R. v. A[redacted]

Ontario Judgments

Ontario Superior Court of Justice

J.M. Copeland J.

Heard: March 6-15 and April 4, 2019.

Judgment: June 17, 2019.

Court File No.: CR-18-70000384-0000

[2019] O.J. No. 3407 | 2019 ONSC 3717 | 438 C.R.R. (2d) 215

Between Her Majesty the Queen, and J[redacted] T[redacted] A[redacted], B[redacted] T[redacted]l and A[redacted] G[redacted]

(260 paras.)

Counsel

Scott Graham, for the Crown.

Terry Kirichenko and Sorina Cojocaru, counsel for J[redacted] T[redacted] A[redacted].

Alana Page, counsel for B[redacted] T[redacted]

Taro Inoue, Stephen Feldman and Alice Barton, counsel for A[redacted] G[redacted]

REASONS FOR DECISION ON CHARTER APPLICATIONS

J.M. COPELAND J.

INTRODUCTION

1 J[redacted] A[redacted], B[redacted] T[redacted] and A[redacted] G[redacted] were each charged with a number of counts relating to possession of a loaded handgun in a vehicle, and possession of schedule I drugs (oxycodone and hydromorphone) for the purpose of trafficking. The charges arise out of a vehicle stop and searches on October 9, 2017.

2 Each of the defendants brought an application to exclude the evidence found in the searches on the basis that their *Charter* rights were violated. All of the defendants raised ss. 8 and 9 of the *Charter*. In addition, Mr. T[redacted] alleged that his rights under ss. 10(a) and 10(b) of the *Charter* were violated.

3 I heard the applications in advance of the scheduled trial date. On April 4, 2019, I gave a decision on the result of the *Charter* applications, with reasons to follow. These are my written reasons.

4 I note at the outset that in his written application, Mr. A[redacted] raised the issue of racial profiling. Once the evidence had been heard, Mr. A[redacted] abandoned the racial profiling issue in submissions (but still maintained that his ss. 8 and 9 *Charter* rights were breached). Thus, I do not give any consideration to the issue of racial profiling in these reasons.

5 I note as well there was initially some suggestion by Crown counsel that he intended to argue that Mr. G[redacted] did not have standing to bring a *Charter* application regarding the searches. But in oral submissions Crown counsel abandoned that argument. In light of the decision of the Supreme Court in *R. v. Jones*, [2017] 2 S.C.R. 696, 2017 SCC 60 at paras. 16-34, this concession makes sense. As I understand it, the Crown's theory of liability on the trial proper would be that Mr. G[redacted] was jointly in possession of the items seized pursuant to the detention and searches.

6 The central issue in the *Charter* applications is the reasons for the initial vehicle stop. The Crown argues that it was a dual purpose stop, motived both by *Highway Traffic Act* concerns (R.S.O. 1990, c. H.8, as amended ("*HTA*")), and by a non-*HTA* criminal investigative purpose. The defence argues that there was no *HTA* purpose. The defence argues that the stop was pretextual and solely for purposes of criminal investigation. In the absence of grounds to meet the reasonable suspicion standard for investigative detention enunciated in *R. v Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, the defence argues that the stop constituted an arbitrary detention. It is common ground that if the stop was not a valid dual purpose stop, there were not grounds for common law investigative detention at the time the vehicle was stopped. There are then further issues in relation to when the passengers were detained, and the searches of the passengers, and the vehicle itself.

7 Each of these grounds requires me to make findings of credibility regarding the evidence of the officers involved in the vehicle stop, and to a lesser degree about other officers who had information about an earlier event that was conveyed to the officers who made the stop. For this reason, I begin my analysis with a summary of the evidence, and my findings of fact and credibility.

8 It is clear from the case-law that the analysis of issues related to vehicle stops is very fact-specific. The law is clear that police may conduct so-called dual purpose stops, if they have a valid *HTA* purpose for the initial stop, even if they also have an additional investigative purpose. The law is also clear that the police may stop a vehicle for an initial *HTA* stop, and depending what occurs, the situation may develop into something else, including developing into articulable cause for an investigative detention. The analysis in any given case is fact-specific, and events can develop in a fluid manner. But as a starting point, in order to validly stop a vehicle, the police must have either a valid *HTA* purpose, or have articulable cause in the sense set out in *Mann*.

9 In this case, for reasons I will explain, I do not believe the evidence of Officers Adams and Evans that they had a *HTA* purpose when the initially stopped the vehicle. Rather, I find that their sole purpose for stopping the vehicle was criminal investigation based on information given to them by DC Arshad at the start of their shift, and potentially linked to a rash of shootings in Regent Park (I note that it was agreed before me that, in fact, none of the defendants had anything to do with the Regent Park shootings that

were of concern in the summer and fall of 2017). The officers' reliance on the *HTA* was a pretext. Further, their investigative purpose relating to the shootings was not based on information which amounted to reasonable suspicion to permit an investigative detention. For these reasons, I find that all of the occupants of the vehicle were arbitrarily detained in breach of s. 9 of the *Charter* from the time of the initial vehicle stop.

10 In addition, I have significant concerns about the credibility of the evidence of Officer Adams about what he says he saw when after the vehicle was stopped, which the Crown puts forward as the basis for an argument that grounds developed after the initial stop to investigatively detain the passengers, and to justify the searches of the passengers and the vehicle. I find that the searches infringed the s. 8 rights of the defendants.

11 I find that the *Charter* breaches were serious, both in their impact on the defendants, and on the administration of justice. For this reasons, even though the charges against the defendants are very serious, I find that on balance the long term reputation of the administration of justice requires that the evidence be excluded. In particular, in light of my findings that Officers Adams and Evans misled the court about their reasons for the stop, I find that the court must exclude the evidence in order to dissociate itself from and not condone that conduct.

EVIDENCE AND FINDINGS OF FACT

Events of the evening of October 8/9, 2017 -- the reasons for the initial stop, events at the roadside, search of the occupants, and arrests

Officer Adams

12 Officer Todd Adams was working uniform patrol in the fall of 2017, in the primary response unit ("PRU"). The primary task of PRU officers is to respond to radio calls. When there are no radio calls to respond to, they do traffic enforcement.

13 On October 8, 2017, Officer Adams' partner was Officer Joel Evans. They began their shift at 11 p.m. Officer Adams testified that after the parade at the start of their shift, when he and Evans were on their way to their cruiser, they had a conversation with DC Sheraz Arshad in the parking lot. DC Arshad told them about a vehicle in Regent Park that had taken off from a Toronto Community Housing ("TCHC") officer on a previous date. DC Arshad told them the vehicle was a red Nissan Altima, licence number CCSV 802. The information included that two males with hoodies were involved. Officer Adams testified that he made a note of the information in his notebook when he received it from DC Arshad. Officer Adams also testified that he made a note that there had been a "number of shootings in Regent Park." He did not recall DC Arshad providing any further details. He was not given any descriptive information such as skin colour, height or weight. Officer Adams did not suggest in his evidence that DC Arshad had said anything to him about the September 26 men possibly being armed.

14 Officer Adams agreed in cross-examination that the information he was given by DC Arshad did not say that any offence had been committed on September 26 by the males observed on that date. He agreed that what DC Arshad conveyed was that the vehicle was possibly linked to the Regent Park shootings. He agreed that DC Arshad did not say the males were suspects in any particular crime, or say there were grounds to detain those men.

15 Officer Adams testified that he and Officer Evans left the station and began to respond to radio calls. At 12:43 a.m. (now October 9) they were dispatched on a radio call for "unknown trouble" at the north end of Church Street. This was a priority call. Officer Evans was driving. Officer Adams testified that as they travelled to that call, and passed Dundas Street, Officer Evans said to him that there was a car behind them that Officer Evans thought was refusing to pass them. The police vehicle was in the curb lane. Officer Adams looked back, but could not see due to the cage in the cruiser. He then looked in the passenger mirror, and saw what looked like a red Nissan Altima. The vehicle made a U-turn and proceeded southbound on Church Street. Officers Adams and Evans proceeded to their radio call.

16 In cross-examination Officer Adams was clear that there was nothing unsafe or unlawful about the U-turn. Rather, the reason it was of note to him was because possibly the vehicle avoiding passing the police cruiser to avoid having its plate run.

17 After completing the radio call, the officers were travelling southbound on Jarvis, and looking for a place to park to do their report on the call they had just attended. It was about 40 minutes after they had received the radio call. Officer Adams testified that they saw a red Nissan Altima drive quickly across Shuter. He testified that the speed limit on Shuter is 40 km/h. He could not say the exact speed of the vehicle because they did not have a radar device, but he testified that he believed it was speeding. He testified that he saw a white male driver, a black male front passenger, and a white male rear passenger.

18 Officer Adams testified that he and Evans both thought it was the same vehicle they had seen earlier, and the same make as the car DC Arshad had told them about earlier. They tried to catch up to the vehicle, following it along Shuter. The vehicle took the first right turn on Shuter. It was one block down to Queen Street. Officer Adams testified that they saw the vehicle's licence plate before they got to Queen Street. He testified that at that time they tried to run the licence plate on the computer in the cruiser, but they did not get a response from the computer at that time. Officer Adams looked at his notes from the start of the shift, and saw that the licence number was the same as the vehicle DC Arshad had told them about.

19 The vehicle turned left onto Queen Street. The officers stopped the vehicle soon after on Berkeley Street. Officer Adams testified that at the time of the initial stop, they still did not have a return on the computer query they had sent about the licence plate. The vehicle was stopped at 1:18 a.m.

20 Officer Adams testified in examination-in-chief that the reason for the stop was an *HTA* stop. He testified that they also intended to gather intelligence, based on the licence plate of the vehicle being the same as the one DC Arshad had told them about. He said it was "mainly to gather intelligence." He testified that based on the *HTA* he could ask the driver for identification. He testified that if, for example, one of the passengers was not wearing a seat belt, then he could ask them for identification (he testified that in the result, both passengers were wearing seat belts, so he did not initially ask them for identification). He testified that it was his understanding that a police officer can stop a vehicle under the *HTA* to confirm that the driver is licenced. He testified that it was his understanding that the *HTA* permits police to stop vehicles if a traffic offence occurs, for mechanical fitness, to check for sobriety, if there is unsafe driving, and also to confirm that the driver is licenced. He testified that there were no moving violations by the vehicle that night. He said his intention was to gather intelligence based on the information DC Arshad had given them, and that he was using the *HTA* to stop the vehicle.

21 Officer Adams testified that he did not believe he had grounds for an investigative detention of anyone at the time of the initial stop of the vehicle. He said investigative detention was not the basis for the vehicle stop.

22 Officer Adams agreed in cross-examination that he made a note in his notebook about the reasons for the stop. He agreed that he took the time to articulate in his notes the reasons that he stopped the vehicle. His note reads as follows:

> No HTA reason to stop the vehicle. Reason for the stop is info from Arshad along with all the shootings, time of day, day of week, public safety. My intentions were to detain and investigate driver and occupants.

23 Officer Adams agreed in cross-examination that nowhere in his notes did he refer to the *HTA* as the reason for the stop. He maintained that he knew at the time that he had authority to make the stop under the *HTA*. He asserted that "no HTA reason to stop the vehicle" in his notes meant there was no moving violation by the vehicle. He maintained that the reasons for the stop were under the *HTA* to check if the driver was licenced, and also to investigate based on the information about the vehicle from DC Arshad. He denied the suggestion that the only reason for the vehicle stop was the information received from DC Arshad.

24 In cross-examination, Officer Adams agreed that he met with officer Kraehling in the early hours of October 9 in order to provide information for the information to obtain the search warrant for the vehicle (the "ITO"). He said he could not specifically remember what information be provided to officer Kraehling. He denied the suggestion that he did not tell Kraehling anything about relying on the *HTA* as one of the purposes for the stop. He said he could not recall the full conversation, but he would have told Kraehling everything they did, including reliance on the *HTA*. He agreed that he knew Officer Kraehling needed information for the purpose of a search warrant ITO. He said for this reason he was careful with the details he told him.

25 Officer Adams testified that he walked to the driver window. He asked the driver for his driver's licence, ownership and insurance. He told the driver that the reason for the stop was that they had seen the vehicle make a U-turn 40 minutes earlier, and now they saw the vehicle going quickly down Shuter. Officer Adams said they had a conversation about the recent shootings in the area. The driver said he knew about the shootings. The driver gave him the insurance and ownership, but said he did not have his driver's licence on him. Officer Adams asked the driver to write down his name, so he could check his driver's licence that way. The driver wrote down Jerome Trevena Smith, dob 79-03-31 (it is common ground that the driver was Mr. A[redacted].

26 Officer Adams testified that at this time he observed a white balaclava in the centre console of the vehicle between the driver and the passenger.

27 In cross-examination Officer Adams was asked if he could be more specific about where he saw the balaclava. He was unable to do so. It was suggested to him that one would not be able to see it was a balaclava unless it was stretched out flat so one could see the eye-hole. He responded that if it was folded with the eye-holes at the front one could see it was a balaclava. But he maintained that he could not remember how it looked in the car. He agreed that he was saying he observed the balaclava while he stood

outside the driver door. He agreed it was dark, but said there was artificial lighting. He then said, for the first time in cross-examination, that he probably had his flashlight out. He denied the suggestion that he did not see the balaclava while he was standing outside the driver door.

28 In cross-examination, Officer Adams denied the suggestion that what he told Officer Kraehling about the white balaclava was that he saw it only after he had placed the driver under arrest and told him to exit the car.

29 Officer Adams testified that he then walked back to the cruiser with Officer Evans. He testified that back at the cruiser, the return on the computer query about the licence plate came back as "10-66", which means officer safety. He recalled that it also said "approach vehicle with caution, occupants may be armed", and "to obtain information on occupants."

30 Officer Adams testified that they ran the name they had been given by the driver, and it came back with no hits whatsoever on CPIC or on the MTO database. The latter result meant there was no person with that name with a driver's licence.

31 Officer Adams testified that at this point they had seen the vehicle twice, and the first time it made the U-turn possibly to avoid having its plate run, the speed of the vehicle on Shuter, the information from DC Arshad, and the 10-66 hit on the vehicle from the computer, he had seen the white balaclava (in his experience, a balaclava can be used to conceal a person's identity), and the driver had given a name which produced no return on the computer search. Officer Adams testified that his officer safety concerns were heightened at this point.

32 In cross-examination, Officer Adams agreed that seeing the white balaclava was a significant observation (which as noted above he claimed he saw when first talking to the driver when Adams was standing outside the driver door). He agreed that given the impact it had on his concerns about officer safety, he would have wanted to tell Evans about seeing the balaclava. The suggestion was made to Officer Adams that when the two of them were in the cruiser after he had received the (fake) name from the driver, but before the arrest of the driver, he did not say anything to Evans about having seen a balaclava. Officer Adams said he could not recall if they discussed it then, and he was not sure if Evans had seen it.

33 Officer Adams testified that he went back to the vehicle to confirm the spelling of the driver's name, and the date of birth. While doing that he said he saw a green card in the driver's pocket which he believed to be a health card. The driver pushed the card into his pocket. Officer Adams felt he was concealing it. So he asked the driver to turn off the car, and step out of the vehicle. He testified that he believed at this point that the driver was lying about his name. The driver said, "Ok, ok, I'll tell you my real name." Officer Adams asked the driver to turn off the car and step out. The driver complied. He arrested the driver for obstruct police for failing to identify himself.

34 The driver was cuffed to the rear and placed in the cruiser. Officer Adams testified that as the driver stepped out of the vehicle, he saw some objects in the driver door storage compartment. He testified that he saw a big stack of cash tied with an elastic band, something he believed to be a drug scale, and a white plastic bag with a number of tears in it. He testified that in his experience, drugs, in particular crack

cocaine, are placed in torn pieces of plastic bag and twisted closed for sale. Officer Adams testified that he believed what he was seeing was drug money, and drug scale and drug bags.

35 Officer Adams testified that while he was in the cruiser with the driver under arrest, he radioed for more units to attend.

36 Putting these things together, Officer Adams testified that he had heightened security concerns. Officer Evans was still by the passenger side of the stopped vehicle. Officer Adams told Mr. A[redacted] the reason he was under arrest. He did not at that time read him right to counsel, because he felt it was more pressing to go back to the vehicle with office Evans for officer safety reasons.

37 Officer Adams testified that he walked back to the passenger side of the vehicle. He testified that at this point he decided to investigate and detain the two passengers (Mr. [redacted] and Mr. G[redacted]).

38 In cross-examination, Officer Adams said he could not recall if he said anything to Officer Evans about the observations of drug related items in the driver-side door. He said whatever conversation they had about detaining the passengers was brief, and he could not remember the details.

39 Officer Adams agreed in cross-examination that his grounds to investigatively detain and pat search the passengers were dependent on his having seen the white balaclava, and the items he said he saw in the car door (i.e., that there was not reasonable suspicion to detain the passengers prior to those observations). He denied the suggestion that he did not see the white balaclava or the items in the door prior to removing the passengers from the car.

40 Officer Adams testified that he went to the front passenger door, and Evans was at the rear passenger door. Adams opened the front passenger door. He intended to detain the front passenger (Mr. T[redacted] and do a pat down search. Officer Adams took the male's arm to guide him out. He felt the male start to pull away. Officer Adams testified that for officer safety reasons, he began to "tap" the male's front near his waist, and his lower back. At the front near the belt he felt a firearm. Officer Adams yelled, "gun". He put the front passenger in a kind of a bear hug and picked him up off the ground. Evans came over, and they were able to handcuff the male without incident.

41 Officer Adams testified that he did not tell the front passenger the reason for detention at the time he took his arm to guide him out of the car. He said he wanted to do the pat down search first for officer safety reasons. He said he told the front passenger he was going to do a pat down search, and that is when he started to pull away.

42 Officer Adams testified that at this point the rear passenger (G[redacted]) started to come towards them. He testified that their training is that where there is one firearm, there is another ("one plus one"). Officer Adams drew his firearm and ordered the passenger to the ground. The passenger complied and was handcuffed.

43 Officer Adams testified that he proved the seized firearm safe (the firearm was loaded. Photos of the firearm and the six rounds in it were made exhibits). Other officers were now arriving on the scene.

44 Officer Adams testified that he then went to the driver side of the vehicle where he had seen items in

the door compartment. He seized the money and what he had thought was a drug scale. That in fact turned out to be a blackberry phone (photos of the money and the blackberry were filed as exhibits). In cross-examination, he agreed that he did not seize the white balaclava at that time. He could not explain why, other than to say there was a lot going on and that it was due to the stress of just having seized a firearm. He also agreed that he did not seize the torn plastic bag he claimed to have seen in the driver door compartment (and which he claimed he thought was turn for use as drug wrapping). He was asked if he ever mentioned the torn bag to anyone. He said no. He denied the suggestion that the torn bag he said he saw in the driver door never existed.

45 The front passenger (T[redacted]) was turned over to DC Kotzer.

46 Officer Adams recalled that other officers were discussing whether to get a search warrant to search the vehicle.

47 Officer Adams returned to his cruiser. He told Mr. A[redacted] he was under arrest also for a firearms charge. He read him right to counsel.

48 Officer Adams testified that he returned to the Division with Mr. A[redacted]. Mr. A[redacted] was booked.

49 Officer Adams testified that at the Division there was a debrief with the detectives, and then officers were given duties regarding preparing paperwork and processing the items seized.

Officer Evans

50 On October 8, 2017, Officer Evans was assigned to PRU with Adams as his partner. As between Evans and Adams, Adams was the more senior office. Adams had been an officer approximately 12 years in the fall of 2017, and Evans had been an officer approximately four years.

51 They started their shift at 11:00 p.m. After the parade at the start of the shift, when they were on their way to their cruiser, they ran into DC Arshad. Arshad briefed them on some information he said he had obtained from the Major Crime unit ("MCU"). Arshad told them that two hooded males had taken off from a TCHC special constable in Regent Park a couple of nights prior. He told them the males were seen to get into a red Nissan with licence number CCSV 802. DC Arshad also said there had been a rise in shootings in Regent Park. DC Arshad did not give them the names of any identifiable suspects, or any descriptions of suspects, other than that they wore hoodies. Officer Evans said DC Arshad did not say anything to them about the September 26 men possibly being armed.

52 In cross-examination, Officer Evans agreed that DC Arshad did not give them any information that a crime had been committed involving the September 26 men, or tell them that the men were suspects for anything.

53 Officer Evans testified that he and Adams went out in their cruiser and responded to a couple of radio calls. At about 12:45, they received a radio call for an address on Isabella. At the time they were driving northbound on Church Street, north of Dundas. They were in the curb lane. Officer Evans testified that he saw a red Nissan in the passing lane behind him, driving faster than his cruiser. He testified that the vehicle could have passed him, but it hovered in his blind spot. He testified that he stopped the cruiser at a red light at Gould Street. He said the Nissan did not come up to the line at the light, but waited "kiddy

corner" behind the cruiser. He said he remarked to Adams that the car was being weird and would not pass them.

54 Officer Evans agreed in cross-examination that this was not the first time a vehicle had not passed his cruiser. He agreed that it happens often because people do not want to be caught speeding.

55 Officer Evans testified that when the light turned green, they proceeded through the intersection at Gould. The Nissan put on its hazard lights and did a U-turn. Evans testified that he mentioned to Adams that the red Nissan might be the car DC Arshad had mentioned. In cross-examination, Officer Evans agreed that the vehicle had to pull over to the curb lane first in order to have room to make the U-turn. He agreed that the U-turn was not unlawful.

56 Officer Evans testified that they proceeded to the radio call they had been dispatched to. Afterwards, they were driving southbound on Jarvis, approaching Shuter, when they saw a red Nissan Altima heading eastbound on Shuter at a rate of speed that appeared to be over the speed limit. He got a brief look at the occupants. The driver was a white male. The front passenger was a black male. The back passenger was a white male. The officers followed the vehicle along Shuter. Once they turned onto Sherbourne, Adams saw the licence number and said it was the same car that DC Arshad had told them about. Adams also entered a query into the computer regarding the licence plate.

57 The car turned east on Queen Street. The officers activated their lights and siren to pull the vehicle over, and pulled it over on Berkeley Street.

58 Officer Evans testified that due to the information received from DC Arshad, they decided to pull the car over under the *HTA* in order to identify the driver and to gather intelligence. He also said they took into account that it was speeding in deciding to stop it. In cross-examination, Officer Evans agreed that they did not pull the vehicle over for a specific *HTA* offence.

59 Officer Evans testified that his understanding of the authority to stop a vehicle under the *HTA* is that an officer can stop any vehicle on the road to check for documents, including insurance and to check that the driver is licenced, and can stop to check sobriety and the condition of the vehicle. Officer Evans testified that it was his understanding that the *HTA* could also be used to conduct a criminal investigation. He gave the example of RIDE programs, and referred to a case where a RIDE program was used under the *HTA* to check bikers and if they were engaged in criminal activities. He testified that with an *HTA* stop, you can only identify the driver of a vehicle, not passengers. If something happens during the stop that leads to reasonable suspicion, then that can ground an investigative detention, and a search for weapons if there are officer safety concerns.

60 In cross-examination, Officer Evans maintained that the vehicle was pulled over to identify the driver under the *HTA*, and also to gather information about the occupants of the vehicle based on the information given to him and Adams by DC Arshad. He said it was a dual purpose stop. He was asked when he became aware of the phrase "dual purpose" in relation to vehicle stops. He said he could not recall specifically when, but said he had known about it for a long time. He agreed that he did not use the words "dual purpose" in describing the stop in his notes.

61 In cross-examination, Officer Evans agreed that he made the notes back at the station, in order to

detail clearly what the grounds were that made them pull the vehicle over. After noting that he activated the cruiser's lights and siren and that the location of the stop was southbound on Berkeley, he wrote in his notebook:

> Hairs on the back of my neck stand up (heightened alert) due to info received on vehicle. There is a rise in shootings recently. About 4 in the last little while. All occurring around this time at night. Increased officer presence to curb the gun violence. Call back duty on right now. We have no HTA reason for the stop is the info/ shootings in the area.

62 He agreed that the reference to "info received on vehicle" was a reference to the information they had received near the start of their shift from DC Arshad. He said the reason he makes notes is for later use to refresh his memory. He agreed that his note did not say anything about a dual purpose, or an *HTA* check of documents such as licencing or insurance. He agreed that his note was focused on the Regent Park shootings as the reason for the stop. He agreed his note said there was no *HTA* reason for the stop.

63 Officer Evans also agreed in cross-examination that at the time they pulled the vehicle over they did not have grounds to suspect that the vehicle had been involved in a crime, or that a crime was in the process of unfolding.

64 Officer Evans testified that he went over to the passenger side of the car. He said the passengers had put the windows down. Officer Adams went over to speak to the driver. Evans thought he recognized the driver, but he could not recall where from.

65 Officer Evans testified that he had casual conversation with the passengers about school and pizza. He did not tell them the reason for the stop. Officer Evans testified that the front passenger asked the reason for the stop. Due to officer safety concerns, he did not say anything to the passenger about the information they had about the vehicle. He thinks he said the officers had seen the vehicle twice and there was an increase in shooting. But this conversation was very brief, and they continued talking about school. In cross-examination, Officer Evans said he could not remember verbatim what he told the passengers about the reason for the stop.

66 Officer Evans agreed in cross-examination that when he was speaking to the passengers he was in uniform, and he had just gotten out of a marked police cruiser. He agreed that he stood outside the passenger side doors, and the passenger doors were closed. He denied that he had his flashlight out. He then said that his flashlight was on his vest, and he had turned it on, but he was not shining it into the vehicle. He agreed that he did not tell the passengers that they were free to leave.

67 In cross-examination, Officer Evans agreed that he did not tell the passengers that the reason for the vehicle stop was to identify the driver and check his documents (under the *HTA*). He agreed that telling the passengers this would not have put officer safety at risk. He was asked why he did not tell the passengers that the reason for the stop was to check driving documents. He said he was just having casual conversation with the passengers, and did not want to disclose the reasons for the stop. It was suggested to him that if one of the reasons for the stop was to check the driver's identification and driving documents, there was no reason not to tell the passengers this reason. Officer Evans agreed with this suggestion. He denied the suggestion that the reason he did not tell the passengers that the reason for the stop was to check the driver's driving documents was because that reason was not in his mind at the time.

68 Officer Evans testified that he heard Adams ask the driver for identification. He heard the driver verbally identify himself. Evans and Adams then went back to the cruiser. They ran the name the driver had provided on the computer, and got no returns. Officer Evans testified that they had a conversation about the lack of returns on the name of the driver being impossible, because they recognized him from somewhere. At that point, the return from the earlier query they had put in on the licence plate came back on the computer. It said the occupants of the vehicle could be armed.

69 In cross-examination, Officer Evans agreed that when he was in the cruiser with Officer Adams at this point (checking the name given by the driver, and having the return on the licence query come back), Officer Adams did not say anything to him about having seen anything suspicious or illegal in the vehicle.

70 They returned to the vehicle, with Adams on the driver side, and Evans on the passenger side. Adams asked the driver for identification again. Evans saw the driver shove something in his pocket. Adams said to the driver, "what's that?" Adams told the driver to step out, and he complied. The driver (A[redacted]) was arrested for obstruct police. The driver then advised that his identification was in his pocket. Officer Adams got the identification, and escorted him back to the police cruiser. Evans stayed outside the cruiser, slightly behind the red Nissan.

71 In cross-examination, Officer Evans agreed that when he returned to outside the passenger side of the vehicle, he did not see a balaclava inside the vehicle, and he was not looking for a balaclava (recall, on Evans' evidence, Officer Adams had not told him anything about having seen anything suspicious inside the vehicle yet).

72 Officer Evans testified that Adams came back. They had a brief conversation. Officer Adams said, "Hey, let's get those guys out of the car. I saw some money and a balaclava in the vehicle." Officer Evans also testified that at that point, based on what Adams had told him about the money and the balaclava, and based on the form 227 that came back on the licence plate query, the information pointed to a robbery or a weapons offence.

73 In cross-examination, Officer Evans agreed that in the brief conversation about getting the passengers out of the vehicle, Officer Adams did not say anything about having seen a digital scale, or a torn bag that he thought could be used to conceal drugs. He agreed that when they asked the passengers to step out, he had no information about drugs as a reason for doing this, rather he believed the concern was a robbery or weapons offence. Officer Adams said nothing to him about seeing anything related to drugs in the vehicle. He agreed that he heard nothing that night (i.e., at any point that night) about a torn plastic bag that could be used to conceal drugs being seen. Officer Evans agreed that absent Officer Adams' observation of a balaclava and money in the vehicle, they had no grounds for investigative detention of the passengers. Officer Evans denied the suggestion that Adams telling him before they got the passengers out that he had seen a balaclava and money in the vehicle was made up after the fact because they realized they did not have grounds to investigatively detain the passengers.

74 They walked back to the passenger side of the vehicle. Evans asked the passengers to step out. Evans testified that he was more focussed on the back seat passenger (G[redacted]. Mr. G[redacted] stepped out of the vehicle. Evans told him that he was going to pat him down for weapons. Almost simultaneously, his partner yelled "gun, gun". Evans tried to get G[redacted] down and went to assist Adams. There was a struggle

with the front seat passenger for the gun [redacted]). The officers got control of him and were able to handcuff him.

75 Other officers started to arrive on the scene.

76 Officer Adams turned Mr. [redacted] over and removed the gun from his waistband. Officer Evans search Mr. T[redacted] incident to arrest. He found in his pocket a quantity of cash, and a package of what he believed at the time was crack cocaine (it later turned out to be medication prescribed to Mr. T[redacted]

77 Custody of Mr. T[redacted] was turned over to DC Kotzer, who had arrived on the scene.

78 The front passenger door was open. Officer Evans seized a white balaclava and an iPhone from the centre console. Officer Evans testified that the first time he saw the white balaclava was when he removed it from the vehicle. He said from its shape and size it looked like a balaclava where it was lying in the vehicle, but that he could not see the eye-holes from the passenger side until he picked it up. In cross-examination, he said he could not recall what type of centre console it was -- whether with a gear shift or a brake there. He agreed that when he seized the balaclava, it was not lying flat over the console.

79 Officer Evans agreed that he had testified at the preliminary inquiry that it was not until he picked the item up and saw that its size and shape were like balaclavas he'd seen before, and said at the preliminary inquiry, "then I realized it was a balaclava". It was suggested to him that the reason he only "realized" it was a balaclava when he picked it up, was because Officer Adams had not earlier told him he had seen a balaclava in the vehicle. Officer Evans denied this suggestion. He then said that when he picked it up he "confirmed" it was a balaclava. When asked again about his use of the word "realized" at the preliminary inquiry, he said that he could have said, "I realized it was the balaclava that Adams told me about" (I pause to note, this was not, in fact, what Officer Evans said at the preliminary inquiry).

80 A number of officers had now arrived at the scene. Some were discussing whether a search warrant should be obtained to search the vehicle. Evans testified that he did not really take part in that conversation.

81 Officer Evans transported Mr. A[redacted] back to 51 Division.

Detective Constable Kotzer

82 Detective Constable Ryan Kotzer was a member of the Major Crimes unit at 51 Division in the fall of 2017. The evening of the arrests at issue in this case was his first night back in uniform as a constable.

83 He testified that in the early morning hours of October 9, 2017, he was in a marked police cruiser near Adelaide and Jarvis when he heard Officer Adams put over the radio that they were stopping a vehicle near Queen and Berkeley. A short time later he heard another radio transmission, possibly officer Evans, giving the location of the stop. The next thing he heard was frantic yelling over the radio. He rushed to the location of the stop.

84 DC Kotzer testified that when he arrived at the location of the stop, he saw Officers Adams and Evans doing a takedown of two males outside a red Nissan Altima. One male (G[redacted]) was lying on the ground

on his stomach outside the rear passenger door. Adams and Evans were not near him. The other male (T[redacted]) was lying on the ground outside the front passenger door. Evans and Adams were physically engaged with him, and DC Kotzer heard someone yell, "gun". Officer Kotzer drew his firearm and ran up and pointed it at the male and told him not to move. The male complied and did not move. Officer Adams removed a revolver from the male's waistband. DC Kotzer holstered his weapon, and then assisted Officer Evans to restrain that male.

85 Officer Kotzer testified that he then tried to slow down both events at the scene, and response of other units. He put over the radio that two males were in custody and everything was in order (he testified that he was not yet aware that Mr. A[redacted] was also in custody in Adams' and Evans' cruiser). He instructed Officer Adams to prove the seized firearm safe. He then started assigning roles to the officers who were present.

86 DC Kotzer continued to keep custody of Mr. T[redacted] He advised him he was under arrest for possession of a firearm in a motor vehicle at 1:23 a.m. Officer Evans did a pat search on Mr. T[redacted]. Officer Evans advised him that he found money, a cell phone, and what he believed to be drugs on Mr. T[redacted] (the drugs later turned out to be prescribed medication for Mr. T[redacted]. DC Kotzer advised Mr. T[redacted] that he was also under arrest for possession of drugs. DC Kotzer's partner took custody of Mr. G[redacted].

87 At 1:28 a.m., DC Kotzer placed Mr. [redacted] in the back of his cruiser and read him his right to counsel from his memo book. He also read him a caution. Mr. [redacted] indicated that he understood. DC Kotzer testified that he understood that Mr. T[redacted] indicated he wanted to speak to counsel, although he did not say precisely what words Mr. T[redacted] used. DC Kotzer also testified that his understanding at that time was that Mr. T[redacted] wanted to speak to duty counsel. He testified that at some point later, Mr. T[redacted] said he wished to speak to a specific counsel, Jennifer Myers. DC Kotzer testified that Mr. T[redacted] identified himself as Omar Ali. There was evidence about DC Kotzer's efforts to verify this name. I will not recount it as I understand there is a charge relating to this issue, but it is not on the Indictment before me.

88 At that point a number of officers had arrived on the scene, and there was discussion about how to continue the investigation, in particular investigation and search of the vehicle, and whether the vehicle could be searched incident to arrest, or whether a search warrant should be obtained. DC Kotzer also spoke to Detective Walther by phone about this. In considering this decision, DC Kotzer received from Officer Adams a narrative of the events leading to the seizure of the gun. DC Kotzer had a vague recollection of Officer Adams saying something about having seen drug paraphernalia in the centre console of the vehicle, but he did not remember the details.

89 DC Kotzer testified that in conjunction with other officers, they came to the conclusion that the vehicle could be lawfully searched incident to arrest, but that out of an abundance of caution, they would obtain a search warrant to search the vehicle. He said the ultimate decision on this issue was made by Detective Walther.

90 DC Kotzer arranged for a tow for the vehicle.

91 The three males were transported back to 51 Division. DC Kotzer was responsible for the transport of Mr. T[redacted]. When they arrived at the Division, they were the third vehicle waiting for booking.

92 At 2:49 a.m., they were able to access the booking hall, and Mr. T[redacted] was booked and searched. The search was completed at 3:01 a.m., and Mr. T[redacted] was placed in interview room #4 at 3:09 a.m. DC Kotzer said that room can also be used to privately speak to counsel.

93 However, DC Kotzer testified that Detective Walther was considering whether to seek search warrants for the men's homes. For this reason, a decision was made not to let the three men speak to counsel pending the search warrant decision. Just prior to 4:16 a.m., Detective Walther advised DC Kotzer that the men could be allowed to call counsel.

94 DC Kotzer testified that the reason access to counsel was delayed was a concern that if the men were allowed to contact counsel, the lawyers might contact potential sureties for court. He testified that the officers were concerned that if a lawyer called a potential surety, that might tip them off, and a surety might destroy evidence, or it could create officer safety concerns.

95 DC Kotzer testified that as soon as he was told (at 4:16 a.m.) that warrants for homes were not going to be done, he called Ms Myers for Mr. T[redacted].

96 In cross-examination, DC Kotzer agreed that it was his position that if search warrants were to be obtained for any of the three men's residences, allowing them to contact counsel could jeopardize the investigation. He agreed that it can take hours to obtain a search warrant. He agreed that it is not unusual for it to take four or five hours to obtain a search warrant. He denied that there was a protocol at 51 Division to delay access to counsel while a decision is made on whether to obtain a search warrant. But he agreed that it does routinely occur at 51 Division that access to counsel is delayed while a decision is made about whether to obtain a search warrant. He agreed that in his experience it is routine if a gun has been found to delay access to counsel while a decision is made about obtaining a warrant to search a home. He said sometimes police will attend at an address to freeze it while they wait for a search warrant. In those circumstances, a detainee will be allowed access to counsel. But he said that approach was more rare.

Officer Jason Kraehling

97 In the fall of 2017, Officer Kraehling was a member of the Criminal Investigation Bureau. He prepared the information to obtain a search warrant ("ITO") for the vehicle at issue in this case.

98 His primary evidence relevant to these applications relates to what Officer Adams told him or did not tell him about events at the scene, relevant as possibly prior inconsistent statements by Adams. In addition, he executed the search warrant on the vehicle (what was found is not in dispute).

99 Officer Kraehling testified that he spoke to Officer Adams while he was preparing the ITO for the warrant for the vehicle. He testified that he recorded what Officer Adams told him both in notes he jotted down in his notebook while he was speaking to Adams, and by typing what Adams told him directly into the ITO as he prepared it. In cross-examination, officer Kraehling agreed that Adams was sitting in the room with him as he prepared the ITO. He agreed that he could ask Adams for clarification as he needed

it. He said that he did not ask Adams to read over the ITO to ensure it was correct once it was completed, but that he was sure that he accurately recorded in the ITO what Adams told him. He also agreed that there was detail in the ITO that was not in his jotted notes in his notebook, and this was because he input some of the information Adams gave him directly into the ITO.

100 Officer Kraehling testified that he knew the importance of making full, frank and fair disclosure in an ITO for a search warrant.

101 I will not recount all of Officer Kraehling's evidence about what Officer Adams told him. To the extent what he says Officer Adams told him was consistent with Adams' evidence, it is not probative. I will just highlight the alleged prior inconsistent statements that I think have some significance.

102 Officer Kraehling said that Officer Adams recounted events that evening to him in chronological order. After recounting that the driver gave the name "J[redacted]", and would not identify himself, so he was arrested for obstruct police, Officer Kraehling said that Officer Adams started to say something about the driver door, then he stopped and said that he saw a balaclava on the centre console. He then said that in the driver side door there was a stack of cash and a white bag of drugs, or something to that effect. Officer Kraehling's note about this recorded: "driver side door, balaclava on centre console [then on the next line] cash stack on door (driver) -- white bag drugs (door)". Similarly, in the ITO for the search warrant (para. 16), Officer Kraehling recorded that officer Adams had seen the balaclava as Mr. A[redacted] was removed from the vehicle when he was arrested.

103 In cross-examination, Officer Kraehling confirmed Officer Adams told him that he saw the balaclava when the driver was placed under arrest and asked to step out of the vehicle.

104 A search warrant was issued for the vehicle. Officer Kraehling executed the warrant on October 14, 2017 with Constable Ramis, who was a scene of the crime officer. In the trunk, they found a backpack with a shoebox inside it. Inside the shoebox were multiple pill bottles, mostly of oxycocet and hydromorphone. Photos of the pill bottles were marked as exhibits. It is common ground between the parties, and this is evident from the photos, that the bottles are wholesale bottles of the type a pharmacy would possess, not smaller bottles that would be given to an individual holding a prescription. Officer Kraehling testified that some of the bottles were still sealed, and some had been opened. There were approximately 2000 pills in total, broken down as follows: 131 x 1 mg pills of hydromorphone, 60 x 2 mg pills of hydromorphone, 75 x 4 mg pills of hydromorphone, 137 x 20 mg pills of oxycodone hydrochloride, 50 x 40 mg pills of oxycodone hydrochloride, 1458 pills of oxycocet (5 mg of oxycodone and 325 mg of acetaminophen per pill), and a further 83 pills in an unlabelled bottle that appeared to by the same as the oxycocet pills.

105 In cross-examination, Officer Kraehling agreed that when he was searching the vehicle, he was careful to check the compartment on the driver side door because of what Officer Adams had told him about seeing money and a white bag which may contain drugs there. He looked in that compartment. But he said he was not looking for drugs because the search warrant was for firearms and ammunition. But he agreed that he would seize drugs if he found them. He agreed that he did could not recall seeing in the driver side door either a white substance or a bag that would contain a substance. He agreed that he made no efforts to have the SOCO officer take photos of the driver side door or the console. In his view it was not his job to tell the SOCO officer how to do his job.

Findings of Fact regarding reasons for the stop and the searches

106 I do not accept the evidence of Officers Adams and Evans about the reasons for the stop. I also do not accept the evidence of Officer Adams about what he saw when within the vehicle that is the asserted basis for the lawfulness of the search of the occupants of the vehicle and of the interior of the vehicle. It is these purported observations made only by officer Adams that the Crown relies on as the basis to investigatively detain and search the passengers.

107 My first, and most significant, concern about the credibility of Officers Adams and Evans about the reasons for the vehicle stop is that their trial evidence is significantly inconsistent with the contemporaneous notebook entries that each of them made for the stop.

108 In the face of these very clear notebook entries, I do not accept as truthful the evidence of Officers Adams and Evans that at the time they conducted the stop in their minds it was a dual purpose stop both under the *HTA* and to gather intelligence or information/criminal investigation. I find that the officers had only one purpose -- to gather intelligence about or criminally investigate the occupants of the vehicle. They did not have an *HTA* purpose.

109 The words the officers wrote in their notebooks, in their ordinary English meaning, say that the officers did not have an *HTA* reason to stop the vehicle. Each officer's note expressly disclaims a *HTA* reason for the stop. Each note then states the actual reason for the stop as investigating the information from DC Arshad, that is, an intelligence gathering/criminal investigation purpose in relation to previous sighting of the vehicle on September 26, 2017.

110 Thus, of two possible purposes (*HTA* or criminal investigation), in a situation where the officers could have asserted either or both of the purposes as a factual matter (not necessarily each alone constituting lawful constitutional grounds), each officer expressly said in his notes that that there was no *HTA* reason for the stop, and expressly stated that the reason for the stop was information gathering/criminal investigation based on the information from DC Arshad about the vehicle. The each officer's note repudiates one purpose for the stop (*HTA*), and say it is only the other (investigation in relation to the information from DC Arshad and the shootings).

111 In addition to the clarity of the notes, this formulation (which I will summarize as "not this purpose; that purpose") appears in the notes of both Officers Adams and Evans. If only one officer had this formulation in his notes, and the other officer clearly had in his notes some language to make clear that it was intended as a dual purpose stop, then (depending on all of the evidence) one might draw the conclusion that the officer who had a note saying "not this purpose; that purpose" was just a poor communicator. But with two officers, each with a clear note disclaiming any *HTA* reason for the stop, I am not able to draw that conclusion.

112 Both Officer Adams and Officer Evans gave an explanation for these notes and the apparent inconsistency of the notes with their evidence that the stop was a dual purpose stop. I do not find the explanation provided by either officer to be credible.

113 Officer Adams' explanation for the note was that "no HTA reason to stop the vehicle" in his notes meant there was no moving violation by the vehicle. I do not accept this explanation. Officer Adams' note

in relation there being no *HTA* reason for the stop is categorical. I do not accept that Officer Adams would have written in his notes, "no *HTA* reason to stop the vehicle", if, in fact, he was relying on the authority of the *HTA* to make the stop at the time of the stop. His explanation does not make sense given the ordinary meaning of the words in his note, and particularly given the rest of the note that immediately follows: "Reason for the stop is info from Arshad along with all the shootings, time of day, day of week, public safety. My intentions were to detain and investigate the driver and occupants."

114 Officer Evans' explanation for the note, given in a fairly leading re-examination, was that it is not his practice to list *HTA* reasons in his notes when he does a vehicle stop. He said that he writes things in his notes to refresh his memory, and he has no need to refresh his memory about the reasons for *HTA* stops.

115 I do not find this explanation to be credible. One wonders why when a stop is an *HTA* stop Officer Evans finds it less necessary to note the reason for the stop than if it is a stop for some other reason. One wonders why he finds it less necessary to refresh his memory for this particular kind of stop. And one wonders why, if he does not as a practice write in his notebook *HTA* reasons for a vehicle stop, he would write in his notebook about the stop at issue in this case, "We have no HTA reason for the stop".

116 In addition to the very clear notes that each officer made saying there were no *HTA* reasons for the stop, I find that Officer Evans evidence about what he told Mr. T[redacted] about the reasons for the stop is a factor that supports my finding that there were no *HTA* reasons for the stop. Officer Evans testified that when the front seat passenger asked him the reason for the stop (at the time of the initial stop), he told him that the officers had seen the vehicle twice and there was an increase in shootings. If one of the reasons for the stop had been an *HTA* reason such as checking if the driver was licenced or the speed of the vehicle on Shuter, why would Officer Evans not simply have said it was a stop to check for driving documents, or the speed of the vehicle? His failure to give one of these straightforward reasons, which would pose no officer safety concerns, in my view speaks to these not really being the reasons for the stop.

117 I also do not accept Officer Adams' evidence about seeing the balaclava on the centre console when he was first standing outside the driver door speaking to the driver (prior to the arrest of the driver), or seeing in the driver door compartment money, a digital scale (which turned out to be a blackberry) and a torn bag he took to be drug wrapping when the driver door was opened when he placed the driver under arrest.

118 My reasons for not believing this evidence relate to a combination of the evidence being in some ways contrary to common sense and logic, inconsistency with the evidence of Officer Evans, and Officer Adams having given an inconsistent statement about the chronology when he related events to Officer Kraehling who prepared the search warrant. I list these concerns one by one below. But I want to make clear that my finding of not accepting the credibility of Officer Adams' evidence about when he says he saw the various items in the vehicle is based on considering these factors together, along with my finding that I do not accept his evidence about the reasons for the initial stop of the vehicle, in the context of all of the evidence.

119 First, Officer Adams claimed he saw the balaclava on the centre console when he was standing outside the vehicle by the driver door and speaking to the driver. A photo of the balaclava was filed as an exhibit. It is a white knit item, with one hole, approximately three inches wide, where the eyes would be if

one wore it. Unless the item was lying face up over the console and flat, I do not see how Officer Adams would have been in a position to tell it was a balaclava when he was standing outside the driver door. I note that Officer Evans gave evidence that he did not realize it was a balaclava until he picked it up (after all the men were under arrest). This also speaks to the balaclava not being laid over the console in a manner that made it obvious what it was without picking it up.

120 Second, if Officer Adams had seen the balaclava when he was first speaking to the driver as he testified, one would expect he would have told Officer Evans about it when they both went back to the cruiser to check the name given to them by the driver, particularly given Officer Adams' evidence that a balaclava was something that made him concerned because people use them to conceal their identities. Both Adams and Evans testified that they went back to the cruiser after receiving the name from the driver to run computer checks on it. But Officer Evans testified that when they were in the cruiser doing that, Officer Adams did not tell him about having seen anything suspicious or unlawful in the vehicle. Indeed, Officer Evans testified that Officer Adams only told him about the balaclava after the driver had been arrested and placed in the cruiser, during the brief conversation when they say they decided to detain and search the passengers.

121 Third, Officer Adams' evidence about when he saw the balaclava was inconsistent with the evidence of Officer Kraehling about what Adams said to him about the events at the roadside when Kraehling was preparing the search warrant application. In both his jotted notes and the ITO (para. 16), Officer Kraehling recorded that Officer Adams told him he saw the balaclava when the driver door was opened at the time of the arrest of the driver (not earlier, as Officer Adams testified to). I have considered the possibility that officer Kraehling was mistaken in the chronology when he recorded what Adams told him. Considering that Kraehling was aware of the importance as an affiant to obtain a search warrant of full and frank disclosure, and also the points I have set out above at paragraphs 119-120, that I find officer Kraehling correctly recorded what he was told by Adams. Thus, I find that Officer Adams made a statement to Officer Kraehling about when he saw the balaclava that is inconsistent with Officer Adams' trial evidence.

122 Fourth, Officer Evans testified that Officer Adams told him about having seen a balaclava in their brief conversation before they asked the passengers to get out of the vehicle (i.e., after the driver had been placed under arrest and taken back to the cruiser). But this evidence is inconsistent with Officer Evans evidence at the preliminary inquiry that he "realized" it was a balaclava when he picked it up off the console after all of the men had been arrested. I agree with the defence argument that if Officer Evans had been told by Adams earlier that he had seen a balaclava in the vehicle, Officer Evans would not have testified at the preliminary inquiry that he "realized" the items was a balaclava when he picked it up. The ordinary meaning of the word "realize" is that one becomes aware of something that one did not know before. I do not accept Officer Evans' explanation that he really meant that he "confirmed" it was a balaclava when he picked it up.

123 Regarding the items that Officer Adams testified he saw in the driver door compartment when the door was opened to arrest the driver, I have a number of concerns. Officer Adams testified that after the seizure of the firearm, after he proved the firearm safe, he seized the items from the driver door. He seized money, and a blackberry. He did not seize the torn plastic bag that he said he saw and that based on his experience was used to package drugs (by tearing a piece of plastic and twisting it up). The digital scale turned out not to be a scale, but a blackberry. In light of the fact that these items he claimed to have seen were an important part of his asserted grounds to investigatively detain and search the passengers, one

would expect he would seize all three items he claims to have seen, especially after the scale turned out to be a blackberry. Adams' explanation for not seizing the torn bag was the continuing stress after having found a firearm. But in light of his thinking to seize the money and blackberry, it is difficult to accept this explanation for not seizing the bag. I note that no torn bag was seized when Officer Kraehling later searched that area pursuant to the warrant.

124 Further, if Officer Adams had seen items he took to be drug paraphernalia, as he asserted in his evidence, one would expect that he would have told Officer Evans that when they discussed the basis to investigatively detain and search the passengers. I appreciate that both officers said this was a brief discussion. But Officer Evans was clear that he thought that the basis to detain and search the passengers was a robbery (based on a balaclava and money allegedly seen), and that Officer Adams said nothing to him about having seen anything associated with drugs.

125 Before leaving this area, I note that the defendants also argued that Officer Adams' evidence about when he saw the balaclava was not credible because the recording of his radio call for another unit does not show the level of urgency one would expect if he had already seen the balaclava in the vehicle. The recording of the radio dispatches has a radio call for back-up when the driver was already under arrest, and then shortly afterwards one can hear what sounds like the struggle over the gun. The defence argues that the low level of urgency in that radio call for back-up is inconsistent with having already seen the balaclava and other items. The request was phrased as a request that "if you've got a free unit, if they could just swing by". I do not rely on this argument in making the findings that Officer Adams was not credible about when he saw the various items. I find that the record in terms of what language police use to indicate various levels of urgency in sending radio calls is insufficient for me to assess this argument.

126 I note that I have considered DC Kotzer's evidence that at the scene, when they were considering whether to search the vehicle incident to arrest, or to obtain a search warrant, Officer Adams said something to him about having seen drug paraphernalia in the centre console of the vehicle, but DC Kotzer did not remember the details. Crown counsel urged the court to rely on this evidence as supporting Officer Adams' credibility.

127 I did not find this evidence helpful because of the vagueness of DC Kotzer's recollection. Potentially, if DC Kotzer had a better recollection, the evidence could be the basis for a finding of a prior inconsistent statement by Officer Adams (because Adams' evidence was that he saw what he took to be drug paraphernalia in the driver door compartment, not in the centre console). Potentially, it could also be used to rebut an allegation of recent fabrication, on the basis that Officer Adams referenced seeing drug paraphernalia at the scene, very soon after the events. But I find that DC Kotzer's evidence on this point is so vague and lacking in detail that I do not use it for either of these purposes.

128 Crown counsel argued that a factor I should weigh in assessing PC Adams' credibility was his demeanour when the suggestion was made to him in cross-examination that he was lying about the reasons for the vehicle stop and about what he had seen when in the vehicle. According to Crown counsel's argument, PC Adams was "upset".

129 I start by noting that I am very cautious in relying in demeanour as an indication of credibility. The Court of Appeal has cautioned against overreliance on demeanour in assessing credibility. Use of

demeanour to assess credibility often has the pitfall of making stereotypical assumptions about how people do or should react to various things.

130 But I want to address this issue because as a factual matter I disagree with Crown counsel's characterization of Officer Adams' demeanour. Officer Adams did not strike me as "upset" at any point during his evidence. I would describe his demeanour when the suggestion was made to him that he was lying about the grounds for the stop and about when he saw various things as being firm in his denial. Having made this finding, I find that the observations I made of Officer Adams demeanour while he testified is a neutral factor in my assessment of his evidence.

131 In these circumstances, I do not accept as truthful the evidence of Officers Adams and Evans that at the time they conducted the stop they considered it to be a dual purpose *HTA* and investigative/intelligence gathering stop. I find that the officers' sole purpose in making the stop was to investigate the occupants of the vehicle in relation to the information DC Arshad had given them at the start of their shift.

132 Finally, I want to return to one issue related to my findings that I do not find Officers Adams and Evans credible on the reasons for the vehicle stop (and Officer Adams on what he says he saw when inside the vehicle). In my view, having found that the officers misled the court in their evidence, I find that it is an inescapable conclusion that they did so in order to try and save *Charter* problems with the detention and searches. However, I do not need to go further in assessing the cause of their not relying on the *HTA* as one of the bases for the stop at the time of the stop (where arguably they could have done so and lawfully done a dual purpose stop -- a factor I will return to in my s. 24(2) analysis).

133 I say this for the following reasons. At the time of trial both Officer Adams and Officer Evans seemed well-versed in their powers to stop vehicles under the *HTA*, and about the law relating to dual purpose stops. Indeed, in his evidence, Officer Evans described a case which on its facts appeared to refer to the *Brown* decision of the Court of Appeal. He referred to a case involving bikers and RIDE stops.

134 The evidence of Officers Adams and Evans at trial was that they were aware of the authority to conduct dual purpose stops at the time this stop was conducted, in October 2017. As I have outlined above, I do not accept as credible their evidence regarding the reasons for the stop and for the detention. For this reason, I am also not prepared on their word alone to accept that they knew they had the authority to conduct dual purpose stops in October 2017. I make no finding of fact on this issue. They may have known, they may not have known. But I am not prepared to find that they knew in October 2017 that the law gave them the authority to conduct dual purpose stops based only on their word for it.

135 On the evidence before me, and in particular given the officers' notebook entries that there was no *HTA* reason for the stop, and instead listing the reason for the stop as related to the information from DC Arshad and the shootings, it seems to me there are likely two possible explanations not relying on the *HTA* at the time. Either the officers knew about their *HTA* authority to conduct dual purpose stops, but did not turn their minds to it; or they did not in October 2017 understand the scope of their authority to conduct dual purpose stops under the *HTA*, and have somehow learned of it since that time. I make no finding as between these two possibilities. But given the clarity of their contemporaneous notes about reasons for the stop, I find that their reasons or purpose in making the stop did not include *HTA* reasons.

Background information from Detectives Hammeed and Arshad regarding previous sighting of the red Nissan on September 26, 2017

136 There was significant cross-examination and some argument about whether DC Arshad exaggerated the information he had regarding the events observed by the TCHC officer on September 26, 2017 in relation to the red Nissan Altima, and also about whether the form 227 directed officers to stop the red Nissan (regardless of whether lawful grounds existed for a vehicle stop).

137 Ultimately, neither of these issues is significant in my findings of violations of the defendants' *Charter* rights. I find that DC Arshad did exaggerate the information he was given, for reasons set out below. However, I find that he did not pass on any of the exaggerated detail to Officers Adams and Evans, so the exaggeration had no practical impact on the defendants.

138 Further, although I have concerns about the wording of the form 227, I accept that neither Officer Adams nor Officer Evans treated it as a directive to stop the vehicle. The record before me does not support such a finding.

DC Hammeed

139 Detective Constable Mohammed Hammeed is an officer at 51 Division. In the fall of 2017 he was with the Major Crime unit.

140 DC Hammeed testified that in the summer and fall of 2017, there were a number of shootings in Regent Park. He testified that as part of the investigation of the shootings, the Major Crime unit set up static surveillance in Regent Park. On September 26, 2017, Detective Shaw (who was not called as a witness) put over the radio during surveillance that two black males were loitering in the area of Regent Park, one of the males showed signs of having a gun. The males were seen to quickly leave Regent Park in the area of Sumach and Gerrard in a red vehicle with licence plate CCSV 802. Detective Shaw had not seen the individuals himself, but had received the information from a TCHC officer. DC Hameed had no information about what about the one male made it seem like he may have a gun.[1]

141 Based on this information, DC Hammeed completed a form 227. A form 227 is a form to note a person or a vehicle is of interest to police. It may be filled out for reasons of officer safety, and/or for investigation. DC Hammeed testified that in filling out the form 227 regarding the September 26 information, his purpose was for future investigation of the two people associated with the red vehicle, in particular to find out who they were. In addition to listing the year, make, model and licence plate number of the vehicle, the form 227 stated: "Please approach the vehicle with caution, the vehicle has been seen in the Regent Park area and the occupants of the vehicle may be armed. Please obtain information on all occupants of the vehicle." The form 227 is uploaded to the police computer system.

142 Prior to completing the form 227, DC Hammeed did an MTO search on the licence plate for the vehicle. The registered owner was a woman. He did not do any follow up investigation.

143 DC Hammeed testified that on October 6, 2017, DC Arshad inquired with him about the Regent Park shootings. DC Hammeed told DC Arshad about the form 227, and showed him a copy of it.

144 DC Hammeed agreed in cross-examination that regarding the September 26 incident, he received no

information about where the men went from Gerrard and Sumach, and he received no information about the men using laneways to leave the area. He agreed that since he had received no information about the men using laneways to leave the area, he did not tell DC Arshad anything about the men using laneways to leave the area. He also agreed that the information he received about the September 26 incident did not say anything about the males running from the scene. He also agreed that he did not receive any information between September 26 and October 9, 2017 that a crime had been committed by the men on September 26.

145 I found DC Hammeed's evidence on what information he had received about the September 26 incident, and what information he passed on to DC Arshad on October 6, to be credible and fair.

146 I pause to note that the wording on the form 227 of "please obtain information on all occupants in the vehicle" causes me some concern. To the extent that it could be read as a directive to officers who may encounter the vehicle to stop it, and to question all of the occupants, in the absence of a finding at the time of the stop of some lawful basis for the stop (and if the stop is based on the *HTA*, some lawful basis to question any passengers), it creates a situation which unnecessarily puts constitutional rights at risk. I make no definitive holding on this issue, because on the record before me, I find that Officers Adams and Evans did not treat the form 227 as a directive.

Detective Constable Arshad

147 In the fall of 2017, Detective Sheraz Arshad was a field intelligence officer at 51 Division. He gave evidence about information that he became aware of regarding a vehicle seen near Regent Park on September 26, 2017 (the same vehicle that the defendants were stopped in on October 8/9, 2017). He also testified about the conversation with Officers Adams and Evans at the start of their shift on October 8, 2017, where he passed some of this information on to them.

148 DC Arshad testified that in his role as a field intelligence officer, he was responsible to collect information form a variety of sources and provide it to officers pursuing investigations and to uniformed officers.

149 DC Arshad gave evidence about a rash of shootings in Regent Park in the in the summer and fall of 2017 that were of concern to the police and the public. The details of the shootings are not important for purposes of this application. I accept that they were of serious concern to the police who worked in 51 Division. The suspect information that DC Arshad testified he was aware of regarding the shootings was that there were one to three males, wearing hoodies. There was no description of height, weight, age or race of the perpetrators available. The shootings all happened late at night within a two block radius in Regent Park. DC Arshad also testified that he had information that the perpetrators travelled through laneways in the area, and that the laneways are not through laneways, so in his view this showed that they knew the area well. DC Arshad testified that he disseminated information about the shootings to other officers in 51 Division by email, and through briefings as new platoons would come on shift. As a result of the shootings, the police placed extra officers on shift in the area overnight beginning on October 6, 2017.

150 On October 6, 2017, during his shift, DC Arshad spoke to an officer with the Major Crime unit, DC Hammeed. DC Arshad testified that DC Hammeed told him that a week or so previously, two hooded individuals had taken off running from an area in Regent Park in a red Nissan Altima, licence number

CCSV 802. DC Arshad said that DC Hammeed told him that the information was that the men took off after seeing a TCHC special constable, and that they used a laneway behind 407 Gerrard. The only description of the men associated with the vehicle was two males with hoodies. There was no description of the men. DC Arshad also testified that he was shown a form 227 relating to this incident which had been completed by DC Hammeed. The form 227 (which was marked as Exhibit C) contained the information about the vehicle and the two males in hoodies, and said the time was between 11:00 p.m. and 2:00 a.m., and that the event had occurred on the south side of 407 Gerrard. DC Arshad testified that it was his belief that south of 407 Gerrard was one of the laneways used in 3 of 4 of the shootings.

151 DC Arshad testified that DC Hammeed did not say anything to him about the men in the September 26 incident being armed. But the form 227 said to approach the vehicle with caution because the occupants may be armed.

152 DC Arshad continued to disseminate information he felt was relevant to the Regent Park shootings within 51 Division. On October 8, 2017, he spoke to Officers Adams and Evans near the start of their shift. He did not make a note of the conversation at the time, except that he had a note than he spoke to C Platoon officers, and Adams and Evans were members of C Platoon. However, later that evening when he heard about the vehicle stop by Adams and Evans and the finding of a gun, he made a note of the conversation.

153 DC Arshad testified that in that conversation on October 8, 2017, he told Officers Adams and Evans about the red Nissan Altima, and that it may possibly be connected to the Regent Park shootings. He told them that the occupants may be armed. And he told them that individuals in that vehicle had taken off from TCHC officers on an earlier date from behind 407 Gerrard. He gave them the licence number of the red Nissan from the form 227. He agreed in cross-examination that he did not tell Evans and Adams that the occupants were suspects in the Regent Park shootings.

154 In cross-examination, DC Arshad agreed that all of the information he had about the event on October 6, 2017 came from DC Hammeed and the form 227. When it was put to him that DC Hammeed had testified at the preliminary inquiry that the information he had was that the September 26 men had left the area, but not that they took off running, and that he had not told DC Arshad that the men took off running, DC Arshad maintained that he had been told by Hammeed that the men took off running. He went on to say, commenting on DC Hameed's evidence at the preliminary inquiry which had been put to him in the question: "Listening to the testimony there, it appears that he didn't remember initially what he had said. But I do, and I even remember where I was sitting."

155 In cross-examination, it was also suggested to DC Arshad that DC Hammeed did not tell him anything about the men in the September 26, 2017 incident using laneways to leave the area (and a portion of DC Hammeed's evidence from the preliminary inquiry was played to DC Arshad as part of this question. DC Hammeed had testified that he had not told DC Arshad anything about the men using laneways, because he did not have any specific information about laneways. He only had information that the incident was Gerrard and Sumach or Regent Park generally). DC Arshad maintained that DC Hammeed had given him information about the men using laneways to leave the area.

156 DC Arshad testified that he did not do any investigation of the licence plate of the red Nissan Altima

that he heard about on October 6, 2017. He was not aware if the Major Crime unit had done any investigation of it.

157 DC Arshad also gave some evidence about attending at the scene of the vehicle stop after the gun had been found. I will not summarize it, as it is not germane to the *Charter* applications (except for continuity of exhibits, which is not in issue).

158 DC Arshad denied the suggestion put to him in cross-examination that he exaggerated what he was told by DC Hammeed on October 6 in order to make the September 26 incident appear more connected to the Regent Park shootings.

159 DC Arshad agreed in cross-examination that at no point prior to October 9, 2017 did he receive any information that a crime had been committed by the males on September 26, 2017.

160 DC Arshad agreed in cross-examination that no-one brought the September 26 incident to his attention as a field intelligence officer between September 26 and October 6. He agreed that the only reason it came to his attention on October 6 was because he was on shift and happened to walk in to where the Major Crime unit was working, and it came up in conversation with DC Hammeed. DC Arshad also agreed that he was not given the information about the September 26 event as a "lead" on the Regent Park shootings.

161 I have concerns about the reliability of DC Arshad's evidence in the following sense. He appears to have been somewhat careless with the information he had about the vehicle sighted in Regent Park on September 26, 2017. In my view, he tended to exaggerate the information that was received. I come to this conclusion because the evidence of both DC Hammeed and DC Arshad was that whatever information DC Arshad had, came from Hammeed and the form 227. Yet DC Hammeed was much more limited about the information that was received from the security officer from Regent Park, in particular in his evidence that he did not receive any information that the men were running when they left the area, and that he did not receive any information that they used laneways to leave the area. In light of DC Arshad's evidence that all the information he had about the September 26 incident was received from DC Hammeed, and the content of the form 227, I do not see how DC Arshad could have received this more detailed information that DC Hammeed had. As noted above, I found DC Hammeed to be a credible and fair witness.

162 In addition, I found that DC Arshad at times to seemed to advocate for his position, rather than just give factual evidence. For example, as I have outlined above, at one point when DC Arshad was confronted with DC Hammeed's evidence from the preliminary inquiry that DC Hammeed had not been told that the September 26 men were running when they left the area, DC Arshad took it upon himself to advocate for the weakness of DC Hammeed's memory on this point, and seemed to be arguing that the court should find that DC Hammeed was not a reliable witness on this issue.

163 However, ultimately, I do not find that DC Arshad's exaggeration of the information he had received had an impact on the vehicle stop, because the information passed on to Officers Adams and Evans was very general. For example, Officer Adams testified that the information he was given by DC Arshad on October 8, 2017 did not include anything about the men associated with the vehicle using laneways to leave the area, or say they were running (but he did say that DC Arshad told him the men "took off"). DC

Arshad himself testified that he recalled telling officers Adams and Evans that the September 26 men "took off", but he did not remember telling them anything about the men using laneways.

ANALYSIS

Burden of proof on the *Charter* applications

164 The defendants bear the burden of proof on the *Charter* applications on a balance of probabilities, with one exception. Because the initial searches of the passengers and the passenger compartment of the vehicle was warrantless, the Crown bears the burden to justify those search as reasonable on a balance of probabilities: *R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CanLII 84, *R. v. Haas*, (2005), 76 O.R. (3d) 737 (ONCA), 2005 CanLII 26440 at paragraphs 24-38 (ONCA). The burden remains with the defendants for the later search done with a warrant.

Section 9 of the *Charter* and dual purpose stops

165 Crown counsel argues that the initial stop of the vehicle was lawful under the *HTA* as a dual purpose stop. He argues that Mr. A[redacted] was lawfully removed from the vehicle after he gave a fake name and the officers did some preliminary investigation to come to the conclusion they had grounds to arrest for that. He further argues that it developed into a lawful *Mann* investigative detention of the passengers, in light of Officer Adams' evidence of what he saw in the vehicle (both when he was first speaking to A[redacted], and when A[redacted] was removed from the vehicle).

166 Crown counsel concedes that at the time of the initial stop of the vehicle, Officers Adams and Evans did not have reasonable suspicion that an offence had been committed or was being committed to ground a *Mann* investigative detention.

167 In the alternative, Crown counsel argues that if I find that the initial stop of the vehicle was not a valid dual purpose stop under the *HTA*, I should use the ancillary powers doctrine to find that the stop was lawful and did not infringe *Charter* rights (despite the absence of reasonable suspicion to meet the *Mann* standard for investigative detention).

168 The defendants argue that as a matter of fact, Officers Adams and Evans did not initiate the vehicle stop for *HTA* reasons. Rather, the sole reason for the stop was to gather intelligence or conduct criminal investigation in relation to the information provided to them at the start of their shift by DC Arshad. The defendants argue that this purpose, absent a lawful *HTA* purpose, was unlawful and violated the defendants' s. 9 *Charter* rights.

169 As is clear from my findings of fact in relation to Officers Adams and Evans, the factual basis for Crown counsel's primary submissions is undermined by the findings of fact I have made. I will set out the governing law in relation to dual purpose *HTA* stops, which is not in dispute. I will then explain my analysis of how that law applies to the facts I have found in this case.

The Law in relation to dual purpose HTA stops

170 As I have noted, the applicable law is not in dispute. The following principles emerge from the case law:

(i) A dual purpose stop is lawful and will not violate s. 9 of the *Charter* as long as one of the purposes for the stop is an *HTA* purpose. This is so even if the *HTA* purpose is a secondary purpose or small part of the reasons for stop: *R. v. Nolet*, [2010] 1 S.C.R. 851, 2010 SCC 24 at paras. 35-41; *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223, 1998 CanLII 7198 (ONCA) at pp. 235-36; *R. v. Humphrey*, 2011 ONSC 3024 at paras. 90-99; *R. v. Morris*, 2011 ONSC 5142 at paras. 39-46, affirmed 2013 ONCA 223; *R. v. Gayle*, 2015 ONCJ 575 at para. 12.

(ii) For a valid dual purpose *HTA* stop, there does not need to be a specific *HTA* offence under investigation; rather, a road safety-related purpose is sufficient. Examples of such purposes include checking the driver's licence and insurance, checking the sobriety of the driver, and mechanical fitness of the vehicle: *Nolet* at para. 25-26; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, 1990 CanLII 108 at pp. 1274-76, 1279-87; *Humphrey* at para. 79.

(iii) A court reviewing the reasons for a stop should not weigh the relative importance to the detaining officers of the *HTA* purpose as compared to an ulterior investigative purpose. As long as an *HTA* purpose is present, the stop will be lawful and constitutional: *Nolet* at paras. 35-41.

(iv) Only if there is no genuine *HTA* purpose as a reason for the stop will the stop be unlawful and violate s. 9 (assuming there is no other legal basis for the stop, such as grounds for a *Mann* investigative detention)[2]. In other words, if the purpose for the stop is criminal investigation, or intelligence gathering, or some other purpose, and the *HTA* is used solely as a pretext or ruse for the stop, the stop will be unlawful and violate s. 9 of the *Charter*: *Nolet* at paras. 36, 41; *Brown* at p. 234; *Humphrey* at paras. 87-88, 98-102; *Morris* at para. 37; *Gayle* at para. 13.

(v) The assessment of the reasons for the stop is necessarily very fact-specific, and the factual findings of the trial judge will be central to assessing whether or not the stop was *Charter*-compliant. It is necessary for a trial judge to proceed step by step through the interaction from the initial stop onward to assess whether there was a breach of s. 9 (or 8) of the *Charter: Nolet* at paras. 4, 23; *Gayle* at para. 10.

171 I will briefly focus on two issues from the summary above that are important in this case: the breadth of concerns that can validly ground a stop under the *HTA*, and the issue of the use of the *HTA* as a "ruse" or "pretext".

172 With respect to the types of reasons that can ground a stop under the *HTA*, the case law has interpreted the authority very broadly. It is not necessary that reasonable and probable grounds or reasonable suspicion exist that an offence under the *HTA* has been committed. Rather, the authority to stop a vehicle under provincial highway traffic legislation extends to any purpose related to road safety, including checking the driver's licence and insurance, checking the sobriety of the driver, and mechanical fitness of the vehicle: *Ladouceur* at pp. 1274-76, 1279-87; *Nolet* at paras. 25-26; *Brown* at pp. 233-234. I note that the authority to use a stop under the *HTA* to check if a driver is properly licenced and insured is supported by the combined effect of s. 216 (the power to stop vehicles), and s. 33 (the obligation on a driver to carry and produce their driver's licence upon request by a police officer).

173 With respect to the use of highway traffic legislation as a "ruse" or "pretext" for a stop, Justice

Binnie, writing for the court, made the following comments in relation to the limits of *HTA* stops in *Nolet* at paras. 36 and 41 (referring with approval to the approach of Wilkinson J.A. in the court below):

> Wilkinson J.A., for the majority in the court below, found the dual purpose debate unhelpful and succinctly expressed the view that
>
> > The lawful aim cannot be used as a pretext, ruse, or subterfuge to perpetuate the unlawful aim. That, ultimately, is the focal point of the inquiry. It is not a question of degree, or determining which purpose is predominate or subordinate. Rather, it is a question whether a lawful purpose is being exploited to achieve an impermissible aim.
>
> What happened here, in her view, is not within the mischief contemplated by the late Chief Justice Bayda in *Ladouceur (Sask.)* that "it is important not to encourage the establishment of checkstops where a nominally lawful aim is but a plausible façade for an unlawful aim".
>
> . . .
>
> I agree with Wilkinson J.A. that the question is not "determining which purpose is predominate or subordinate". As long as there is a continuing regulatory power, the issue is whether the officer's search of the duffle bag infringed the reasonable expectations of privacy of the appellants.

174 In *Brown*, Justice Doherty made a similar point at p. 234:

> The appellants argued at trial and on appeal that highway safety concerns were a ruse used by the police to justify the stopping of the appellants, their friends and associates. Had this argument been accepted, s. 216(1) of the *HTA* could provide no lawful authority for the stops and detentions [citations omitted].

The appellants in *Brown* did not prevail because the trial judge found as a fact that highway safety concerns were one of the purposes motivating the stop, and the Court of Appeal did not find any basis to interfere in the trial judge's fact-finding role (at pp. 234-35).

175 Similarly, in *Humphrey*, Justice Code held as follows at paras. 87-88:

> [Defence counsel's] submission is that the police were not, in fact, acting on the basis of the expired val tag. It was simply a "ruse" or a "pretext" for the real purpose behind the stop, which was to conduct a general criminal investigation of suspected gang members. In addition, he alleges "racial profiling" as an underlying factor that contributed to the stop.
>
> There can be no doubt that both branches of [defence counsel's] s. 9 argument are sound in law. It would clearly violate s. 9 of the *Charter* to use *Highway Traffic Act* grounds as a mere "ruse" or "pretext" for a broad and unfounded criminal investigation. In the passages set out above from *Brown et al v. Durham Regional Police Force, supra* at 22, Doherty J.A. states that the s. 9 inquiry involves examining "the reasons behind the exercise of statutory power to stop and detain", in order to determine whether they are "legitimately connected to legitimate highway safety concerns".

As in *Brown*, the defendant in *Humphrey* did not prevail because the trial judge was not persuaded as a factual matter that the evidence supported a finding that the *HTA* was used as a pretext or a ruse (at paras. 98-102).

176 Considering the ruse/pretext issue from the flip-side of what constitute lawful grounds to stop a vehicle under the *HTA*, I turn back to the early authority for "random" (i.e. non-static) use of *HTA* stopping powers, *Ladouceur*. In holding that the precursor to s. 216 of the *HTA* was a reasonable limit on the infringement of s. 9 posed by these stops, Justice Cory underscored that the existence of a link to highway safety reasons as the purpose for a stop was a part of what supported the constitutional validity of the section (at p. 1287):

> Finally, it must be shown that the routine check does not so severely trench upon the s. 9 right so as to outweigh the legislative objective. The concern at this stage is the perceived potential for abuse of this power by law enforcement officials. In my opinion, these fears are unfounded. There are mechanisms already in place which prevent abuse. Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and mechanical fitness of the vehicle.

177 I highlight this passage not to suggest that a having a secondary purpose beyond the *HTA* is not permissible -- it clearly is permissible on the later cases. Rather what this passage underlines is that there must be an *HTA* purpose present. In the absence of any *HTA* purpose for the stop, the stop will be unlawful and unconstitutional.

178 There is not extensive discussion in the case law of the meaning of a pretext or ruse. But reading the various extracts above, it appears to have its ordinary meaning. I find the comments of Justice Duncan in *Gayle* on this issue helpful (at para. 16):

> A pretext is not something that is false -- at least not necessarily so. It is an "ostensible or alleged reason or intention" (*Concise Oxford Dictionary*) or "a reason that you give to hide your real reason for doing something" (*Merriam-Webster Dictionary*).

179 Justice Stribopoulos, in a decision released after the argument of these applications, described a pretext as "a false justification", which I find is to similar effect: *R. v. Mitchell*, 2019 ONSC 2613, at para. 112.

Application of the law regarding dual purpose stops

180 As I have noted, where the Crown seeks to rely on a purported dual purpose stop, the case law is clear that a trial judge must carefully assess the facts of the particular stop, step by step, beginning with the initial stop.

181 In light of my findings of fact and credibility, I do not accept that Officers Adams and Evans had a dual purpose or had any *HTA* purpose when they stopped the vehicle. Their sole purpose in stopping the vehicle was to investigate its occupants based on the information given to them at the start of their shift by DC Arshad about the sighting of the vehicle on September 26, 2017 at Regent Park. To the extent that officer Adams asked Mr. A[redacted] (as the driver) for his driving documents, this was done only as a pretext in order to hide the real purpose of the stop, which was to investigate the vehicle and its occupants, as a result of the information about the sighting of the vehicle on September 26, 2017.

182 Without repeating all of the reasons I do not believe the officers' evidence about the reasons for the stop, I underline that both of them wrote in their notebooks on the night of the stop that there was "no

HTA reason" for the stop. As I have explained above, I do not accept the officers' explanations for why these words would not have their ordinary meaning, that the *HTA* was not the reason for the stop.

183 I am satisfied on a balance of probabilities that the sole purpose of the vehicle stop was to investigate the occupants based on the information that the officers had obtained at the start of their shift from DC Arshad. The stop was not lawful under the *HTA*. And in the absence of sufficient grounds to support an investigative detention pursuant to *Mann*, stopping the vehicle for criminal investigation was an improper purpose for the stop.

184 In accordance with *Grant*, I must consider whether the occupants of the vehicle were detained, and whether the detention was arbitrary: *R. v. Grant* [2009] 2 S.C.R. 353, 2009 SCC 32 at paras. 19-56.

185 In *Grant,* the Supreme Court held that detention refers to a suspension of an individual's liberty interest by a significant physical or psychological restraint. Psychological detention exists where an individual has a legal obligation to comply with the restrictive demand by a police officer, or where a reasonable person would conclude that he or she had no choice but to comply. To determine if a reasonable person in the circumstances of the individual would have thought they were deprived of their liberty to leave, a court should consider all of the circumstances, including whether the police were (on one hand) providing general assistance or making general inquiries or (on the other hand) singling out an individual for focussed attention, and also the nature of the police conduct during the encounter: *Grant* at paras. 28-44.

186 The Court further held in *Grant* that a detention will be arbitrary where it is not authorized by law (and the authorizing law must itself not be arbitrary -- although that issue does not arise in this case): *Grant* at paras. 53-56

187 I find that there is no question that the driver, Mr. A[redacted], was detained at the time of the initial stop. The officers pulled the vehicle over, stopping it from continuing to wherever it had been headed. Officer Adams stood outside the driver door and demanded driving documents from Mr. A[redacted] Although I have found that the use of the *HTA* by the officers was a pretext, and their real reasons for stopping the vehicle were for criminal investigation, Mr. A[redacted] could not have been aware of that. Certainly he was not told that by either of the officers. So, as far as he knew, he was required to submit to the stop or face a charge under s. 216(2) of the *HTA*.

188 However, I separate Mr. A[redacted] as the driver only because *Grant* draws a distinction between a situation of a legal obligation to comply, and the situation where a reasonable person would feel in all the circumstances that they had no choice but to comply. In my view, on the latter analysis, there is no basis to draw a distinction between the driver and the passengers in the circumstances of this case.

189 In light of my finding that the purpose of the stop was solely for intelligence gathering or criminal investigation, and not for any *HTA* purpose, I find that all of the occupants were detained from the time of the initial stop.

190 This finding is supported by the circumstances of the stop. Both officers were in uniform, and were in a marked cruiser. They had pulled the vehicle over using their lights and siren, stopping it from proceeding wherever the occupants had been going prior to the stop. As I have found above, the purpose

in the minds of both officers for doing the stop was criminal investigation of the occupants of the vehicle. Officer Adams' contemporaneous note from that evening included the following: "My intentions were to detain and investigate driver and occupants". This makes clear that in Officer Adams' mind the detention was of all of the occupants of the vehicle.. I find that it is clear that the attention of the officers was focussed solely on investigating the occupants of this particular vehicle. They were not making general inquiries.

191 Once the vehicle was stopped, Officer Adams stood on the driver side, asking for documents from the driver (Mr. A[redacted]). Officer Evans stood outside the passenger doors, in uniform, and having turned on the flashlight on his vest. When Mr. T[redacted] asked why the vehicle had been stopped, officer Evans told him and Mr. G[redacted] that it was because they had seen the vehicle twice, and because of an increase in shootings in the area. These reasons told to the passengers (although not stating the real reason for the stop, as I have found) were not reasons that were limited to the driver. Rather, the reasons that Officer Evans gave to Mr. T[redacted] and Mr. G[redacted] rather related to all the occupants of the vehicle.

192 Putting together the fact of the vehicle stop, the officers' criminal investigative purpose for making the stop, Officer Adams' note that his intention was to "detain and investigate the driver and occupants", the officers standing outside the doors on either side of the vehicle, and Officer Evans then telling the passengers a reason for the stop that was not limited to the driver, I find that objectively all of the occupants of the vehicle were detained from the outset.

193 I have considered the evidence of both Officer Adams and Officer Evans that had the driver properly identified himself, they would have let the vehicle go on its way. I do not accept this evidence. I also do not accept their evidence that the passengers were free to go at the outset of the stop. The evidence of both officers on these points was inextricably linked to their evidence that one of the reasons for the stop was *HTA* concerns. As I have rejected their evidence on this issue, I also reject their evidence that the impact of the stop was limited in a way that flowed from it (purportedly) being and *HTA* stop.

194 Having found that all of the occupants of the vehicle were detained from the time of the initial vehicle stop, I also find that the detention was arbitrary, in the sense that it was not authorized by law. As noted above, Crown counsel conceded that there was not reasonable suspicion that an offence had been committed or was being committed to ground a *Mann* investigative detention at the time of the initial vehicle stop. This concession is consistent with the evidence of officers Adams and Evans that neither of them were of the view that they had reasonable suspicion at the time of the initial stop.

195 In light of the Crown concession that *Mann* grounds for investigative detention did not exist at the time of the initial vehicle stop, and my finding that the officer's use of the *HTA* was a pretext to do a criminal investigation, there was no lawful basis to stop the vehicle. I find that the vehicle stop and subsequent detention of all of its occupants was arbitrary and violated s. 9 of the *Charter*.

196 Further, in addition to the initial unconstitutional arbitrary detention, I do not accept as credible officer Adams' evidence about seeing the balaclava when he was first at the driver door speaking to the driver, or about seeing money, a scale and a torn bag he took to be drug wrapping in the driver door compartment when the door was opened when he asked the driver to step out for the arrest in relation to giving a false name. The Crown's argument that grounds to investigatively detain Mr. T[redacted] and Mr. G[redacted] (the passengers) developed over the course of the stop was dependent on the court accepting

the evidence of Officer Adams about the various items he testified he saw in the vehicle, and when he saw them. I have outlined above my findings of fact on this issue. Absent Officer Adams seeing those things, there were no grounds to investigatively detain the passengers, Mr. T[redacted] and Mr. G[redacted], that arose after the vehicle was stopped.

197 Crown counsel relied on heavily on two decisions where judges of this court found that lawful dual purpose stops had taken place, *Morris* and *R. v. Lubansa*, 2016 ONCJ 235, affirmed 2018 ONCA 227. Crown counsel argued that they are factually similar to this case. I disagree.

198 I start by noting the primary distinguishing feature of both cases, which is that the trial judges in both *Morris* and *Lubansa* accepted as credible the evidence of the officers who conducted the stops in those cases: *Morris* at paras. 9, 20-21, 38, 47-51; *Lubansa* at paras. 1-30. Thus, both *Morris* and *Lubansa* were cases where the trial judges found as a fact that the officers who had conducted the stops had both an *HTA* purpose and a criminal investigative or intelligence gathering purpose at the time they conducted the stops. Unfortunately, I do not come to the same conclusion about the evidence of Officers Adams and Evans about the reasons for the stop in this case.

199 But there are further distinguishing factors. In *Morris*, Justice Harvison-Young clearly placed weight on the fact that the officers' initial interest in the vehicle at issue in that case was clearly for *HTA* reasons which is that the make of vehicle at issue was frequently stolen. There was evidence that the officers had run a number of other licence plates for the same make of vehicle earlier in the evening. Thus, Justice Harvison-Young concluded that the vehicle at issue "had initially come to the attention of the officers for clear HTA-related reasons. This is relevant in my view, to whether the stop was tainted by an improper purpose" (at para. 50). The facts in the case before me are different. The reason that the attention of Officers Adams and Evans was first drawn to the vehicle in this case was because it was a red Nissan Altima, the same vehicle that DC Arshad had given them information about at the start of their shift.

200 Similarly, in *Lubansa*, before any stop of the vehicle was initiated, the officers had run the licence plate and learned that the plate was not authorized to be attached to any vehicle (at para. 6). The trial judge accepted this evidence. This clearly is an *HTA*-related concern.

201 One issue I want to flag, which I will return to under s. 24(2), is that on the record before me, it would have been open to the officers to do a stop based on the *HTA*, if that is what they genuinely subjectively intended to do. I have found as a fact that this was not the purpose of Officers Adams and Evans when they stopped the vehicle. As noted in the *Gayle* decision at paras. 16-17, and as is clear from the language in the decided cases, the inquiry into whether the *HTA* was used as a ruse or pretext focusses on the subjective purposes of the officer(s) who conducted a vehicle stop. But I accept that objectively viewed, it would have been open to an officer to stop the red Nissan on October 9, 2017 for *HTA* reasons, either to check that the driver was licensed, or due to the observed speed of the vehicle as it travelled on Shuter (that is, in my view, an officer need not have a radar gun to be entitled to stop a vehicle under the *HTA* for concerns about speed. Absent a radar gun it might be difficult to sustain a prosecution, but it would certainly be open to an officer to stop a driver and caution them about their speed). I will return to this in my s. 24(2) analysis in considering the seriousness of the breach.

Additional arguments related to s. 9 of the Charter

202 Before leaving section 9, I want to address three additional points. One relates to the provincial carding regulations. The other two relate to alternative arguments made by Crown counsel.

203 Counsel for the defendants and for the Crown made some argument based on the provincial carding regulation which came into force in 2016, prior to the vehicle stop at issue in this case: *Ontario Regulation 58/16, Collection of Identifying Information in Certain Circumstances -- Prohibition and Duties*. Sections 1(2) and 1(3) of the regulation create exceptions to the application of the carding regulation. Those exceptions include where an officer has reasonable suspicion that an offence has been or will be committed (i.e., if grounds exist for a *Mann* investigative detention), or where an individual is legally required to provide information to a police officer (for example, a driver during a lawful *HTA* stop).

204 In light of my finding that the stop of the vehicle was not a lawful stop under the *HTA*, because it was pretextual and its sole purpose was criminal investigation, and the fact that reasonable suspicion for an investigative detention also did not exist at the time of the initial stop, I do not see any basis for application of these exceptions in the regulation.

205 Nor do I find it necessary to consider whether the stop breached the carding regulation. I have already found that the stop violated s. 9 because it was not a valid *HTA* stop, and there were no other grounds for the stop. Analysis of the carding regulation does not add anything to the nature of the *Charter* breach.

206 Second, Crown counsel argued that if I found that the stop was not a valid *HTA* stop, then I should break new ground and find a new standard for stopping an individual or a vehicle that is something more than no grounds at all, but less than the reasonable grounds to suspect standard set out in the investigative detention case law. Crown counsel argued that I could come to this conclusion based on common law police powers and a *Waterfield* analysis.

207 I reject this invitation for two reasons. First, the Supreme Court of Canada considered the appropriate balance between an individual's right to be left alone and go about their business, and the state interest in criminal investigation using a *Waterfield* analysis in *Mann*. The Supreme Court decided that the appropriate balance was to set the standard for stopping for investigative detention at the level of reasonable suspicion. I do not think it is appropriate for me, as a trial judge bound by decisions of the Supreme Court, to revisit that balance. Second, in light of the decision of the provincial government to legislate by way of regulation in this area with the carding regulation, in my view it is not the appropriate role for the court to judicially revise the common law.

208 Third, Crown counsel argues that even if the court finds that there was no *HTA* purpose for the vehicle stop, <u>any</u> lawful execution of a police officer's duties permits a stop under s. 216 of the *HTA*, and the lawful purpose need not be connected to the *HTA*. That is, Crown counsel argues that a criminal investigative purpose, standing alone, as long as it is lawful, can form the basis for a stop under s. 216 of the *HTA*. I reject this argument. This argument was expressly considered by the Court of Appeal in *R. v. Simpson* (1993), 12 O.R. (3d) 182, 1993 CanLII 3379 (ONCA) at p. 193 and in *Brown* at pp. 233-34, and was rejected. Further, it is inconsistent with the case law on dual purpose stops under the *HTA* at this

court, the Court of Appeal, and Supreme Court of Canada level, which, as the name implies, requires a dual purpose for the stop, one of which is an *HTA* purpose, for a stop to be lawful.

Section 8 -- the Searches of the occupants of the vehicle and of the vehicle

209 In light of my factual and legal findings in relation to s. 9 of the *Charter*, the subsequent searches were unreasonable and in violation of s. 8. If the police did not have lawful authority to stop the vehicle, they did not have lawful authority to search anyone following that stop. The purported basis to do the searches depends on events that allegedly happened after the vehicle was arbitrarily and unlawfully stopped: *Mitchell* at paras. 112-115.

210 Further, in light of my factual findings not accepting officer Adams' evidence about what he says he saw when in the vehicle, even if the initial stop had been lawful, there never developed grounds to investigatively detain Mr. [redacted] and Mr. G[redacted] which was the asserted basis to then search them based on officer safety concerns. It was the search of Mr. T[redacted], that led to the finding of the gun and ultimately the obtaining of the search warrant that led to the finding of the drugs in the trunk of the vehicle.

211 Crown counsel made some submission with respect to whether Mr. A[redacted], the driver, could have been searched incident to arrest for obstruction for giving a fake name, including searching the area around him in the vehicle. In my view this argument is speculative, in light of the fact that the officers did not proceed by way of searching the vehicle incident to Mr. Atkinson's arrest, but rather, detained and searched the passengers.

212 On the record before me, it is clear that the warrant later obtained to search the trunk of the vehicle could not have issued absent the search of Mr. T[redacted] and the search of the interior passenger compartment of the vehicle once the men were arrested. That is, the ITO for the warrant is entirely based on the events of the vehicle stop and the searches of its occupants. Thus, the evidence obtained in the search of the trunk with the warrant is evidence obtained in a manner that violated s. 8 (and 9) of the *Charter*, and must be subject to a s. 24(2) analysis (which I consider below): *R. v. Kokesch*, [1990] 3 S.C.R. 3, 1990 CanLII 55 at pp. 19 (Dickson C.J. for the court on this issue, although in dissent in the result).

Section 10(a) of the *Charter*

213 Only Mr. T[redacted]l raised this issue in his application materials and argument.

214 As set out above, my finding of fact is that the reason that the officers stopped the vehicle was solely to investigate the vehicle and its occupants based on the information given the officers Adams and Evans by DC Arshad at the start of their shift. The officers who conducted the stop did not initiate the stop for any *HTA* reasons.

215 Section 10(a) of the *Charter* requires that an officer who arrests or detains a person must inform them promptly of the reasons for the arrest or detention: *R. v. Nguyen*, 2008 ONCA 49 at paras. 16-22; *R. v. Borden*, [1994] 3 S.C.R. 145, 1994 CanLII 63; *R. v. Evans*, [1991] 1 S.C.R. 869, 1991 CanLII 98.

216 On the evidence before me, Officers Adams and Evans gave two different reasons to the occupants

of the vehicle for the stop and detention, neither of which was the true reason, which was to investigate the vehicle and its occupants because of the information about the vehicle from September 26, 2017.

217 Officer Adams' evidence was that he did not specifically say the reason for the stop to the driver, but in his view it was implicit in his asking for driving documents that he was saying it was an *HTA* stop. Officer Evans told Mr. T[redacted] that the reason for the stop was because they had seen the vehicle twice in the area, and the increase in shootings in the area.

218 Neither of these was the true reason for the stop and detention. Thus, I find that the officers violated Mr. Tesfamichael's s. 10(a) rights.

219 For sake of clarity, I underline that I leave open the question of whether, had the officers in fact been engaged in a dual purpose *HTA* stop, it would have been sufficient to tell the occupants of the vehicle about the *HTA* purpose to comply with s. 10(a), without telling them about the secondary investigative purpose. As far as I am aware, this issue has not been settled in the jurisprudence: S. Penney, V. Rondinelli, J. Stribopoulos, *Criminal Procedure in Canada* (LexisNexis: 2011) at pp. 108-109. Because I reject as a factual matter that the officers had any *HTA* purpose in conducting the vehicle stop, it is not necessary for me to consider this issue.

220 Regarding s. 10(a), Mr. A[redacted] and Mr. G[redacted] did not raise s. 10(a) in their written notices of application. Although they adopted the oral submissions made on behalf of Mr. T[redacted]l in a general way, which included s. 10(a), as this argument was not raised in their written notices, I decline to rule on s. 10(a) in relation to Mr. A[redacted] and Mr. G[redacted].

Section 10(b) of the *Charter*

221 This issue relates only to Mr. T[redacted].

222 The chronology in relation to Mr. T[redacted]l's right to counsel is not in dispute. He was placed under arrest shortly before 1:23 a.m. He was read the right to counsel by DC Kotzer at 1:28 a.m., and said he wanted to speak to counsel. According to DC Kotzer, Mr. T[redacted] initially said he wanted to speak to duty counsel, but sometime later said he wanted to speak to a specific lawyer, whose name he gave to DC Kotzer (counsel of choice is not in issue, because ultimately he was allowed to contact the named counsel).

223 There was some delay in booking Mr. T[redacted], but he was in an interview room by 3:09 a.m. The police did not allow Mr. T[redacted] to contact counsel at that time because they were considering obtaining search warrants for the men's homes. DC Kotzer testified that the concern was that if Mr. T[redacted] was allowed to contact counsel, counsel might contact potential sureties, and one of those people might destroy evidence or pose an officer safety concern.

224 Once it was decided not to seek search warrants for the residences of the men, contact with counsel was facilitated at 4:16 a.m.

225 Crown counsel argues that Mr. T[redacted]l's s. 10(b) rights were not violated. He argues that the police were justified in delaying Mr. T[redacted]'s access to counsel while they considered whether to obtain search warrants for the homes of the men. He argues that once a decision was made not to obtain

search warrants for the men's homes, Mr. T[redacted] was allowed to contact counsel of his choice. He also argues that evidence in this case does not establish the type of practice or policy that the Court of Appeal condemned in *R. v. Rover*, 2018 ONCA 745.

226 The defence does not raise the delay prior to 3:09 a.m. due to the logistics of waiting in line for booking. But the defence argues that the delay after 3:09 violated Mr. T[redacted]l's s. 10(b) rights.

227 In light of the decision of the Court of Appeal in *Rover*, I find that the delay in implementing Mr. T[redacted]'s right to counsel after 3:09 a.m. infringed his right to counsel protected by s. 10(b) of the *Charter*. In my view, the concern asserted by DC Kotzer for delaying right to counsel that counsel might contact sureties and sureties might then destroy evidence or pose an officer safety concern was speculative. There was also some evidence from DC Kotzer supporting that delay in implementing right to counsel was a regular occurrence at 51 Division when the police were considering obtaining search warrants for residences, absent real individualized consideration of the issue.

228 However, I note that the evidence of it being a routine practice was not as strong as the evidence on that issue in *Rover*, and the delay was much shorter, factors which are relevant under s. 24(2).

Section 24(2) -- Should the evidence be excluded?

229 There is no question that the evidence found in the searches of the occupants of the vehicle, and of the vehicle is evidence that was obtained in a manner that violated the *Charter* rights of the defendants. I focus at this stage primarily on the ss. 8 and 9 *Charter* violations. Absent those violations, the physical evidence at issue would not have been obtained. The obtaining of the physical evidence is thus causally, contextually, and temporally related to the breaches.

230 Further, as I have noted above, these connections between the s. 8 and 9 breaches and the obtaining of the evidence, including the causal connection, extend to the items seized from the trunk of the car (the schedule I drugs) pursuant to the warrant subsequently obtained: *Kokesch* at para. 19. On the record before me, it is clear that the warrant later obtained to search the trunk of the vehicle could not have issued absent the search of Mr. T[redacted] and the search of the interior passenger compartment of the vehicle once the men were arrested. That is, the ITO for the warrant is entirely based on the events of the vehicle stop and the searches of its occupants.

231 The analysis under s. 24(2) pursuant to the Supreme Court of Canada decision in *Grant* requires me to consider the following factors in assessing whether in all the circumstances, admission of the physical evidence would bring the administration of justice into disrepute: first, the seriousness of the *Charter*-infringing state conduct; second, the impact of the breach on the *Charter*-protected interests of the defendants; and third, the societal interest in a trial on the merits: *Grant* at paragraphs 71-98, 112-115.

232 The seriousness of the breach inquiry requires the court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending the message that the courts condone state conduct in breach of the *Charter* by refusing to disassociate themselves from the products of that conduct. The more serious or deliberate the conduct, the greater the need for the courts to dissociate themselves from it in order to preserve public confidence in the justice system and the rule of law: *Grant* at paragraphs 72-75.

233 The second branch of the *Grant* analysis focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the defendant, and the extent to which the breach actually undermined the interests the right at issue is designed to protect. The more serious the impact on the defendant, the more strongly this factor will weigh in favour of exclusion: *Grant* at paragraphs 76-78.

234 The third branch of the *Grant* analysis requires the court to consider the societal interest in a trial on the merits. Admission of reliable physical evidence may be more likely to support the societal interest in the truth-seeking function of a trial that will admission of a statement: *Grant* at paras. 79-84; 89-98; 112-115.

235 At the same time, I must consider the important societal interest in protection of the *Charter* rights of individuals and in ensuring that the police respect *Charter* rights in carrying out their duties: *Grant* at paragraphs 79-84. In the case of a serious *Charter* breach, the long terms impact on the administration of justice may favour exclusion of evidence.

236 In considering s. 24(2) of the *Charter*, I focus on the ss. 8 and 9 breaches, as they are the central constitutional violations in the circumstances of this case.

The Seriousness of the breach

237 I find that the breaches in this case are very serious, for two reasons. First, the stop of the vehicle was without lawful grounds and disregarding well-established requirements for lawful vehicle stops. Second, the officers then misled the court about the reasons for the stop and the searches.

238 With respect to the first reason, Officers Adams and Evans stopped the vehicle and detained and searched the occupants solely for criminal investigative reasons. This was not a lawful stop under the *HTA*, nor were there grounds for an investigative detention pursuant to *Mann*. At the time, the law regarding *HTA* stops (including dual purpose stops) and investigative detentions was well-established. The officers acted with disregard for the law in stopping the vehicle for criminal investigation alone, in the absence of lawful grounds to do so: *R. v. Harrison*, [2009] 2 S.C.R. 494, 2009 SCC 34 at paras. 22-25.

239 With respect to the second reason, my finding that the officers misled the court about the reasons for the stop and searches is a factor that significantly aggravates the seriousness of the breach. It is vital that the court not be seen to condone this behaviour by failing to dissociate itself from the fruits of the unconstitutional police conduct: *Harrison* at para. 26; *R. v. Somerville*, 2017 ONSC 3311 at paras. 145-147, 153, 165-66.

240 Indeed, in relation to s. 24(2), although Crown counsel did not concede that the evidence should be excluded if I found Officers Adams and Evans lied about the reasons for the stop, he acknowledged the importance in the case law of the principle that the courts cannot condone police officers giving misleading evidence in relation to *Charter* claims.

241 I have considered in assessing the seriousness of the breach, the fact that although I have found that Officers Adams and Evans had no genuine *HTA* purpose when the stopped the vehicle, that objectively, it would have been permissible to do an *HTA* stop in the circumstances. I accept that this is relevant factor that I should consider in the s. 24(2) analysis. It could be argued that this renders the *Charter* breach of the

initial stop less serious, because although these officers were engaged in a ruse using the *HTA*, it would have been open to an officer to do a lawful *HTA* stop.

242 However, I have two difficulties with this approach. First, in this case I am also faced with a situation where I have found that the officers who conducted the stop misled the court about the reasons for the stop and other aspects of the encounter. The court cannot be seen to condone that conduct.

243 Second, in my view that the fact that it would have been open to an officer to do an *HTA* stop does not make the breach less serious. The power to stop vehicles under highway traffic legislation has been very broadly interpreted by the courts. In order to preserve the freedom of individuals to move about in society, if the police (having been given such broad powers to stop vehicles) misuse these powers and engage in stops that exceed these powers, in my view it is a serious *Charter* breach.

The Impact on the defendants' constitutionally protected interests

244 I find that the impact on the defendants' *Charter* rights was significant. The police singled out this vehicle, and stopped it for criminal investigation in the absence of any lawful grounds to do so. Members of the public are entitled to move around the community without unjustified detention by police. Further, following on the unjustified and unlawful detention, the occupants of the vehicle (in particular the passengers) were removed from the vehicle and searched in the absence of grounds to do so, further aggravating the impact on the defendants.

245 I have considered that the defendants were all in a motor vehicle at the time of the stop and search, and that the relative expectation of privacy in a motor vehicle is less than in, for example, a residence. But in my view the importance of that factor should not be overstated. Most people in modern society travel by car with some frequency. There is an important individual interest in being able to move freely in the community and not be stopped by police unless there are lawful grounds to do so. Although we as a society accept motor vehicle stops for legitimate reasons related to road safety as a justified limit on that freedom, individuals do not give up their *Charter* rights because they step into a vehicle: *Harrison* at paras. 30-32.

Society's interest in an adjudication on the merits

246 I turn then to the third branch of the analysis.

247 There is no question that the offences that the defendants were charged with are very serious. Firearms are a scourge on our community. A loaded firearm in a vehicle poses particular dangers, given the mobility a vehicle provides. Similarly, the large quantity of opiates found in the trunk of the vehicle would be capable of doing untold harm to individuals in terms of addiction, and possible overdoses. Both firearms and opiates are growing problems in recent years. Further, the packaging of the drugs in wholesale pharmaceutical bottles, and their co-existence with a handgun speaks to their having come into the possession of the defendants by unlawful means. Thus, the offences at issue in this case were very serious. The physical evidence seized is reliable evidence. The Crown cannot sustain the prosecution without it. There is a high public interest in a trial on the merits.

248 However, there are also a number of strong public interest concerns on the other side of the balance.

249 There is a public interest in ensuring that individuals are free to move around the community and not

be stopped by police in the absence of lawful authority. This concern must be viewed through the lens of the right members of the public at large to move around the community unimpeded by unlawful and unjustified detention. It skews the analysis to consider the issue only through the lens of the defendants, who, it appears in retrospect after the stop, were engaged in unlawful activity.

250 There is a public interest in the long terms respect for our constitutional rights, and police not over-stepping their legal authority in carrying out their duties.

251 Finally, there is a very important public interest in the courts not being seen to condone unlawful and improper police conduct. This interest is heightened in this case, where I have found that the officers who conducted the stop misled the court about their reasons for the stop in order to avoid detection of unconstitutional actions by the police: *Harrison* at para. 34.

Conclusion on admission or exclusion under s. 24(2)

252 The final s. 24(2) analysis is a qualitative assessment, and not a mathematical exercise.

253 On balance, I find that the long term repute of the administration requires that the evidence be excluded in this case. As I have outlined above, I find that the breaches were serious. Further, the finding that the police misled the court in the evidence about the reasons for the initial stop, and Officer Adams about the reasons for removing and searching the passengers, requires that the court not condone the police action by permitting reliance on the fruits of the *Charter* breaches. The impact of the *Charter* breaches on the rights of the defendants was also significant.

254 The effect of excluding the evidence has the impact that very serious offences will not be tried on their merits. But this factor must not be allowed to overwhelm the balancing. By excluding the evidence, the court dissociates itself from the police misconduct, and promotes the long term repute of the administration of justice by underlining the justice system's commitment to the rights protected by the *Charter*: *Harrison* at paras. 35-42; *R. v. McGuffie*, 2016 ONCA 365, at paras. 61-64, 78, 83.

255 Before leaving s. 24(2), I want to underline that the reasons I exclude the physical evidence in this case relate to the ss. 8 and 9 breaches -- the unconstitutional vehicle stop, and the searches that occurred as a result. Without minimizing the seriousness of the s. 10(a) and 10(b) breaches that I have found in relation to Mr. T[redacted] (in particular the s. 10(b) breach), I would not have excluded the evidence based on those breaches standing alone, and I do not weigh them significantly in my decision to exclude the evidence.

256 In particular, I note that neither the s. 10(a) breach nor the s. 10(b) breach is causally related to the obtaining of the evidence. In relation to the s. 10(a) breach, whether or not the officers had properly informed the men of the reason for the detention, I do not think it would have changed the outcome. Similarly, the s. 10(b) breach occurred after the gun had been found. It is thus not causally connected to the finding of the gun. Although the large amount of drugs found in the trunk pursuant to the warrant was found after the s. 10(b) breach, no evidence was obtained from the s. 10(b) breach, and the s, 10(b) breach had no impact on the obtaining of the search warrant.

257 I accept that the s. 10(a) and 10(b) breaches require a s. 24(2) analysis, because they were temporally and contextually connected to the finding of the gun, drugs and other evidence in the vehicle: *Strachan*; *R.*

v. Pino, 2016 ONCA 389. But the absence of a causal connection between the finding of these items and the *Charter* breaches makes the impact of the breaches much less serious in relation to the items seized.

CONCLUSION

258 For these reasons, I find that the s. 8 and 9 *Charter* rights of all three defendants were infringed. I also find that the s. 10(a) and 10(b) rights of Mr. T[redacted] were infringed. I find that the physical evidence seized from the vehicle was obtained in a manner that infringed the *Charter* rights of the defendants. I find that admission of the physical evidence seized would bring the administration of justice into disrepute. For sake of clarity, the evidence excluded includes the following: the firearm and ammunition; the controlled drugs found in the trunk of the vehicle; two balaclavas; two packages of Canadian currency; the blackberry phone.

259 On April 4, 2019, after I delivered the result on the *Charter* applications, with reasons to follow, on consent, all of the defendants re-elected trial by judge alone, and were arraigned. They each pleaded not guilty to the counts against them. Crown counsel called no evidence, and invited the court to dismiss all of the charges. On that basis, I found all three defendants not guilty of all of the counts against them.

260 I thank all counsel for their assistance during the hearing of the applications.

J.M. COPELAND J.

---

1 Neither the TCHC officer nor Detective Shaw were called as witnesses on the applications. It is not clear to me what the factual basis is for the assertion that one of the September 26 men showed signs that they may have had a firearm. An extract of the preliminary inquiry evidence of the TCHC officer, Alexander Schulz, which was filed on the application is clear that the reason that Schulz was suspicious of the September 26 men was that it was an unusually warm night, and they were wearing hoodies with the hoods up, which concealed parts of their faces, and also that when the men seemed to see the TCHC officers, they turned and walked the other way. Schulz did not make any assertion about a belief about either of the men being armed. He just said "I wasn't sure if they were armed".

2 The case law is clear that a stop will also become unlawful in circumstances where although there may have been an initial valid *HTA* reason for the stop, the police exceed the lawful scope of their powers under the *HTA* (or other governing legislation or common law powers) or where a secondary purpose is itself improper: *Brown* at pp. 236-38. I do not address this line of cases in any detail because of my finding of fact that in this case the initial stop was not motivated by any *HTA* concerns, and the *HTA* was used as a pretext.

End of Document