of all the circumstances.

[156] Here, the evidence is highly reliable. It is undoubtedly critical to the Crown's case. But the fact that the evidence is, as the respondent characterizes it, "real, reliable and crucial" (R.F., at para. 3), does not overwhelm the flexible balancing process that s. 24(2) demands. This Court's jurisprudence has consistently emphasized the importance of this principle. For instance, the majority of this Court in *Harrison* excluded 35 kilograms of cocaine that had been seized from the accused's vehicle, notwithstanding the fact that it was also undoubtedly real, reliable and crucial evidence (para. 34).

[157] With respect to the seriousness of the offence at issue, it is true that this Court has long acknowledged that cannabis offences are "generally regarded as less serious than those involving 'hard' drugs such as cocaine and heroin" (*R. v. Kokesch*, [1990] 3 S.C.R. 3, at p. 34, per Sopinka J.; see also *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 68). Further, this Court has stated that while trafficking offences in relation to "hard" drugs are "very serious", even they are "not one of the most serious [offences] known to our criminal law" (*Harrison*, at para. 35). Nevertheless, we are persuaded that the offences at issue in this case are serious. Like the trial judge and both the majority and dissenting judges at the Court of Appeal, we are of the view that this result flows from the very large quantity of drugs at issue in this case.

[158] Taking into account each of the foregoing considerations, we are persuaded that there is a strong social interest that favours the adjudication of these charges on the merits. Accordingly, the third line of inquiry strongly favours the admission of the evidence.

(4) Would the Admission of the Evidence Bring the Administration of Justice Into Disrepute?

[159] After engaging with the three lines of inquiry mandated by *Grant*, the weight assigned to each factor must be balanced (para. 86). This process “involves a qualitative exercise, one that is not capable of mathematical precision” (*Tim*, at para. 98; see also *Grant*, at paras. 86 and 140; *Harrison*, at para. 36). Thus, “[n]o overarching rule governs how the balance is to be struck” (*Grant*, at para. 86). But as this Court has held, “[i]t is the sum, and not the average, of [the] first two lines of inquiry that determines the pull towards exclusion” (*Le*, at para. 141; see also *Beaver*, at para. 134, *McColman*, at para. 74). The third factor’s weight “will seldom tip the scale in favour of admissibility when the two first lines, taken together, make a strong case for exclusion” (*Lafrance*, at para. 90; see also *Paterson*, at para. 56, *Le*, at para. 142, *Beaver*, at para. 134).

[160] In this case, the first line of inquiry exerts a moderate to strong pull towards exclusion, while the second pulls strongly in the same direction. The third factor strongly favours admission. But it is not enough to overwhelm the cumulative seriousness of the *Charter*-infringing conduct along with impacts on Mr. Zacharias,

which together make a relatively strong case for the evidence's exclusion. For that reason, we conclude that the administration of justice would be brought into disrepute by its admission. Accordingly, s. 24(2) directs that the evidence shall be excluded.

### III. Conclusion

[161] We would allow the appeal. Because the evidence in question was essential to the Crown's case, rather than order a new trial, we would enter an acquittal.

*Appeal dismissed, MARTIN and KASIRER JJ. dissenting.*

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