R. v. Grant

Ontario Judgments

Ontario Superior Court of Justice

N.J. Spies J.

Heard: April 11-14, 2022.

Judgment: May 30, 2022.

Court File No.: CR-21-9/488

[2022] O.J. No. 2472 | 2022 ONSC 2703

RE: R., and [redacted] Grant

(191 paras.)

Counsel

Lucas Price, for the Crown.

Alana Page, for the Defence.

RULING ON DEFENCE *CHARTER* APPLICATION TO EXCLUDE EVIDENCE

N.J. SPIES J.

Introduction

1 The defendant [redacted] Grant was charged with possession of cocaine for the purpose of trafficking.

2 On September 5, 2020, police officers Miller and Minto of the Toronto Police Service stopped the vehicle Mr. Grant was driving because he was speeding. Although Mr. Grant denied traveling as fast as the officers alleged, there is no dispute that the initial detention of Mr. Grant was lawful. PC Miller approached the driver's side of the vehicle to investigate the speeding infraction but then proceeded to question Mr. Grant about cannabis and items he saw in the vehicle. He demanded that Mr. Grant and his female companion exit the vehicle. Mr. Grant was then searched by PC Miller who also searched the satchel he was carrying claiming that these searches were authorized by the *Cannabis Control Act* ("CCA"). A quantity of what is alleged to be cocaine was found in Mr. Grant's satchel and Mr. Grant was arrested.

3 In advance of his trial, which was scheduled to begin on May 9, 2022, Mr. Grant brought an

Application to exclude all the evidence police seized, alleging breaches of his rights under ss. 7, 8, and 10(b) of the *Charter of Rights and Freedoms*. The substance alleged to be cocaine formed the basis of the charge before this Court. Although this substance was not admitted to be cocaine, for the purpose of this application that is how I will refer to it.

4 The Crown called three police officers involved in the stop and the search of Mr. Grant and the vehicle he was driving. The video from the in-car camera ("ICC Video"), photographs taken during the search of the vehicle and the items seized, save for the cocaine, were entered into evidence. Mr. Grant also testified.

5 On May 9, 2022, I advised Mr. Grant and counsel that his *Charter* application was granted and that the evidence seized would be excluded from evidence at trial, with written reasons to follow. As a result, Mr. Grant re-elected trial without a jury before me and pleaded not guilty to the charge. Mr. Price, counsel for the Crown, advised that in light of my decision, the Crown had no evidence to lead. As a result, I dismissed the charge against Mr. Grant. My written reasons for my ruling on the *Charter* Application are as follows.

The Issues

6 It is the position of Ms. Page, counsel for Mr. Grant, that PC Miller violated Mr. Grant's ss. 7, 8 and 10(b) *Charter* rights by asking him investigatory and potentially inculpatory questions at a time when he was detained but not advised of his rights to speak with counsel ("RTC"), not cautioned to remain silent, or told that he was not obliged to answer the officer's questions or participate in what amounted to a search of the vehicle. It is also her position that the searches of Mr. Grant, his satchel, and the vehicle he was driving were unlawful and contrary to s. 8 of the *Charter* because PC Miller did not have reasonable grounds to believe that the vehicle contained cannabis in contravention of the CCA. It was also alleged that the arrest and subsequent search of the female passenger was also unlawful since the police did not have grounds to arrest her for possession of cocaine. Finally, it was alleged that Mr. Grant's s. 10(b) *Charter* rights were again violated by the delay in providing him access to a lawyer. As a result of these alleged breaches, it is the position of Mr. Grant that all the evidence seized should be excluded pursuant to s. 24(2) of the *Charter*.

7 The position of Mr. Price, counsel for the Crown, is that there was no breach of Mr. Grant's *Charter* rights. He argued that the police lawfully pulled Mr. Grant over and detained him, as he was speeding and that his s. 7 and 10(b) rights were not engaged during the regulatory phase of the investigation related to the *Highway Traffic Act* ("HTA") and the CCA, that the police complied with s. 8 of the *Charter*, as the searches were authorized by the CCA, that Mr. Grant's s.10(b) rights were implemented in a timely fashion, taking account of the realities of a criminal investigation, and the specific circumstances of this case and that Mr. Grant has no standing to challenge any perceived violations of his passenger's *Charter* rights. Mr. Price argued in the alternative that if any of Mr. Grant's *Charter* rights were breached, no evidence should be excluded pursuant to s. 24(2) of the *Charter*.

8 The issues therefore are:

a) Has Mr. Grant proven that his s. 7 and s. 8 *Charter* rights were breached when he was asked questions by PC Miller, and he handed certain items over to PC Miller?

b) Has the Crown proven that the warrantless search of Mr. Grant's satchel was lawful and not contrary to s. 8 of the *Charter*?

c) Does Mr. Grant have standing to challenge the arrest and search of the female passenger and if so, were her *Charter* rights breached?

d) Were Mr. Grant's s.10(b) *Charter* rights violated by the delay in providing him access to a lawyer?

e) If there was a breach of any of Mr. Grant's *Charter* rights, should the evidence that was seized be excluded from the trial pursuant to s. 24(2) of the *Charter*?

9 As I will come to, the central issue before me on the lawfulness of the search of Mr. Grant, his satchel, and the vehicle he was driving, is whether PC Miller had reasonable grounds to believe that cannabis was in the vehicle in contravention of ss. 12(1) and (2) of the CCA. A determination of that issue will require an assessment of the credibility and reliability of the evidence of the witnesses and in particular PC Miller and Mr. Grant. Those findings will also depend to a large extent on what I find that I can see on the ICC Video and the exchange between PC Miller and Mr. Grant that can be heard.

The Evidence and Preliminary Findings of Fact

10 On September 5, 2020, at approximately 12:52 pm, officers Miller and Minto stopped the vehicle Mr. Grant was driving as he travelled westbound on Kingston Road in the city of Toronto. PC Miller testified that he clocked Mr. Grant at 95 km per hour in a 60 km/hour zone, using a LIDAR speed sensor device. Mr. Grant denied traveling as fast as PC Miller said he did, but he admitted that he may have been speeding. I find that the decision to pull Mr. Grant over for speeding was reasonable and that Mr. Grant's initial detention was lawful.

11 At the time, the officers had been parked at the entrance/exit of the Knights Inn on Kennedy Road just east of Beechgrove Drive. The ICC Video shows some of the traffic on Kingston Road just before PC Miller decided to pull Mr. Grant over. It also shows all the events that took place thereafter that could be seen from the front of the police car until PC Miller switched the camera to show the rear seat of his vehicle where Mr. Grant was seated following his arrest. That ICC Video has been very helpful in determining some of the contested factual issues.

12 After PC Miller signaled to Mr. Grant that he pull over, he did so. PC Miller approached the driver's side of the vehicle and PC Minto approached the passenger side where the only passenger, a female, was seated in the front seat.

13 Using a transcript prepared by Mr. Price of the ICC Video as an aid, the relevant parts of the conversation, to the extent it can be heard and deciphered is as follows. I have included my comments in italics, based on my observations from watching the video. I have underlined those portions of the conversation that I found to be particularly important. I have not included all of the times as they are not relevant save that the entire exchange from the time PC Miller began to speak to Mr. Grant to his arrest was about three minutes, beginning at 12:53 pm.

* PC Miller: "Advise you you're being recorded on microphone and camera. You were doing 95 kilometres an hour and your tint is way too dark."

    * Mr. Grant said something in response that is inaudible, and an exchange followed between PC Miller and Mr. Grant about whether the officer could see into the car. Although PC Miller did state that he could not see in the car "right now" it was not suggested to him in cross-examination that he could not see into the car at that time. Mr. Grant testified that he had his window down all the way. PC Miller said it was three-quarters of the way down. Either way, based on the video and the evidence I heard, I find that PC Miller could see Mr. Grant and the area where he was sitting.

    * PC Miller: "Do you have your driver's licence and insurance as well". *As Mr. Grant began to comply with this request PC Miller started asking him questions*.

    * PC Miller: Do you have any weed in the car? *I note that PC Miller did not ask if Mr. Grant had been smoking weed?*

* Mr. Grant: No

    * PC Miller: What's the bag there, it looks like it's a little (inaudible), no in the footwell, is it empty, is it? - *At this point, based on the evidence, Mr. Grant first picked up a bag of corn nuts that was sitting on the console between him and the passenger when PC Miller stated that he had a "bag there". PC Miller then directed him to a small bag on the floor in front of him. I will come to a description of that bag but there is no dispute that PC Miller could see that was empty. The conversation continued*.

    * PC Miller: it smells like weed in here, you got a grinder right there.

* Mr. Grant: Ya that's we just came from a trip

    * PC Miller: Ya but you can't be having marijuana in the vehicle right so

    * Mr. Grant: There's nothing in it it's empty. *I find that by this time Mr. Grant had handed the empty plastic bag and the grinder to PC Miller. I find that PC Miller opened at least one section of the grinder and he saw the inside. I will come to a description of the grinder*.

    * PC Miller: Well it's [*referring to the grinder*] still going to have all the residue right, you cannot have any cannabis that's accessible to you.

* Mr. Grant: But there's nothing in it

    * PC Miller: So residue [*referring to the residue in the grinder*] can be put on anything and smoked right

    * Mr. Grant: But that's not what that's for that's for actually grinding

    * PC Miller: Ya well I'm still going to check your car for having cannabis accessible ok so I'm going to have you exit the vehicle.

14 According to PC Miller, before he told Mr. Grant to exit the vehicle, he saw the top of a marijuana cigarette, referred to in the evidence as a "roach" or a "joint" interchangeably, sticking up between his legs. This is vigorously denied by Mr. Grant who testified that he had a roach - a partially burned marijuana cigarette, but it was in the pocket of his sweatshirt or sweatpants.

15 As Mr. Grant exited the vehicle, the ICC Video shows him and PC Miller look down towards the

ground. PC Miller then stated: come to the back [*referring to the back of the vehicle*], there's a joint right there [*referring to the roach that had fallen to the ground*].

* Mr. Grant: Oh what the hell
* PC Miller: Right
* Mr. Grant: Oh what the hell
* PC Miller: A joint right there
* Mr. Grant: Oh what the hell
    * PC Miller: So I'm going to check your pockets and everything and then we'll get you to check your pockets ok [*referring to the female passenger*]
* Female voice: [inaudible]
    * PC Miller: You can pull out your pockets [*this statement was to the female passenger who did not want to be searched by PC Minto, a male officer*].
* Female voice: [inaudible]
* PC Miller: Any more drugs or anything on you?
    * Mr. Grant: I have weed in here [*referring to the satchel*]
    * PC Miller: But you said you didn't have any weed in here
* Mr. Grant: No, it's in the car actually sorry
    * PC Miller: Take this off [*the satchel Mr. Grant had over his shoulder*]. I'm going to check it on the camera here.

16 PC Miller searched the satchel on the hood of the scout car and the search can be seen on the ICC Video.

* PC Miller: What's this what's the white powder?
* Mr. Grant: Cocaine. *I find that when Mr. Grant made this utterance he made it in a questioning way-it was not stated as a fact*.
* PC Miller: Ya turn around, put cuffs on, can we get another car at to Eglinton and Kingston/Beachgrove we got one in custody right now.
* PC Miller: Put cuffs on her [*a reference to the female passenger who was also arrested*]
* PC Miller: Ok right now you're under arrest for possession of cocaine
* Mr. Grant: I just found the bag on the floor I don't even know if it's cocaine
* PC Miller: You just told me it's cocaine
    * Mr. Grant: [inaudible] that it's cocaine because it's a white bag. I found a bag on the floor picked up a bag and and that was what was in the bag I don't know what more to tell you we just came from a trip we were literally spending the night somewhere and I found the bag on the floor
* PC Miller: Let me ask you this

* Unknown voice: What do you have going on there?
    * PC Miller: We've got a guy with a bunch of cocaine on him right now. We got two in custody right now just one car all in order right now we've got them both cuffed up now.

17 At 12:57 pm, PC Miller handcuffed Mr. Grant to the rear. At 12:58 pm, Mr. Grant was seated in rear of the scout car by PC Miller.

    * PC Miller: Read her RTC for possession for the purpose [*instructions to PC Minto with respect to the female passenger*]
    * Mr. Grant: Like I literally found that I found that that individual bag that you have there two individual bags and a sandwich bag on the floor out of town
* PC Miller: Ok
    * Mr. Grant: I literally just came back and and the whole
    * PC Miller: Just keep in mind like I still have the microphone on here but now there's a camera inside here as well ok ok so we'll figure it out but right now I'm placing you under arrest for possession of the purpose for the purpose of trafficking uh cocaine
* Mr. Grant: Ok

18 At 12:59 pm, PC Miller told Mr. Grant: It is my duty to inform you that you have the right to retain and instruct counsel without delay. You have the right to telephone any lawyer you wish. You have you also have the right to free legal advice from a legal aid lawyer if you are charged with an offence. You may apply to the Ontario Legal Aid plan for assistance. 1 800 265 0451 is the number that will put you into contact with Legal Aid duty counsel lawyer for free legal advice. Right now do you understand?

* Mr. Grant: Yes
* PC Miller: Do you wish to call a lawyer?
* Mr. Grant: Yes
* PC Miller: Ok do you have a lawyer?
* Mr. Grant: No
    * PC Miller: Ok so do you want to look for a lawyer or just duty counsel the free lawyer?
    * Mr. Grant: Um I'd most likely be looking for a lawyer but when I get the opportunity to make a phone call, I'll figure that out
* PC Miller: You'll figure it out?
* Mr. Grant: Yes
    * PC Miller: So you're not obliged to say anything in answer to the charge whatever you say may be given into evidence do you understand?
* Mr. Grant: Yes
* PC Miller: Ok

19 At 1:00 pm: PC Miller asked for a female officer to attend. PC Pablo had already arrived, and he was instructed by PC Miller:

* PC Miller: If you want to do a search of the vehicle nothing has been searched in the vehicle, so he's been arrested for possession for the purpose of trafficking so now we're looking for also cannabis because that's what the original was for um and then also both of them are under arrest yep he's he's driver yep

20 At 1:01 pm, PC Miller completed his search of the satchel on camera on hood of scout car.

Evidence of the Witnesses

Evidence of PC Brian Miller

21 PC Miller testified that before approaching the vehicle he did an investigation of the licence plate to get the registered owner and any other information concerning the registered owner. I accept this is standard procedure. This however would also have given Mr. Grant a couple of minutes after he was stopped before he interacted with the officer.

22 In his evidence in chief, PC Miller stated that as he approached the driver's side of the vehicle, he could smell the odour of burnt marijuana coming from the vehicle. I note that he did not volunteer it was a strong smell. It was in cross-examination that he added the adjective "strong" for the first time. I find that PC Miller's evidence was that he smelled a strong smell of burnt marijuana.

23 As PC Miller got much closer and was talking to Mr. Grant, he testified that he smelled a "faint or light" odour of fresh marijuana. As to how he could distinguish between the smell of burnt and fresh marijuana, PC Miller referred to the fact that as a police officer he had extensive contact with marijuana in his training at police college where they would see and smell both fresh and burnt marijuana.

24 At the hearing, PC Miller gave very detailed evidence as to what point he smelled the burnt marijuana, referring to point "A" and "B", in reference to parts of the vehicle Mr. Grant was driving. He testified that he smelled the burnt marijuana when he reached the pillar that divides the driver door and the passenger door. Based on the odour, he believed that the driver was smoking marijuana just before he was stopped and that he could possibly be entering a CCA investigation as well as investigating the speeding. He was concerned that the driver could possibly be impaired by drugs. He did not see any cloud of smoke. PC Miller testified that he did not smell the fresh marijuana until he was at the driver's window and started talking to the driver.

25 PC Miller testified that he asked Mr. Grant if he had any weed in the car because based on the CCA, he could only transport marijuana if it was being transported lawfully in which case grounds for a search would not exist. He therefore was of the view that he would have to ask if it was being transported lawfully. PC Miller admitted that when Mr. Grant was asked if he had any weed in the car that he knew Mr. Grant was not legally required to answer him and that he did not tell him this or what the legal implications would be of any answer. It is significant that PC Miller admitted that the smell of marijuana

was not enough to justify the search. He testified that the reason he was asking the questions was that he did not have sufficient grounds to search because of the smell of marijuana alone.

26 In cross-examination, PC Miller agreed that if someone is a regular marijuana user that the person's clothing and hair could smell of burnt marijuana. He felt, however, the odour of burnt marijuana in this case was stronger than it would be if it was just in clothing. His belief was that it was strong enough to suggest that marijuana had been recently smoked. In cross-examination PC Miller admitted that there was nothing about what Mr. Grant said or how he looked that suggested recent consumption. He did not see that Mr. Grant had glassy eyes or any other indicia consistent with recent consumption of marijuana. It was just the smell of burnt marijuana that led him to believe that possibly Mr. Grant had just smoked a joint.

27 PC Miller testified that as he had his discussion with Mr. Grant his belief that there may be a CCA violation was further developed. He saw a small Ziploc bag about two inches by two inches in the footwell which he asked Mr. Grant about. He admitted the bag was empty when he saw it but said that it nevertheless contributed to his concern because it made him think that this was the type of bag that was used for marijuana which raised his suspicion. When Mr. Grant picked up the bag of corn nuts on the centre console PC Miller told him that was not the bag he was looking at. Mr. Grant then handed this Ziploc bag to PC Miller.

28 PC Miller disagreed with the suggestion that the presence of this empty bag only meant that this was someone who may have consumed marijuana in the past. He admitted at its highest it showed that at some point Mr. Grant had had marijuana in the bag but said that this was a factor he took into consideration and the empty bag did form part of his grounds because in his experience it had contained marijuana and he had found "many times" before that there was more than one bag of marijuana in a vehicle. As a result, he believed marijuana was being transported and it was a possibility that the other bags of marijuana were not being transported lawfully. He admitted, however, that in his experience he had also had cases where only one bag of marijuana was being transported.

29 PC Miller also observed what appeared to be a grinder in the shape of a black cylindrical tube. Nothing on the grinder states that it contains marijuana. PC Miller testified that he was 99% sure it was a grinder based on his previous experience. He could tell the top of the tube was removable. PC Miller testified that most grinders have small compartments that can store marijuana in them. The significance of the grinder to him was that it was used to grind marijuana. It makes it easier to roll a joint or however a person smokes marijuana. He admitted that Mr. Grant handed the grinder to him after he pointed it out and that the grinder was closed. During the debate with Mr. Grant about whether the grinder was empty or not, PC Miller opened it up. He saw what he then called "residue" and at the hearing called "marijuana powder" in it. He denied, however, that it was just powder equivalent of two grains of rice and no more. When PC Miller opened the grinder, the evidence is clear that apart from what was referred to as "residue" there was no marijuana in the grinder.

30 PC Miller testified that he was concerned there may be a "little bit of non-compliance" based on what he saw. He felt that the driver or someone had been smoking marijuana recently and that therefore there was a safety issue too. It is his belief if he smells burnt marijuana, that generally means that marijuana has been recently smoked and it is reasonable to assume there is marijuana in the vehicle and it is not being

lawfully transported. He said that he therefore needed to inquire if it was being transported lawfully or not.

31 In cross-examination, PC Miller testified that even though Mr. Grant denied that there was weed in the car, when he saw the Ziploc bag in the footwell and the grinder, he was starting to formulate a "strong belief" and they were all "strong indicators" although he did not explain what they were indicators of.

32 PC Miller admitted that he did not have enough grounds to meet the threshold for a search of the vehicle based on the empty bag in the footwell. He was not asked about the grinder as an additional factor. PC Miller denied the suggestion that it was because of what he saw in the grinder -- what he called the residue -- that he said that it was illegal and that this was cannabis accessible to the driver and for this reason he was going to search Mr. Grant.

33 PC Miller testified that there also appeared to be a burnt roach between the driver's legs that he saw as he was speaking to him. The burnt end was up, and it was extinguished. He could not tell how long it had been out. Not very much was visible. He only saw the top portion sticking out - one-and-one-half centimetres, but he could tell that it appeared to be a marijuana joint and not a cigarette. PC Miller testified that he saw this before Mr. Grant got out of the car and he remained firm on this in cross-examination. That furthered his grounds to believe that there was marijuana in the vehicle that was not being transported properly. At that point he knew with "100% certainty that marijuana was being improperly transported".

34 PC Miller admitted that while Mr. Grant was still in the vehicle, he did not point out that he saw the roach between his legs. This is obvious from the ICC Video. According to PC Miller, it was once he saw the roach that he asked Mr. Grant to exit the vehicle so he could search him, the passenger, and the vehicle under the authority of the CCA. PC Miller testified that as Mr. Grant exited the vehicle, the roach fell to the ground, and he pointed it out him as Mr. Grant was walking away. This can be seen in the ICC Video.

35 In summary, PC Miller testified that prior to asking Mr. Grant to exit the vehicle he had smelled burnt marijuana, a light smell of fresh marijuana, saw the Ziploc plastic bag in the footwell of the driver's side of the vehicle, saw the grinder and the roach between Mr. Grant's legs. This led him the believe there was a contravention of the CCA and Mr. Grant's denial that there was any marijuana in the vehicle also went against his observations. Even if Mr. Grant had remained silent, PC Miller testified that he still would have searched the vehicle based on all his observations, including seeing the roach between his legs.

36 It was put to PC Miller that if he had in fact seen anything like a joint that he would have said so as he knew everything was being recorded. He also would have asked Mr. Grant to pass it to him like he did with everything else. To this PC Miller said that once he saw the joint it was the "final piece" that resulted in him asking Mr. Grant to step out. He saw it after he saw the grinder. He disagreed with the suggestion that he only saw the joint as Mr. Grant exited the vehicle.

37 PC Miller testified that he did not give Mr. Grant his RTC at that time as he was not entering a criminal investigation and he was not investigating him for a criminal offence. It was more regulatory to determine if there was a violation of the CCA or not. PC Miller did not tell Mr. Grant that he had to answer the questions or show him the various items. He testified that he could not say that it was clear to

him that Mr. Grant felt that he was directed to do so. However, I note that as Mr. Grant handed items to him, he accepted them and examined them. He did not tell Mr. Grant that he did not need to do so.

38 PC Miller confirmed that the satchel was closed when he removed it from Mr. Grant and that he searched it because he had grounds to believe Mr. Grant was unlawfully transporting cannabis in the satchel or on his person. He said that when he searched the satchel, he found a bag of white powder in multiple packages that he believed to be cocaine based on his experience. His automatic reaction was to ask Mr. Grant "what's this?". He admitted that in hindsight he should not have asked Mr. Grant this question as he was now conducting a criminal investigation based on his belief that this was cocaine. However, PC Miller stated that Mr. Grant's answer did not have any bearing on his decision to arrest him and he would have been arrested in any event for cocaine possession.

39 Mr. Grant was arrested at 12:56 pm, handcuffed to the rear and put in the back seat of PC Miller's police cruiser. He was then advised of his RTC and the exchange is set out above.

40 PC Miller testified that when he found what he believed to be cocaine he told PC Minto to arrest the female passenger as well because of the substantial quantity and the female passenger probably knew that it was there. He based this only on the quantity of cocaine. The female passenger was arrested at 12:56 pm and released at 1:45 pm.

41 After giving Mr. Grant his RTC and caution, PC Pablo arrived, and PC Miller asked him to help him search the vehicle for marijuana and cocaine. He then returned to the front of his vehicle and searched the satchel while the in-car camera was filming what he was doing.

42 PC Pablo turned over the two items to PC Miller at 1:24 pm that he found on the floor of the back seat of the vehicle on the passenger side. I will describe those items when I come to the evidence of PC Pablo.

43 When PC Miller was questioned in cross-examination about his evidence that he smelled fresh marijuana, he admitted that he did not find any, but he suggested that there were flakes of marijuana in the cup holder between the two front seats. I note that at the time PC Miller would not have seen what was described as flakes of marijuana in the cup holder as they would have been covered by the bag of corn nuts. When it was put to PC Miller that he could not smell those flakes, even if they were marijuana, he said that he could smell a faint odour of marijuana from outside the vehicle. He also believed there were roaches on the centre console, something he was told by PC Minto, but he did not see them from his vantage point. If he had seen them, he would have taken pictures of them and seized them.

44 In re-examination PC Miller admitted that the only fresh marijuana in the vehicle was the contents of the black tube, the yellow plastic tube seized by PC Pablo and the crumbs or flakes in the centre console. He said it was possible the joint would emit "a smell", but he didn't recall any smell from it.

Evidence of PC Jason Minto

45 PC Minto was in his first year on the job as a police officer. He went to the passenger's side of the vehicle after the stop. His role was secondary to PC Miller's, and he was to make observations inside the vehicle and was there for officer safety purposes. The female passenger rolled her window down all the way. PC Minto testified that he first observed a strong smell of what he believed was burnt marijuana

after the window was rolled down. He noted this back at the station after he heard PC Miller tell the driver that he smelled weed. In cross-examination PC Minto admitted that he did not smell fresh marijuana coming from the vehicle. PC Minto testified that he was familiar with both burnt and fresh marijuana from his training as an officer. There was no smoke and he did not smell cigarettes.

46 PC Minto understood that PC Miller was voicing out his observations and that it could lead to a CCA investigation to see if he had grounds to search the vehicle under the CCA. PC Minto was looking for marijuana in the vehicle, including the lap of the passenger and the driver. He did not see a roach or joint in the lap area of the driver. PC Minto testified that he did see what he believed to be a grinder in the centre console of the vehicle and that he heard PC Miller refer to it as a grinder. PC Minto admitted in cross-examination that it was a closed cylindrical container. He was suspicious it was a grinder, although he admitted that it could have been something else. He agreed you would have to open it up to be sure.

47 According to PC Minto, when Mr. Grant lifted the bag of nuts, he saw the ends of what he believed to be one or two roaches underneath, in the cup holder - the area where PC Miller testified he saw flakes of marijuana. PC Minto described the roaches as the end of a rolled marijuana cigarette that has been smoked. He estimated that they were maybe one or two centimetres long. He never touched them and did not see any officer remove them from the vehicle.

48 PC Minto thereafter described his search and arrest of the female passenger as directed by PC Miller. He was not involved in the search of the vehicle. He knew PC Pablo was coming and would help PC Miller search the vehicle. He did not tell PC Pablo that he had seen one or two roaches in the cup holders.

Evidence of PC Glen Pablo

49 PC Pablo arrived on the scene at 12:58 pm and at this point both Mr. Grant and the female passenger were in custody. He was asked by PC Miller to help search the vehicle which he began at 1:00 pm. He was told the authority for the search was the CCA but was not given anything more specific.

50 On the floor of the rear passenger side of the vehicle PC Pablo located two items. One is a black cylindrical item that contained what he believed to be marijuana, and the other is a yellow container that he believed contained hash. I have carefully examined those items and will come to my description of them.

51 PC Pablo had no memory of searching the cup holder area of the vehicle. Had he done so and if he saw two marijuana roaches there, he would have seized them or left them there to be photographed. He did not see them and definitely did not take any out of the vehicle.

52 PC Pablo testified that he did not notice any odour when he searched the vehicle. He turned the two items he found over the PC Miller. He did not have any direct interaction with either Mr. Grant or the female passenger. In cross-examination PC Pablo admitted that if he had noticed an overwhelming smell of fresh or burnt marijuana that he would generally have made a note of it. He did not make such a note, nor does he have any memory of such a smell.

Evidence of [redacted] Grant

53 Mr. Grant does not have a criminal record. He gave evidence about his employment history which is not relevant to this Application. Mr. Grant testified that he did not believe he was speeding. He had traffic hold him up when he exited from the 401 to Kingston Road. He was also aware that officers were generally in the area doing speed traps. He explained what he did by moving lanes to avoid the traffic. He admitted that the speed limit at this point goes from 80 km/hr. to 60 km/hr. Everyone up ahead of him "smashed" on their brakes when they saw the officers, or at least that is why he assumed they did so. He was confused why he was pulled over as he believed another SUV was going faster. He admitted that he might have been going 65 km/hr. but denied he was going as fast as 95 km/hr.

54 Mr. Grant testified that he and his friend had gone to Lindsay for the weekend and by the time he was stopped he had been driving for two to three hours. They had made stops along the way. He testified that he had a rolled a marijuana joint and that he smoked part of it standing outside of the vehicle in the parking lot before they left. His female passenger also smoked from the same joint. They did not smoke it all and he just "outed it" when it was about halfway through.

55 According to Mr. Grant after they smoked part of the marijuana joint, he put the rest of the joint, which was a little more than two inches long, in either the front kangaroo pouch pocket of his sweatshirt or the side pocket of his track pants. He testified that he did not take it out of the pocket from the time he left Lindsay to the time he was stopped by police. He denied that it was ever between his legs as alleged by PC Miller. He also denied that he was driving and smoking the marijuana joint, and he denied smoking it inside the car. He admitted that the marijuana joint would smell like marijuana somewhat, but it would be masked because it was wrapped up, which I assume is a reference to the paper used to wrap the joint.

56 Mr. Grant denied that the officers would smell a strong smell of marijuana from the vehicle, but he accepted that there would be some smell. Mr. Grant did not think his car smelled like marijuana because the upholstery in the car is leather and he drove from Lindsay with the windows down and the sunroof open. This evidence was not challenged. He admitted however that he definitely had the smell of marijuana on his clothes, his hair and his hands because he was a regular user of marijuana at the time. He smoked it every day although the amount would vary based on what he was doing. When he was in Lindsay, he smoked it two to three times per day.

57 Mr. Grant testified that when PC Miller was asking him questions, he was nervous and still somewhat in shock because he did not feel that he had been speeding. He knew the vehicle could be searched if the officers saw marijuana in the car. This evidence was not challenged. When asked if there was weed in the car, he assumed PC Miller was asking if there was weed accessible to him. He said no because there was none accessible to him.

58 Mr. Grant testified that he felt like he was "being directed to explain and identify things in the car". When he was directed to a bag in the centre console he felt as though he was being asked about it and asked to clarify what it was. He did not feel that he had a choice. He testified that he was directed to first the bag with the corn nuts and then to a green plastic bag on the floor in front of him. According to Mr. Grant this was an empty bag from small parts for his hobby driving remote-controlled cars. He picked up the bag and handed it over to PC Miller. He testified that he felt he had to because of how he was being directed around the car in the sense of the questions of what that is. Mr. Grant denied that the small bag on

the floor in front of him was a "dime bag" although he admitted that it has the same characteristics as a dime bag.

59 When asked about the grinder Mr. Grant testified that it seemed to him that PC Miller was inquiring about it and that he should present it to him. He testified that he felt that he had no choice, and he was answering the questions and handed the grinder over to PC Miller. When he handed the grinder over to PC Miller, PC Miller opened it. In cross-examination when it was put to Mr. Grant that the officer did not ask for the grinder, he said it was hard to explain, but he felt that he had no choice and that even though he was not told to do it he felt he needed to hand it over to the officer.

60 Mr. Grant testified that this was a grinder he had used to grind up marijuana. It was empty as he told the officer. According to Mr. Grant, after the grinder is used to grind up marijuana there are crystallites that fall off the weed when it is broken up that will remain in the grinder. He had used the grinder recently but denied it would smell of weed as it is metal and wouldn't retain any smell.

61 Mr. Grant testified that there were no marijuana roaches on the centre console and that he never had a marijuana joint between his legs. He had forgotten that he had a partial one in his pocket and as he stepped out of the vehicle and stood up straight, he saw it on the ground and was shocked. He testified that he remembered hearing it hit the ground, which caused him to look behind him where he saw it on the ground. Mr. Grant was challenged on his evidence that he heard the joint hit the ground given all the noise outside. That makes sense although based on the ICC Video, PC Miller looked down and noticed the joint on the ground too.

62 Mr. Grant answered some questions in cross-examination suggesting that if there was anything between his legs PC Miller would have seen that first versus what was on the floor. Mr. Grant testified that if the joint had been between his legs as PC Miller testified to, it would have fallen inside the car when he stepped out. It was suggested to him in cross-examination that he hoped that it would fall outside the car. Mr. Grant responded that the seats in his car were "almost bucketed" in that there was a cushion on either side of the seat and that had there been anything between his legs it would have to fall off into the car, before he got out the car unless he dragged himself off the seat.

63 Mr. Grant testified that the black tube container of marijuana that was on the floor of the back seat would not smell of marijuana because it was air-sealed and child-locked. You would only smell fresh marijuana if it was open. Mr. Grant did not agree that what can be seen in the cup holder of his vehicle were flakes of marijuana. He did admit it was possible there was some marijuana there, but he couldn't say that it was marijuana. Because his sunroof was open, he said it could be anything. Mr. Grant testified that he never smokes marijuana in the car because "the windows get really nasty". When he was asked why he only answered "no" to a question from Ms. Page when he was asked if he smoked weed in the car the week before, he answered that he had not been asked if he ever smoked weed in the car before. He did smoke marijuana in the car when he first got it when he was working on it to make it roadworthy. After that he did not smoke marijuana in the car.

64 Mr. Grant admitted that he was nervous because he had a significant amount of what he strongly suspected was cocaine. He testified that he picked up this bag outside of the hotel where he and his friend were staying. He was cross-examined at some length about this and what he knew about this bag, including its value and what he planned to do with it. He denied that he had sold cocaine in Lindsay. This

evidence would obviously be relevant to the merits of the Crown's case if it was ultimately agreed that Mr. Grant's evidence would apply to the trial, but for the purpose of this Application it was only relevant to the Crown's theory that was put to Mr. Grant in cross-examination that he was trying to deflect PC Miller so he would not find the cocaine. When asked this question, Mr. Grant answered that he was scared and felt he had been targeted from the very beginning and that there was no way of getting out of this and no means of deflecting this. He was not worried about the marijuana, but he was worried about what he had picked up as he knew he would get into way more trouble it if was in fact cocaine.

The Timeline of Mr. Grant's Phone Calls to his Father and Duty Counsel

65 There is no dispute that Mr. Grant was arrested at 12:56 pm, his RTC were given at 12:59 pm and PC Miller and PC Minto left the scene with Mr. Grant at 1:53 pm, almost an hour after he was arrested.

66 As set out above, when given his RTC Mr. Grant said that he did wish to call a lawyer but that he did not have a lawyer. He said he would be looking for one and that when he had an opportunity to make a call, he would figure that out. Mr. Grant testified that he wanted to speak to his father who would help him find a lawyer. As I will come to, he did speak to his father eventually, but they were disconnected for some reason. He then had to wait longer but later did have a chance to speak to his father again. In between the two calls with his father, he spoke to duty counsel.

67 Mr. Grant was transported to the police station and was paraded at 2:03 pm. When asked by the Booking Sergeant whether he wanted to speak with duty counsel, Mr. Grant indicated "sure". He was told that the police would ensure that would happen. He was also told that he'd be afforded access to reasonable use of the phone to contact his sureties, a lawyer, etc. He was then searched.

68 At 2:13 pm, Mr. Grant advised PC Miller that he wanted to call his father to have him find him a lawyer. At 2:14 pm PC Minto went into the interview room and Mr. Grant told him that he wanted to speak to his father. At 2:34 pm, PC Minto called Mr. Grant's father and Mr. Grant was permitted to speak with his father. There was no evidence as to why it had taken another 20 minutes for this to happen. PC Minto did not know how long the phone call was. At some point this phone call was cut off.

69 At 3:01 pm, PC Minto asked Mr. Grant if he had changed his mind and wanted to speak with a lawyer and he advised he wanted to speak with duty counsel.

70 At 3:07 pm, more than two hours after he indicated he wanted to speak with a lawyer, Mr. Grant was connected with duty counsel.

71 PC Minto let Mr. Grant speak to his father again at 3:19 pm.

72 PC Miller testified that he wanted to speak to a detective from the Division before transporting Mr. Grant to the station, as they now had the option in certain circumstances to release someone at the scene based on a promise to appear. It was at the time of a shift change and so he had to speak to two different detectives and so this took a bit longer. It was not until he spoke to the second detective at 1:45 pm that the detective he spoke to confirmed that Mr. Grant should be brought to the station and that the female passenger should be released without charge. The vehicle was then towed because the female passenger did not have a valid driver's licence.

73 In cross-examination PC Miller admitted that it was most likely that Mr. Grant would be held for a show cause given the quantity of the substance he believed to be cocaine. He also admitted that he could have called for a squad car to take him to the station. He did not allow Mr. Grant to call to speak to someone to get a name of a lawyer using his cell phone as he would not have been able to afford him privacy. He did admit that he could have had another officer let him call a friend to get the information and that Mr. Grant would not need privacy for such a call and that he made no effort to do so.

The Items Seized from the Vehicle and my Findings of Fact

74 The small Ziploc bag that was seized is consistent with the size of a dime bag that is typically used for the sale of drugs, but it could be a small plastic bag for anything. I had an opportunity during my deliberations to open this bag and even up close there is no smell of marijuana coming from it nor is there any residue or powder on the inside of this bag. It certainly could have been a bag used for small parts as Mr. Grant testified to.

75 PC Miller admitted that the grinder was handed over to him by Mr. Grant and that he opened it. I have examined the grinder and opened it myself. The grinder is a black cylindrical object made of metal with the word "Ruthless" on the top. There are no markings or symbols associated with marijuana on the grinder. It comes apart into three parts that screw together. I presume it was the top lid that was removed by PC Miller but that was not clarified in his evidence. It contains the prongs and is the part of the grinder that screws into the middle piece that also has prongs and small holes to let the ground marijuana fall into the bottom piece of the grinder. When this portion of the grinder is opened, there is a very small amount of some sort of residue that is stuck on the prongs. This residue is not loose and, in my view, given the amount and the fact this residue does not come out when these pieces are turned upside down, it would be absurd to suggest that this amount of residue could be smoked.

76 As for the bottom piece of the grinder, the portion where the ground marijuana would be deposited, if PC Miller opened this part as well, he would have seen that it is empty. It does not contain any marijuana leaves or ground marijuana. It does contain a very small amount of brown powder that appears to be like dust at the bottom. Again, it would be absurd to suggest that this amount of powder could be smoked.

77 In my view, given the grinder is made of metal and the three pieces were screwed together when PC Miller saw it, no odour would have emanated from it. In any event, given the minimal amount of marijuana residue and powder in the grinder, those substances would not have been enough to generate an odour of marijuana.

78 The black plastic cylinder that was seized by PC Pablo from the floor area for the rear passenger is about six inches long and has a diameter of just over one and a half inches. It is made of rigid plastic and has a cap that must be pushed down and turned so it can be opened and closed, like a bottle of medication. When the cap on this container is on, it fits tightly and there would be no odour coming from it. It is only if this container is opened, and the opening of the container is brought close to one's nose that there is a smell of marijuana.

79 The marijuana roach that PC Miller seized and put in this container is about two- and one-half inches

long but only a quarter inch in diameter. It has no smell coming from it unless it is brought close to one's nose. I appreciate that it has been some time since it was seized.

80 Finally, the yellow container that was seized by PC Pablo from the same area of the vehicle has a cap that slides on and off but fits tightly. It would have no odour when closed. When the cap is pulled off, the container appears empty on the inside. However, it has a circular piece in the middle that slides out to show prongs at the bottom of that piece and prongs projecting up from the bottom of the inside of the container and so I find that it too is a grinder. When this middle piece is pulled out, there is brown residue on the prongs and along the inside of the bottom of the container. The smell is faint and is not of marijuana. This container apparently had contained hash.

Analysis

Assessments of reliability and credibility

The Officers

81 The Defence challenges the credibility of PC Miller and to a lesser extent PC Minto. There was no issue raised with respect to PC Pablo.

82 The only concern I have with the evidence of PC Minto is his evidence that he saw a couple of roaches in the cup holder of the vehicle. PC Miller testified that he heard PC Minto say that he saw them although he (PC Miller) did not personally see them. PC Minto is the only officer to give this evidence and had there been roaches in the cup holder I find that they would have been photographed and seized. I therefore conclude that there were no roaches in the cup holder.

83 Mr. Price suggested that PC Minto was mistaken, and he also pointed out that PC Minto was new on the job. I have considered this but the only other items in this area of the vehicle were the flakes of what the Crown alleges was marijuana and a tiny piece of what appears to be white tissue. What PC Minto testified he observed would have been under the bag of corn nuts that at most Mr. Grant lifted momentarily when he believed PC Miller was asking him about that bag. Even though he would therefore have only seen this area of the vehicle briefly, I disagree with Mr. Price that it is possible that PC Minto could have seen this piece of white tissue and mistaken it for a roach. I have considered this but quite frankly I would not expect even a brand-new police officer to think that even the smallest piece left of a smoked marijuana joint would look like a tiny piece of white tissue or that it could be mistaken for a roach. This is an issue however I do not have to resolve as the Crown does not allege that the presence of roaches in the cup holder was something PC Miller saw or that it formed part of his grounds for deciding to search Mr. Grant and the vehicle, nor did PC Miller give that evidence.

84 Turning to PC Miller, unfortunately, I do have serious concerns about his credibility for the following reasons. During his evidence, I noted that PC Miller seemed like an honest witness, that there was no change in his demeanour in cross-examination, and that he was careful in giving his answers. For example, at the request of Ms. Page he checked his notes on other similar incidents and after doing so he did not want to give an answer under oath unless he was sure about his answer. Demeanour, however, particularly of a witness accustomed to giving evidence in court, is not that helpful in assessing whether the evidence given by the witness is true.

85 Ms. Page challenged PC Miller's credibility because he refused to admit that there were in fact no roaches in the vehicle for PC Minto to see. He refused to do so because he testified that he heard PC Minto say that he saw them. I have found they were not there but I am prepared to accept PC Miller did hear PC Minto say they were there. I do not find this issue impacts on his credibility.

86 I do have some concern about PC Miller's evidence at the hearing that Mr. Grant admitted that the white substance was cocaine. It is clear from listening to the ICC Video that when Mr. Grant stated "cocaine" his tone of voice was that he was asking a question i.e., "cocaine?". Mr. Price argued that PC Miller heard this statement at the roadside and that for PC Miller to believe the answer that Mr. Grant admitted the substance was cocaine should not detract from his credibility. I considered that submission, but the fact is that PC Miller gave evidence at the hearing that Mr. Grant said it was cocaine after he watched and listened to the ICC Video in court.

87 I am also concerned about the fact that PC Miller denied that what he saw inside the grinder was just powder equivalent of two grains of rice and no more. I appreciate that the grinder may have been opened by others before I examined it but when I did so I would not say that there is any more than even a single grain of rice.

88 If these were my only concerns, I would not fault the officer. However, I have far more serious concerns about PC Miller's evidence. As I will come to, I do not accept his evidence that he smelled fresh marijuana coming from the vehicle or that he saw the roach between Mr. Grant's legs as he alleged. I will set out my reasons for these conclusions when I come to my findings of fact.

Mr. Grant

89 There was nothing about Mr. Grant's demeanour that suggested he was not being honest in answering questions. He was responsive for the most part to the questions asked by Mr. Price. The only area I found that Mr. Grant was not as forthright as he should have been, was when he was cross-examined about the white substance the Crown alleges is cocaine. He ultimately did admit that he was very suspicious that this substance was cocaine, and it took a few questions from Mr. Price to get to that point, but that perhaps is not surprising given what would be at stake if the trial proceeded on the merits.

90 I do not believe Mr. Grant's evidence that he heard the roach hit the ground when it fell to the roadway. In this regard, however, I believe he is simply mistaken. He expressed surprise at the time and PC Miller can be seen pointing to the ground as Mr. Grant exited the vehicle. His attention was clearly drawn to the roach on the ground.

91 In reaching my findings of fact, as already stated I have concluded that PC Miller was not truthful in at least two important aspects of his evidence. Accordingly in those areas, my findings of fact are consistent with the evidence of Mr. Grant. I have not made those findings by preferring the evidence of Mr. Grant over that of the officer based solely on an assessment of their respective credibility. As I will come to, I have made those findings of fact based on the whole of the evidence and considering what makes sense based on the evidence I do accept.

Findings of Fact

92 I am prepared to accept that because of PC Miller's training that he could smell the difference between burnt and fresh marijuana. I accept his evidence, given that Mr. Grant was a regular user of marijuana and had partially smoked a marijuana joint a couple of hours earlier that PC Miller would have smelled an odour of burnt marijuana although I doubt it would have been very strong given that Mr. Grant was driving with the sunroof open. As I already stated, in his evidence in chief PC Miller only testified that he noticed an odour of burnt marijuana whereas his notes state it was "very strong". PC Miller also admitted that all the detail he testified to at the hearing about exactly where he was in terms of point A and point B when he smelled the odour of marijuana was not in his notes, which simply state that he could smell a "very strong odour of marijuana coming from the vehicle". It is hard to believe that in the absence of notes to refresh his memory that PC Miller would recall all these new details at trial.

93 However, I do not accept PC Miller's evidence that he smelled a "faint" smell of fresh marijuana coming from the vehicle as he was talking to Mr. Grant. The fact PC Miller made no distinction between smelling fresh and burnt marijuana when he made his notes is of concern because this was a new and important detail when he gave this evidence for the first time at the preliminary inquiry in July 2021, 11 months after his detention of Mr. Grant. The smell of fresh marijuana is obviously important to his decision to search Mr. Grant and the vehicle he was driving. It would be an important fact to support PC Miller's evidence that he believed because there was one empty dime bag in the vehicle that there would be more marijuana in the vehicle that possibly was being transporting illegally i.e., in an open package that could be the source of a smell of fresh marijuana.

94 My conclusion in this regard is strengthened by the fact that there was no source of fresh marijuana for PC Miller to smell. As I will come to, I do not accept his evidence that the roach was between Mr. Grant's legs as he alleged. I accept Mr. Grant's evidence that the roach was in one of his pockets and that it fell out when he stepped out of the car. That would mean that there is even less opportunity to notice any smell coming from the roach, which I doubt had much of a smell on its own in any event. In fact, PC Miller testified that he did not recall a smell coming from the roach and he handled it at the time.

95 The only fresh marijuana in the vehicle was in the black plastic container that PC Pablo found on the floor of the passenger side of the back seat and there is no dispute it was closed. Based on my examination of that container, the seal is tight and so it is not possible that there would have been a smell of fresh marijuana coming from it. I make the same finding with respect to the grinder, as it was closed and did not contain any fresh marijuana. As for what was alleged to be flakes of marijuana in the centre console, even if they were fresh marijuana, they were under the bag of corn nuts and there is no reason to believe they would smell enough for PC Miller to notice this smell outside of the vehicle. I find that even if this was marijuana it would not have been the source of any detectable odour from outside the vehicle. Furthermore, if there was an odour from these flakes, that would have been smelled by PC Minto and PC Pablo. In cross-examination PC Minto admitted that he did not smell fresh marijuana coming from the vehicle even though he testified that he saw two roaches in the cup holder. The fact there was no smell of fresh marijuana becomes important to my determination of the issues raised on the Application.

96 My most serious concern about the evidence of PC Miller is that I have concluded that he did not see the roach between Mr. Grant's legs as he testified to. I accept that if the roach was between Mr. Grant's legs as PC Miller alleges, that he would have seen it. I also accept that the fact PC Minto did not see what PC Miller alleges he saw could be due to his having a different vantage point. Accordingly, my

assessment of this evidence depends entirely on my assessment of the evidence of PC Miller on the one hand, and Mr. Grant on the other, and quite frankly matters of common sense.

97 I have reached this decision for a number of reasons.

98 Mr. Price argued that I should accept the evidence of PC Miller that he saw the joint between Mr. Grant's legs before he asked Mr. Grant to step out of the car and that this observation also informed his reasonable grounds to do the CCA searches. It was at that point PC Miller reached what Mr. Price characterized as a threshold of 100% certainty, which is well above what is required for a search. He argued that it was a very quick and fluid encounter at the side of the road, that was rapidly unfolding and that in watching the video again I should look very carefully at PC Miller's focus of attention. It is his position that the officer was looking down at Mr. Grant's lap area and that he was aware the joint was there and did not express surprise at all to see it fall to the ground. Having watched the ICC Video a few times, I am not able to conclude that PC Miller was not surprised to see the roach fall to the ground. Mr. Grant expressed surprise repeatedly and that supports his evidence that he had forgotten that he had the roach in his pocket, but I accept he could have been feigning surprise.

99 Furthermore, considering the actual exchange at the time, PC Miller was debating with Mr. Grant whether or not the residue in the grinder was cannabis that was accessible to Mr. Grant and could be smoked in violation of the CCA. Setting aside whether this is a reasonable position which I will come to, when Mr. Grant responded to the contrary, it was at that point that PC Miller stated "Ya well I'm still going to check your car for having cannabis accessible ok so I'm going to have you exit the vehicle". Clearly by stating "still" PC Miller was making it clear to Mr. Grant that despite him telling PC Miller that the grinder was empty, PC Miller disagreed and was of the view it contained cannabis accessible to the driver, presumably for the reasons he had already stated. Had he seen the joint there could have been no debate that Mr. Grant had a joint that could be smoked in the car while he was driving. I note that after the joint fell to the ground that that is when PC Miller stated for the first time "there's a joint right there".

100 What is clear from the ICC Video is that PC Miller was stating what he observed inside Mr. Grant's vehicle including the Ziploc bag in the footwell and the grinder as he saw these things. As PC Minto put it, PC Miller was "voicing out his observations" and he knew that it could lead to a CCA investigation to see if PC Miller had grounds to search the vehicle under the CCA. Based on what PC Miller did see inside the vehicle, had PC Miller seen the roach between Mr. Grant's legs as he claims he did, I am convinced, given his exchange with Mr. Grant, that rather than debate about whether the residue in the grinder could be smoked he would have referred to the roach, which as he correctly stated would clearly have given him grounds to do a CCA search.

101 I also find that if PC Miller saw the roach between Mr. Grant's legs that he would not have asked him to exit the car without asking him to hand it over first. PC Miller had already seized the Ziploc bag and the grinder, and he knew by this point that Mr. Grant was cooperative and handing items he was pointing to over to him. It makes no sense that PC Miller would remain silent and have Mr. Grant exit the vehicle without first taking possession of the roach, knowing of its importance to his grounds to search and knowing that it would fall somewhere as Mr. Grant exited the vehicle. Mr. Grant's evidence makes more sense. If the roach was where PC Miller alleged, he would have no idea where it would fall, and he would lose the benefit of putting on the recording that it was between Mr. Grant's legs, which is clearly more incriminating than had it for example fallen on the floor of the vehicle. Furthermore, PC Miller would

have realized that the roach could fall out on to the roadway in which case it would be his word against Mr. Grant's that it was even in the vehicle to begin with, as opposed to a roach discarded by someone driving by.

102 I also find that if the roach was where PC Miller testified it was, that it would have been easy for Mr. Grant to hide the roach by sitting on it or putting it under the bag of corn nuts, or elsewhere while he was waiting for PC Miller to check his computer before the officer approached the vehicle. Having heard Mr. Grant testify I find he was intelligent and informed enough to take steps to hide the roach, as he would know that the officer would approach the vehicle and would see it. He was afraid of the officer finding what he strongly suspected was cocaine and, in my view, he would not have left a roach in plain view between his legs. In fact, I accept Mr. Grant's suggestion that the roach likely would have been the first thing the officer saw if it was in fact where PC Miller alleged it was.

103 Mr. Price submitted that Mr. Grant on his own evidence had been out of his car a few times before and the joint had not fallen out of his pocket, but in my view that does not mean it could not have fallen out this time as he exited the vehicle. Mr. Price also submitted that if I find, as I have, that PC Miller did not see the joint between Mr. Grant's legs as he testified to that he was simply mistaken in his recollection and that he was not deliberately trying to mislead this Court. He argued that given the "rapid fire series of events" his recollection is simply imperfect and that there was nothing in the demeanour of PC Miller to suggest this was deliberately false and that it was clear from his evidence that he was attempting to give this Court an accurate account of what happened. I appreciate that officers can be mistaken like any witness in giving evidence, but in my view PC Miller either saw the roach where he alleges it was or he did not. Unfortunately, I have concluded that he did not see it and I see no basis upon which I could conclude that he was mistaken. The only conclusion I can reasonably come to on the evidence is that he has given this evidence to bolster his grounds for conducting a CCA search of Mr. Grant and the vehicle he was driving.

Cases that have considered the search power of s. 12(3) of the CCA

104 Section 9 of the CCA provides that cannabis can only be purchased from the Ontario Cannabis Retail Corporation or from an authorized cannabis retailer. Sections 12(1) and (2) of the CCA provide that no person shall drive or have care or control of a vehicle with cannabis contained in it unless either:

a) it is in its original packaging and has not been opened; or

b) it is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle.

105 Section 12(3) of the CCA provides:

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

106 I do not believe that there are very many cases that have considered the power to search under the CCA. I was only referred to two cases from the Ontario Court of Justice ("OCJ") and one from this Court.

107 *R. v. Grant*, [2021] O.J. No. 744, 2021 ONCJ 90 is a decision of Calsavara J. of the OCJ. This was a case where the driver was stopped for an expired validation tag, but this transformed to a sobriety check on the driver and then an investigation for a contravention of the CCA that led to the discovery of a handgun and drugs.

108 The facts are quite different from the case at bar because the officer who approached the driver's side of the vehicle not only detected the odour of burnt cannabis coming from inside the vehicle, but he also noticed a cannabis shake on the centre console of the vehicle, which I believe to be a reference to leftover marijuana. Because of these observations the officer decided to do a sobriety check on the driver. Once the driver was outside of the vehicle, he produced a baggy of cannabis from his pocket. Justice Calsavara found at para. 97 that it would have been "negligent" for the officer to not investigate the driver's sobriety given the smell of burnt marijuana and that it would also have been negligent of the officer, even after he decided the driver was not impaired, to have allowed him to continue on his way without satisfying himself that there was no more cannabis readily accessible to the driver. Accordingly, Calsavara J. concluded that the officer was entitled to conduct a s. 12(3) CCA search. Calsavara J. went on to consider the scope of the search of the vehicle that was permitted; that is not in issue in the case at bar.

109 *R. v. Williams*, [2021] O.J. No. 6858, 2021 ONCJ 630 is a decision of Justice West of the OCJ. It is also distinguishable from the case at bar because after the officer pulled the vehicle over for an expired validation sticker, he was concerned about potential impairment issues as the vehicle had driven over the curb when it turned into a parking lot. The officer detected a strong odour of marijuana coming from inside the vehicle. The driver advised he was not licensed and when the officer asked the driver if he had been smoking marijuana, a woman sitting in the backseat, interrupted, and advised there was a gram of marijuana in the centre console, which the officer testified he saw when this passenger said this. Furthermore, the officer could also see that this bag of marijuana was not in its original packaging, was unsealed, and was readily accessible to the driver while he was operating the motor vehicle. The officer concluded that he had the necessary grounds to search all the occupants of the vehicle, as well as the vehicle itself. The complication in this case was that no photographs were taken of the marijuana, and it was not seized. During the search of the vehicle, a firearm was found in a satchel secreted between the legs of one of the passengers.

110 Justice West found that the officer did smell a strong odour of marijuana coming from inside of the car and that this provided a "contextual basis for a police officer who is initially investigating a driver for a HTA infraction ... to commence an investigation into whether the driver and/or the occupants are infringing the provisions of the CCA", at para. 48. West J. also noted that the evidence of the officer that the driver drove over the curb was not challenged although the officer was satisfied that the driver was not impaired because of his dealings with him.

111 Justice West considered whether there was a *Charter* obligation to provide RTC to the driver and the passengers in considering whether the utterance from the passenger was voluntary. At para. 70, West J. followed *R. v. Singh*, 2007 SCC 48 at paras 31-33, where the Supreme Court referred to police officers being "well advised" to provide a suspect with a police caution but that a caution is only an important consideration on a voluntariness inquiry. He noted that this explains why the police provide cautions to persons who are detained or under arrest. West J., relying on *Singh*, concluded that the absence of a caution did not constitute a breach of s. 7 of the *Charter*.

112 At paras. 74-75 Justice West also considered various authorities including *R. v. Orbanski*, [2005] 2 S.C.R. 3 and *R. v. Harris*, 2007 ONCA 574 at para. 47 that hold that the rights guaranteed by s. 10(b) of the *Charter* are incompatible with a brief roadside detention contemplated by a stop made for road safety purposes, when officers are investigating drinking and driving offences and ask for example, questions respecting whether the driver has been consuming alcohol or when they consumed their last drink. West J. held at para. 74, that investigations respecting drinking and driving offences provide support to the proposition that an officer who detects an odour of marijuana coming from the interior of a vehicle during a lawful traffic stop can question the driver as to whether he was smoking marijuana without giving the driver RTC first, particularly when he had concerns about whether the driver was impaired.

113 Finally, West J. went on to consider the meaning of "reasonable and probable grounds" and referred to authorities from our Court of Appeal and this Court. He found that the officer honestly believed that because of the strong odour of marijuana, the utterance from the passenger and observing what he believed to be an unsealed bag of marijuana that was not in its original package, that the officer subjectively was able to form reasonable grounds that the driver was in contravention of s. 12(1) of the CCA. Justice West went on to consider if a reasonable person standing in the officer's shoes, knowing what the officer did, would be able to come to the same conclusion. He referred to *R. v. Bush*, [2010] O.J. No. 3453 at para. 46, for the proposition that the requirement of reasonable grounds is "not an onerous test" and should not be "inflated to the context of testing trial evidence" but "neither must it be so diluted to threaten individual freedom". On the facts he found, Justice West concluded the officer had reasonable grounds to search all the occupants of the vehicle and the vehicle itself.

114 Finally, I was provided with a copy of *R. v. Sappleton*, 2021 ONSC 430, where De Sa J. considered a *Charter* application to exclude a firearm found in a vehicle after a warrantless search conducted by officers relying on s. 12(3) of the CCA. Again, the facts are distinguishable from the case at bar. The driver was stopped for entering an intersection before a green light. When the officer did the check on his licence, he discovered that the driver was in breach of his recognizance. As the driver was exiting the vehicle the officer told him that he was being arrested for breach of recognizance. He asked the driver if he had any weapons on his person or in the vehicle. During the search incident to arrest the driver was found to have marijuana in a satchel. It was not clear whether it was closed. The officer then asked the driver if he had any other drugs in the car. The driver said he had some weed in the car. As a result, the officer decided to conduct a search because the marijuana was easily accessible to the driver. During that search a firearm was found.

115 Justice De Sa found that the initial stop of the vehicle was justified as a proper HTA investigation. In terms of the CCA search, there was an issue as to whether the marijuana in the satchel was readily available to the driver. De Sa J. found that even if the satchel was zipped closed the marijuana was still readily available to the driver. The question then turned to the scope of the search, which again is not in issue in the case at bar. While dealing with that issue, De Sa J. stated in *obiter*, at para. 64:

> ... if the police had grounds to believe that marijuana was <u>still</u> being stored in contravention of the Act [the CCA], a reasonable search for the marijuana would have been warranted. <u>Additional questioning</u> regarding the presence of marijuana and the location and/ or manner it was stored would have also been a reasonable exercise of police authority. In some cases, questioning of this nature may obviate the need for an extensive search. [Emphasis added]

116 It is not clear what circumstances De Sa J. had in mind when he suggested this broad scope of questioning would be permitted if police "still" had reasonable grounds to believe there was more marijuana in the vehicle that was being stored in contravention of the CCA. I will come to my view as to the types of questions that are permitted depending on the circumstances of the case.

117 I turn then to the issues before me.

Has Mr. Grant proven that his s. 7 and/or s. 8 Charter rights were breached when he was asked questions by PC Miller?

118 Although Mr. Grant did suggest at one point in his evidence that he was being targeted, there is no evidence to support that allegation and Ms. Page did not argue that the decision by the officers to stop his vehicle because of speeding was a pretext for some other investigation. I find that the officers had a legitimate reason to stop the vehicle Mr. Grant was driving because of speeding. Section 216(1) of the HTA authorizes a police officer to stop vehicles for highway regulation and safety purposes. Mr. Grant was lawfully detained.

119 At the conclusion of the hearing Ms. Page acknowledged that the questioning of Mr. Grant, if otherwise *Charter* compliant, was not a breach of s. 10(b) of the *Charter* considering authorities such as *Orbanski* and *Harris*, which have held that the exercise of the rights guaranteed by s. 10(b) is incompatible with the brief roadside detention contemplated by a stop made for road safety purposes.

120 Ms. Page did submit, however, that the questions asked by PC Miller were in breach of s. 7 of the *Charter* as it was an unfair investigation because he did not give Mr. Grant a caution. She did not develop that argument, however, nor provide authority to support her position. Mr. Price suggested that I consider the issue of the questions asked by PC Miller in the context of s. 8 of the *Charter*, rather than s. 7 and that is what I have done.

121 In *Harris*, Doherty J.A. stated at paras. 33 and 34:

> Section 8 of the *Charter* protects against unreasonable searches or seizures. A seizure is a non-consensual taking by a state agent of anything in which the person asserting a s. 8 right has a reasonable expectation of privacy. The thing taken may be tangible or intangible. Information can be seized. At its most fundamental, s. 8 preserves an individual zone of privacy against state intrusion. The state can enter into that zone if the intrusion meets a reasonableness standard: see *R. v. Colarusso* (1994), 87 C.C.C. (3d) 193 at 233 (S.C.C.).
>
> Answers to police questions may or may not give rise to a s. 8 claim. As with other aspects of the s. 8 inquiry, a fact-specific examination of the circumstances is necessary. Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide the information sought in the questions, I do not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person. [Emphasis added]

122 The issue then, in my view, is whether the questions PC Miller asked of Mr. Grant and the items Mr.

Grant handed over to the officer were reasonable intrusions of Mr. Grant's privacy in the context of the CCA investigation that PC Miller had embarked upon.

123 Ms. Page argued that the questions were aimed at forming grounds to search the occupants of the vehicle and the vehicle itself and that Mr. Grant believed he was compelled to answer the questions and provide the items to PC Miller and that this constituted a breach by PC Miller of Mr. Grant's. 8 *Charter* rights.

124 Mr. Price argued that given the strong smell of burnt marijuana that it was reasonable for PC Miller to ask Mr. Grant if he had been smoking marijuana. I agree. However, that is not the question he asked. He asked if Mr. Grant had any weed in the car. He never asked Mr. Grant whether he had smoked marijuana and when.

125 Mr. Price also argued that the officers should be given a certain degree of latitude in questioning the driver to ensure compliance with a heavily regulated regime and in this case, they were not investigating a criminal offence. Mr. Grant would only receive a ticket if he had cannabis that was not being transported legally. He was not being investigated for impaired driving, which could lead to criminal charges. Even if he had been investigated for impaired driving due to the consumption of cannabis, the courts have held that *Charter* rights such as the RTC do not arise. In support of his submission Mr. Price relied on the *Orbanski* decision at para. 45 which provides in part as follows:

> The screening of drivers necessarily requires a certain degree of interaction between police officers and motorists at the roadside. It is both impossible to predict all the aspects of such encounters and impractical to legislate exhaustive details as to how they must be conducted. On this point, I respectfully disagree with the analysis of my colleague Justice LeBel. As I read his reasons, unless a statute prescribes specific investigatory measures, a police officer has a duty to provide motorists with their right to counsel before taking any steps to assess their sobriety. For example, in Mr. Elias's case, my colleague takes the view that police officers can only ask motorists about alcohol consumption before they contact counsel if legislation permits it. Presumably, the same reasoning would apply in respect of any general question designed to assess the sobriety of the driver. On that approach, a police officer would be well advised to provide motorists with their right to counsel as soon as they rolled down their window. In my view, this would result in longer and often unnecessary detentions. While statutory provisions such as the recent Manitoba amendments can provide more guidance and certainty on the scope of permissible investigatory measures, it is my view that many of the powers set out in the amendments are implicit in the existing Manitoba legislation. The recognition of these powers is not carved out of whole cloth from common law principles to suit the occasion -- these powers are part of a longstanding statutory scheme that permits police officers to stop drivers and check their sobriety. The scope of justifiable police conduct will not always be defined by express wording found in a statute but, rather, according to the purpose of the police power in question and by the particular circumstances in which it is exercised. Hence, it is inevitable that common law principles will need to be invoked to determine the scope of permissible police action under any statute. In this context, it becomes particularly important to keep in mind that any enforcement scheme must allow sufficient flexibility to be effective. The police power to check for sobriety, as any other power, is not without its limits; it is circumscribed, in the words of the majority of this Court in *Dedman* by that which is "necessary for the carrying out of the particular police duty and it must

be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference" (p. 35).

126 In *Orbanski*, the driver went through a stop sign without stopping and was swerving on the road. The police officer who approached the vehicle could smell alcohol. The Court held at para. 44 that the police had the duty to check the sobriety of Orbanski and this included the right to ask the driver questions about prior alcohol consumption and request that he perform sobriety tests by stepping out of the car and that this did not require the police to first give RTC to the driver.

127 There is no doubt that Mr. Grant was lawfully detained when PC Miller began to ask him questions. PC Miller had observed Mr. Grant speeding and his questions of Mr. Grant for his driver's licence and his insurance were clearly in accordance with the stop. I have found that PC Miller smelled an odour of marijuana coming from the vehicle and that he believed it to be burnt marijuana. In my view, it would have been reasonable for him to ask some questions directed to the consumption of marijuana if he was concerned about Mr. Grant being impaired. PC Miller admitted that he did not see any signs that Mr. Grant was impaired based on how he was driving. In cross-examination PC Miller also admitted that there was nothing about what Mr. Grant said or how he looked that suggested recent consumption of marijuana. It was just the smell of burnt marijuana that led PC Miller to believe that possibly Mr. Grant had just smoked a joint.

128 Had PC Miller asked Mr. Grant whether he had been smoking marijuana and if so, when he last smoked it, those questions would in my view have been reasonable given the smell of burnt marijuana coming from inside the vehicle. The answers to those questions, based on the evidence of Mr. Grant at trial, should have confirmed the conclusion that PC Miller had already come to that there was no reason to believe there was any concern about Mr. Grant being impaired. That should have ended PC Miller's inquiries pursuant to the CCA. After giving Mr. Grant a speeding ticket, Mr. Grant and his friend would have been on their way.

129 Instead, it is significant that PC Miller did not ask Mr. Grant if he had been smoking marijuana but rather whether he had any weed in the car. Had I found PC Miller smelled fresh marijuana as he testified to, then arguably PC Miller could have asked some questions of Mr. Grant as to whether there was marijuana in the car, as that might have given him reasonable grounds to believe there was an open source of fresh marijuana in the vehicle, in which case it would be reasonable to believe that it was not being transported legally. However, since I have found that PC Miller did not smell fresh marijuana, in my view he had no reasonable basis to ask Mr. Grant whether there was weed in the car. Unlike the cases of *Williams* and *Grant*, there was no evidence in plain view of any cannabis being transported in contravention of the CCA.

130 In addition, even though Mr. Grant answered that he did not have weed in the car, PC Miller began to ask Mr. Grant more questions about items he observed inside the vehicle. He asked Mr. Grant a question about what the empty bag in the footwell was. Even if the small Ziploc bag PC Miller saw looked to him like a dime bag that might have once contained marijuana, he could see it was empty. In my view PC Miller's evidence that because of his experience, since there was one empty bag in the vehicle that he believed had possibly once contained marijuana meant there were more bags containing marijuana in the vehicle was not reasonable, even if that is what he truly believed. At most it might have been a hunch but

that was not in my view a reasonable basis to justify asking Mr. Grant questions about the bag when he could clearly see it was empty.

131 I also find it hard to accept that PC Miller subjectively believed that if he smells burnt marijuana, that generally means that it is reasonable to assume there is marijuana in the vehicle and it is not being lawfully transported. It was on this basis, that PC Miller testified that he therefore needed to inquire if the marijuana was being transported lawfully or not. In my view, even if PC Miller subjectively believed this, no reasonable person standing in the officer's shoes, knowing what the officer did, would be able to come to the same conclusion.

132 As for the grinder, I do not accept PC Miller's evidence that he could be virtually certain that the object he saw was a grinder. There are no unique markings on the grinder such as symbols for marijuana. PC Minto's evidence in this regard was fair. He admitted it could have been something else and that you would have to open it to be sure. It was only once Mr. Grant handed the grinder to PC Miller and he opened it that he could be certain it was a grinder. Even if PC Miller could be reasonably certain that the object he saw was a grinder, that in my view does not mean that the driver is smoking marijuana in the vehicle.

133 Mr. Price argued that the presence of the grinder was a significant observation by PC Miller because the officer's evidence that a grinder could be used to store some fresh marijuana was not challenged. He submitted that it was therefore reasonable for PC Miller to ask about the grinder and examine it. If I was prepared to find that PC Miller reasonably believed the object that he saw was a grinder and that it actually might contain marijuana that could be smoked, I accept that it would have been reasonable for him to ask Mr. Grant questions about it and to examine it to ensure that it did not contain marijuana accessible to the driver. However, if that was the case, after PC Miller opened the grinder, he would have clearly seen it did not contain any fresh marijuana. That should have ended his inquiries.

134 Instead, even though the grinder did not contain any fresh marijuana, that did not satisfy PC Miller. He went on to tell Mr. Grant that the residue that he saw inside the grinder was cannabis accessible to the driver that could be smoked. I do not accept that PC Miller believed this. I find that he stated this as a pretext for justifying what he clearly intended to do, namely conduct a search of the occupants of the vehicle and the vehicle itself. If PC Miller did in fact believe what he told Mr. Grant, then I find that that belief was totally unreasonable. I do not accept the position of PC Miller that the few bits of residue left in the grinder could be smoked is reasonable and sufficient to justify a CCA search. It is simply consistent with Mr. Grant being someone who uses marijuana. It would be analogous to an officer attempting to justify a search by telling a driver he had alcohol that was accessible to the driver because of drops of beer left in the empties he was taking to the beer store.

135 Mr. Price argued that all PC Miller was doing was voicing out his observations and that he was not asking Mr. Grant any questions. That is perhaps true with respect to the grinder, but PC Miller did ask if there was weed in the car and what the Ziploc bag was. Those questions came first before his observation of the grinder. It is true that PC Miller did not expressly direct Mr. Grant to hand these items over to him but he did not tell Mr. Grant that he did not need to do so when Mr. Grant did provide these items to him. Furthermore, he examined the items, particularly the grinder which he opened. In my view, PC Miller had no legal authority to search these items that he observed inside the vehicle.

136 The question before me is what degree of interaction between PC Miller and Mr. Grant was permitted in the circumstances. I have found that PC Miller did not smell any fresh marijuana and he did not observe any marijuana being transported illegally inside the vehicle. In my view, the purpose of PC Miller's questions was to see if he could find evidence that marijuana was not being transported legally so he could justify a search of the occupants of the vehicle and the vehicle itself.

137 My conclusion in this regard is reinforced by my conclusion that PC Miller did not see any roach between Mr. Grant's legs. His pretext for the decision to have Mr. Grant and his friend step out of the vehicle and search them and the vehicle was that the residue in the grinder was cannabis that was accessible to the driver and could be smoked. That in my view was clearly an unreasonable position to take. Even if PC Miller reasonably believed that the grinder might be a place to store marijuana, he had opened it and would have seen that it was empty.

138 In my view, even in the context of a regulatory investigation, it was not permissible for PC Miller to ask questions to see if there was marijuana in the vehicle that was not being transported legally when he had absolutely no reasonable basis to believe that there was based on his interaction with Mr. Grant and what he could see in plain view inside the vehicle. The questions were not asked for a legitimate purpose in accordance with a brief roadside stop that had transformed to a CCA investigation. As Doherty J.A. stated in *Harris*, the answers provided by Mr. Grant to PC Miller's questions constituted a non-consensual taking of that information from him as a detained person contrary to Mr. Grant's s. 8 *Charter* rights.

139 The case of *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481 (S.C.C.) supports my conclusion. In *Mellenthin*, the defendant was pulled over by the police at a roadside checkpoint operated for the purpose of examining the roadworthiness of vehicles. The court found the stop was arbitrary but constitutional. However, the police officer used the opportunity afforded by the stop to randomly investigate other potential crimes. He questioned the driver about the contents of a bag that the officer noticed in the back of the vehicle. The driver's answers to the questions eventually led the officer to physically seize the bag. He discovered narcotics in the bag and charged the driver with possession of the narcotics.

140 Cory J. held that the officer had no lawful authority under the guise of a safety check to question the driver about the contents of the bag or to physically seize the bag from the driver. Cory J. further concluded that the improper questions constituted the beginning of an unreasonable search that culminated in the unreasonable seizure of the bag. He said, at para 15:

> However, the subsequent questions pertaining to the gym bag were improper. At the moment the questions were asked, the officer had not even the slightest suspicion that drugs or alcohol were in the vehicle or in the possession of the appellant. The appellant's words, actions and manner of driving did not demonstrate any symptoms of impairment. Check-stop programs result in the arbitrary detention of motorists. The programs are justified as a means aimed at reducing the terrible toll of death and injury so often occasioned by impaired drivers or by dangerous vehicles. The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search. [Emphasis added.]

141 At para. 26, Justice Cory referred to *R. v. Ladouceur*, [1990] 1 SCR 1257 at para. 60 where the Court stated in the context of a routine safety check that:

> ... Officers can stop persons only for legal reasons, in this case related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the *Charter*. [Emphasis added.]

142 Cory J. rejected the contention that the defendant voluntarily answered the questions. In doing so, he noted that the defendant was under detention and that it could reasonably be inferred that he felt compelled to respond to the questions put to him by the police officer.

143 In the case at bar, although I have found the initial detention of Mr. Grant was lawful, I have found that the purpose of PC Miller's questions was to see if he could find evidence to justify a search of the occupants of the vehicle and the vehicle itself. I accept the evidence of Mr. Grant that he felt compelled to answer the officer's questions and hand over the items that the officer was asking him about. Mr. Price argued that Mr. Grant was trying to divert the officer's attention, so the officer did not search him and the satchel and find the cocaine. I accept, as Mr. Grant testified, that he was nervous about the fact that he had a substance on his person that he suspected to be cocaine, but I do not find that was why he was answering the questions posed by PC Miller in the manner that he did. I accept that the manner of the questioning by PC Miller caused him to provide information and hand over the items PC Miller was asking about. He did not do so voluntarily. In any event, PC Miller chose to accept the items and examine them. He did not tell Mr. Grant that he did not need to hand these items over. They were seized during their conversation.

144 Mr. Grant's compliance with PC Miller's directions was not informed. He was not advised that he was under no legal obligation to hand over the items. At the time, as I have said, PC Miller did not have reasonable grounds to believe that cannabis was being transported in the vehicle in contravention of s. 12(1) of the CCA.

145 Considering the evidence of PC Miller that I do accept, I am of the view that he either knowingly asked questions of Mr. Grant that he knew were not reasonable and proper or he was reckless about what questions he was asking. He erroneously assumed that he could ask whatever questions he thought of as he was investigating a regulatory offence, not a criminal offence. It is significant that PC Miller admitted that the reason he was asking the questions was that he did not have sufficient grounds to search only because of the smell of marijuana alone. As the Court stated in *Ladouceur* following a lawful stop of a vehicle, further questions and more intrusive procedures should only be undertaken based upon reasonable and probable grounds.

146 For these reasons I find that PC Miller's questions of Mr. Grant were for the purpose of finding grounds to conduct a CCA search. There were no reasonable grounds for the questions that PC Miller asked, and the information the officer received from Mr. Grant was an unlawful seizure of information contrary to s. 8 of the *Charter*. Furthermore, PC Miller's warrantless seizure of the Ziploc bag and the grinder was also unlawful, and his search of these items contravened Mr. Grant's rights under s. 8 of the

Charter. There is no evidence that Mr. Grant was aware of, let alone waived, his rights under s. 8 of the *Charter*.

Has the Crown proven that the search of Mr. Grant's satchel was lawful and not contrary to s. 8 of the Charter?

147 The next issue to consider is whether the Crown has proven that the warrantless search of Mr. Grant's satchel was lawful and that, as a result, his s. 8 *Charter* rights were not breached. I have already concluded that Mr. Grant's s. 8 *Charter* rights were breached by PC Miller when he asked certain questions of Mr. Grant and seized the Ziploc bag and the grinder. It follows that PC Miller did not have grounds to search Mr. Grant or the vehicle and that his decision to do so amounted to a serious s. 8 *Charter* breach. However, even if I had concluded that PC Miller did not breach Mr. Grant's s. 8 *Charter* rights by asking him whether or not there was weed in the car, and questions about the Ziploc bag and the grinder, and I had found that these items were not unlawfully seized, I find that PC Miller's decision to have Mr. Grant and his friend exit the vehicle and to search them both, and Mr. Grant's satchel and the vehicle itself was unlawful for the following reasons.

148 Mr. Price argued that based on four observations alone that PC Miller had reasonable grounds for the search before he saw the joint between Mr. Grant's legs. He relied on the smell of burnt marijuana, the faint smell of fresh marijuana, the empty Ziploc bag that looked like a dime bag and the grinder.

149 Had I found there was a smell of fresh marijuana then I agree that questions directed to determining the source of that smell and possibly a search of Mr. Grant and the vehicle would be reasonable as the CCA requires that any marijuana that is being transported must be sealed during transport. In those circumstances it would have been reasonable to assume there was marijuana in the vehicle that was not in a sealed bag. However, I have found that there was no smell of fresh marijuana, and that PC Miller was not being truthful when he gave this evidence.

150 As for the smell of burnt marijuana, it is now legal to smoke marijuana and drive a vehicle provided the driver is not impaired and the driver is not transporting marijuana in a manner contrary to s. 12 of the CCA. It would therefore not be that unusual for a police officer to smell the odour of burnt marijuana coming from a vehicle that has been stopped for a HTA violation. In those circumstances, it is reasonable to investigate whether the driver is impaired. In the circumstances of this case, there was no evidence of impairment and as I have already set out even if the small Ziploc bag PC Miller saw looked to him like a dime bag that might have once contained marijuana, he could see it was empty. He had no reasonable basis to assume there were more bags containing marijuana in the vehicle. Furthermore, having examined the grinder he knew it did not contain marijuana accessible to the driver.

151 In my view, it is not reasonable for police officers who smell burnt marijuana but see absolutely no signs of impairment of the driver or any fresh marijuana accessible to the driver to decide to search the occupants of the vehicle and the vehicle itself to see if there is marijuana that is accessible to the driver. I have made a finding of fact that PC Miller did not see the roach until after he told Mr. Grant to exit the vehicle, when it then fell to the roadway. In my view, before PC Miller saw the roach, he did not have reasonable grounds for the search.

152 In fact, PC Miller's evidence is consistent with my finding, as he testified that it was once he saw the

roach that he decided to have Mr. Grant exit the vehicle and do the search. I find that the reason PC Miller testified that he saw the roach before he had Mr. Grant exit the vehicle was in order to justify his decision to search Mr. Grant. For that reason, I find that in fact PC Miller did not subjectively believe that he had grounds to do a CCA search while Mr. Grant was seated in the vehicle. I also find that a reasonable person standing in PC Miller's shoes, knowing what the officer did, and not seeing a roach between Mr. Grant's legs would not believe there were grounds to search the occupants and the vehicle.

153 Mr. Price submitted that I must decide how far short PC Miller was of having reasonable grounds to search if he did not see the roach between Mr. Grant's legs as he testified to in order to determine how serious his conduct was for the purpose of my s. 24(2) analysis. In my view the conduct is very serious. The only conclusion I can come to is that PC Miller has since realized that he did not have grounds to search based on what he saw when Mr. Grant was still seated in the vehicle and that is why he gave false evidence to this Court that he saw the roach between Mr. Grant's legs. This demonstrates that the officer not only knew he did not have grounds to search at the time but that to attempt to remedy that shortcoming, he chose to give false evidence before this Court.

154 This breach was compounded by PC Miller at the time, using the pretext of residue from grinding marijuana that he saw in the grinder as a reason to justify a s. 12(3) CCA search. The power to search the occupants of a vehicle and the vehicle itself pursuant to s. 12(3) of the CCA is a very significant power given to police and a significant intrusion into the privacy rights of the occupants of a vehicle. That power must be exercised lawfully, for valid public safety concerns where there are reasonable grounds to believe that a driver is impaired or is transporting cannabis illegally. In my view, the Courts must be vigilant to ensure that those powers are not abused by police as a pretext for a CCA search in the hope of finding incriminating evidence. In this case as I have already said, the suggestion that the residue in the grinder amounted to cannabis accessible to the driver that could be smoked was absurd.

155 The breach of Mr. Grant's. s. 8 *Charter* rights was exacerbated when after opening Mr. Grant's satchel and discovering a bag of white powder, PC Miller asked him what the white substance was. There is no doubt that PC Miller should not have asked Mr. Grant this question and he did admit this at trial. I appreciate that the Crown does not seek to rely on this utterance at trial but it is further evidence of PC Miller's cavalier attitude to questioning Mr. Grant without considering the propriety of the questions he was asking.

156 For these reasons I find that the search of Mr. Grant, his satchel and the vehicle was unlawful and a further breach of his s. 8 *Charter* rights.

Does Mr. Grant have standing to challenge the arrest and search of the female passenger and if so, were her Charter rights breached?

157 In my view, Mr. Grant does not have standing to challenge the arrest and search of his female passenger, but I do agree with Ms. Page that I can consider if the police breached her *Charter* rights in considering the conduct of the police when I come to my s. 24(2) analysis. Obviously, for the same reasons I have already stated, the police did not have reasonable grounds to search the female passenger pursuant to CCA. That decision, however, flowed from the decision to search the occupants and the vehicle and was not the result of a separate and further *Charter* breach with respect to her alone.

158 The focus of Ms. Page's submissions was that the arrest of the female passenger was arbitrary and unlawful since police had no reason to believe that she had knowledge, care or control of the white powder located in the satchel that was believed to be cocaine. Forty-five minutes after she was searched, she was released unconditionally from the scene.

159 I am not prepared to find that it was unreasonable to arrest the female passenger although in the circumstances, in my view, it would have been preferable for PC Miller to simply keep her detained until he spoke to his Detective. In any event I do not find her arrest to be a further *Charter* breach by PC Miller.

Were Mr. Grant's s.10(b) Charter rights violated by the delay in providing him access to a lawyer?

160 There is no dispute that in this case, after Mr. Grant was given his RTC at 12:59 pm he was kept at the scene inside the squad car until PC Miller and PC Minto left the scene to bring him to the station at 1:53 pm, almost an hour after he was arrested. Once at the station it was not until 3:07 pm that Mr. Grant was connected to duty counsel a total delay of over two hours.

161 The law is clear and settled that s. 10(b) of the *Charter* requires police to implement the right to counsel without delay. This has been interpreted to mean immediately upon detention: *R. v. Suberu*, [2009] 2 S.C.R. 460 at para. 41, 2009 SCC 33, *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 24. As the Supreme Court stated in *Taylor* at para. 24:

> The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances. [Citation omitted.] Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

162 Accordingly, I find that the onus is on the Crown to satisfy me that the two-hour delay of facilitating access by Mr. Grant to duty counsel was reasonable in the circumstances.

163 The right to counsel is a "lifeline" for detained persons. Through that lifeline, detained persons obtain not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated: *R. v. Rover*, [2018] O.J. No. 4646 (C.A.) at para. 45.

164 The s. 10(b) jurisprudence has, however, always recognized that specific circumstances may justify some delay in providing a detainee access to counsel. Those were reviewed in *Rover* and the law is clear that specific circumstances such as those relating to police safety, public safety or the preservation of evidence can justify a delay in affording a defendant with access to counsel.

165 In *Rover*, the court reviewed cases that have considered this issue and at para. 27 the court held that:

> The police may delay access <u>only after turning their mind to the specifics of the circumstances</u> and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even when those circumstances exist, the police must also take reasonable steps to minimize the delay in granting access to counsel. [Emphasis added]

166 In support of this statement at para. 28 the Court referred to a number of cases including *R. v. Wu*, [2017] O.J. No. 653, 2017 ONSC 1003, 35 C.R. (7th) 101 (S.C.J.), at para. 78 for what was stated to be a helpful summary of the law as follows:

> The assessment of whether a delay or suspension of the right to counsel is justified involves a fact specific contextual determination. The case law on this issue reveals some general guiding principles that provide a framework for this assessment:
>
> a. The suspension of the right to counsel is an exceptional step that should only be undertaken in cases where urgent and dangerous circumstances arise or where there are concerns for officer or public safety.
>
> . . .
>
> e. Police officers considering whether circumstances justify suspending the right to counsel must conduct a case by case assessment aided by their training and experience. A policy or practice routinely or categorically permitting the suspension of the right to counsel in certain types of investigations is inappropriate. [Emphasis in original]

167 The case at bar is not a case like *Rover*, as I do not have evidence that the police were following a practice that routinely prevented arrested persons from accessing counsel. However, the evidence I do have is that Mr. Grant could have been allowed to call his father while at the scene, so that his father could help him find a lawyer. PC Miller conceded that there would have been no need for privacy for such a call and that he made no effort to permit this.

168 Secondly and more importantly, when Mr. Grant was given his RTC by PC Miller he said he wanted to speak to a lawyer. There was no reason Mr. Grant's presence was required while the search of his vehicle took place. He had a right to have his request to speak to counsel acted on without delay. PC Miller admitted that he could have called for a squad car to take Mr. Grant to the station. PC Pablo arrived at around the time of Mr. Grant's arrest and so clearly if he could not have taken Mr. Grant to the station presumably another squad car could have come as quickly for that purpose.

169 PC Miller testified that he wanted to speak to a Detective before bringing Mr. Grant to the station and that there was a shift change that caused delay. However, PC Miller admitted that it was most likely that Mr. Grant would be held for a show cause and given the quantity of what was believed to be cocaine I would have thought that to be virtually certain even though Mr. Grant has no criminal record.

170 In my view PC Miller arrested Mr. Grant and decided to keep him handcuffed in the back of his police car until he and other officers finished searching the vehicle Mr. Grant was driving and finished dealing with the female passenger and the vehicle. There were no concerns for officer or public safety. It was simply a matter of the convenience of the officers that Mr. Grant be kept waiting until they were ready to bring him to the station. Access to counsel could have been facilitated quickly by arranging to have Mr. Grant taken to the station after he was arrested but the officers gave this no thought.

171 Once at the station Mr. Grant repeated that he wanted to speak to counsel. Further delay was necessary because of the decision to do a Level 3 search. However, as I have already pointed out there

was a further 20-minute unexplained delay for a call to be arranged to Mr. Grant's father after he repeated his desire to speak to his father at 2:13 pm to PC Miller and then PC Minto.

172 It was only after almost another 30 minutes that PC Minto revisited the request by Mr. Grant to speak to a lawyer and he put him in touch with duty counsel. It was now more than two hours after Mr. Grant was given his RTC and he advised he wanted to speak to a lawyer.

173 As the Court said in *Rover* at paras. 33, to fall within the exception to the requirement that an arrested person be allowed to speak to counsel without delay, the police must actually turn their mind to the specific circumstances of the case, and they must have reasonable grounds to justify the delay. Like the facts in *Rover*, there is no evidence that any of the officers turned their mind to the specific circumstances of this case before deciding to arrest Mr. Grant and put him in the back of the squad car while they finished their search of the vehicle and investigation at the scene. There is no evidence that PC Miller and PC Minto considered taking any steps that were available to them to minimize the delay or that they even considered it important to ensure Mr. Grant spoke to a lawyer as quickly as possible. This did not result in a delay of several hours as in *Rover*, but in my view the delay was still unacceptable. Even though I do not have evidence of a widespread practice, the evidence in this case demonstrates the same concern that was expressed by the Court in *Rover* at para. 34:

> The effective implementation of the right to counsel guaranteed by s. 10(b) depends entirely on the police. The police must understand that right and be willing to facilitate contact with counsel. The practice under which the officers involved in this case operated demonstrates a disregard of a fundamental constitutional right. The appellant's right to speak with counsel was denied at the time of his arrest, when the police refused his request to speak with counsel.

174 In *R v Khan*, [2019] O.J. No. 3265, Justice Copeland as she then was, considered a s. 10(b) delay. As she said, at para. 63, which applies equally to the case at bar:

> And in the grand scheme of things, this is not a particularly long search. Imagine a longer search. Is a defendant just to wait on his opportunity to contact counsel because it is more convenient for the police to conduct the search? And if nothing is found, just let the defendant go?

175 The police had already found a substance they believed to be cocaine on Mr. Grant's person. The approach of PC Miller, to wait until they finished searching the vehicle Mr. Grant was driving to see if they could find any more incriminating evidence undermined the purpose of the right to counsel. He failed to appreciate the need to immediately facilitate the "lifeline" that Mr. Grant was entitled to following his arrest.

176 For these reasons I find that Mr. Grant has proven that there was a breach of his s. 10(b) *Charter* rights because of a delay in arranging for him to speak to a lawyer.

Should the items that was seized from Mr. Grant's satchel be excluded as evidence at the trial pursuant to s. 24(2) of the Charter?

177 The onus is on Mr. Grant to persuade this Court on a balance of probabilities that the admission of the evidence obtained in a manner that violated the *Charter* would bring the administration of justice into disrepute. There is a causal connection between the breaches I have found of Mr. Grant's s. 8 *Charter* rights and the discovery of the substance believed to be cocaine in his satchel. While there is no causal

connection between this discovery and the s. 10(b) *Charter* breach I have found, there was a close temporal connection. The connection is sufficient to engage s. 24(2) with respect to that breach as well: see *R. v. Pino* (2016), 130 O.R. (3d) 561, [2016] O.J. No. 2656, 2016 ONCA 389.

178 In *R. v Le*, [2019] SCJ No 34 the Supreme Court has clarified the role of s. 24(2) of the *Charter* and stated as follows at paras. 139 and 140:

> Section 24(2) of the *Charter* provides that, where evidence was obtained in a manner that infringed a *Charter* right or freedom, that evidence shall be excluded if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. While the judicial inquiry under s. 24(2) is often rhetorically cast as asking whether evidence should be excluded, that is not the question to be decided. Rather, it is whether the administration of justice would be brought into disrepute by its admission (*R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 42). If so, there is nothing left to decide about exclusion: our *Charter* directs that such evidence must be excluded, not to punish police or compensate for a rights infringement, but because it is necessary to do so to maintain the "integrity of, and public confidence in, the justice system" (*Grant*, at paras. 68-70).
>
> Where the state seeks to benefit from the evidentiary fruits of *Charter*-offending conduct, our focus must be directed not to the impact of state misconduct upon the criminal trial, but upon the administration of justice. Courts must also bear in mind that the fact of a *Charter* breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice. What courts are mandated by s. 24(2) to consider is whether the admission of evidence risks doing further damage by diminishing the reputation of the administration of justice -- such that, for example, reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously. We endorse this Court's caution in *Grant*, at para. 68, that, while the exclusion of evidence "may provoke immediate criticism", our focus is on "the overall repute of the justice system, viewed in the long term" by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights. [Emphasis added]

179 In *R. v. Grant*, [2009] SCJ No 32 the Court identified three lines of inquiry guiding the consideration of whether the admission of evidence tainted by a *Charter* breach would bring the administration of justice into disrepute.

180 With respect to the first factor, the seriousness of the *Charter* breach, I must assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts effectively condone state deviation from the rule of law 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 para. 72. This analysis involves a consideration of whether the *Charter* breach was, on the "one hand inadvertent or minor" or, on the other hand, showed "willful or reckless disregard for *Charter* rights" (at para. 74). The court must also consider whether the police acted in good faith (at para. 75).

181 In *Mellenthin*, at para. 26 Cory J. stated:

> In the case at bar, the trial judge could certainly not be said to have acted unreasonably in concluding that the evidence (the marijuana) would not have been discovered without the

> compelled testimony (the search) of the appellant. To search a person who is stopped at a check stop, without any reasonable or probable cause, goes far beyond the purpose and aim of those stops and constitutes a very serious *Charter* breach. ... As noted earlier, check stops infringe the *Charter* rights against arbitrary detention. They are permitted as means designed to meet the pressing need to prevent the needless death and injury resulting from the dangerous operation of motor vehicles. The rights granted to police to conduct check stop programs or random stops of motorists should not be extended. ... [Emphasis added]

182 Misleading in-court testimony is a proper factor to consider as part of this inquiry: *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494. The Supreme Court at paras. 26 and 27 stated as follows:

> I note that the trial judge found the officer's in-court testimony to be misleading. While not part of the *Charter* breach itself, this is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour. As Cronk J.A. observed, "the integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the *Charter*. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority" (para. 160).
>
> In sum, the conduct of the police that led to the *Charter* breaches in this case represented a blatant disregard for *Charter* rights. This disregard for *Charter* rights was aggravated by the officer's misleading testimony at trial. The police conduct was serious, and not lightly to be condoned.

183 In this case I have found that PC Miller was not truthful in certain respects when giving evidence to this Court and that alone was clearly a very serious and deliberate breach not only of Mr. Grant's *Charter* rights at the time but PC Miller's oath to tell the truth. The fact I have also found that he did so in order to attempt to justify an unlawful search makes it even more egregious. In my view his conduct was serious and should not be condoned by this Court. The unlawful search and this conduct strongly favour exclusion of the evidence. As for the s. 10(b) *Charter* breach, it too was serious, even though it had no causal link with the finding of the physical evidence.

184 The second factor in *Grant*, requires a consideration of the impact of the *Charter* breach on the *Charter*-protected interests of the defendant. When considering the impact of the breach on a defendant, it is necessary to evaluate the extent to which the breach actually undermined the interests protected by the right infringed. A court should consider whether the impact of the breach was "fleeting and technical" or "profoundly intrusive" and consider the effect of the breach on the accused's human dignity: *Grant* at paras. 76 and 78. As the Court said at para. 78, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

185 The arrest and search of any person without legal justification impacts on an individual's rightful expectation of liberty and privacy in a way that is more than trivial. The search must be weighed against the absence of any reasonable basis for justification. PC Miller took advantage of his lawful detention of Mr. Grant for speeding to unlawfully search him, his passenger and the vehicle. That conduct led directly to the discovery of incriminating evidence. The strong causal connection between the denial of Mr.

Grant's liberty, the unconstitutional search of his satchel and the subsequent obtaining of the incriminating evidence speaks to the profound impact of the breaches on his *Charter*-protected interests.

186 Mr. Grant and his friend had the right to be left alone after Mr. Grant was given a ticket for speeding. Instead, there was a serious deprivation of Mr. Grant's liberty and a significant intrusion on his *Charter*-protected interests to privacy. The impact was further magnified when he was denied an opportunity to speak with counsel immediately. Although he gave no evidence about how that impacted him, the breach of a defendant's right to speak with counsel immediately upon arrest denied him what the Court in *Rover* described as a "lifeline". In my view the serious impact of the *Charter* breaches favour exclusion of the evidence.

187 Finally, the third *Grant* factor requires the court to consider the societal interest in a trial on the merits. Assuming that the white substance found in Mr. Grant's satchel is cocaine, that is real evidence and clearly very reliable evidence. The Crown's case depends upon this evidence. Without this evidence the Crown has no case. This is a strong factor favouring inclusion of the evidence. This, however, has the potential to "cut both ways" in that the reasons for both exclusion and admission of the evidence are heightened when the stakes are high; *Grant* at para. 84. As the Court said in *Le* at para. 142:

> The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction -- that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34), we emphasize that the third line of inquiry cannot turn into a rubber stamp where all evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility ...

188 At the final stage of the analysis, I must weigh the various factors. I do so understanding that there is no overarching rule governing how the balance should be struck: *Grant* at para. 86.

189 Although the evidence is reliable and important to the Crown's case and the charge is serious, the breaches of Mr. Grant's s. 8 and 10(b) *Charter* rights were deliberate and serious. PC Miller had no regard for Mr. Grant's *Charter* rights. He seemed totally unaware of any limits on the questions he could ask Mr. Grant. His approach was to ask any question that occurred to him and then use an unreasonable pretext that the residue in the grinder was cannabis accessible to the driver to conduct an unlawful search of Mr. Grant. What makes these *Charter* breaches even more serious is that I have found that PC Miller came to this Court and gave false evidence in an attempt to persuade me that he had reasonable grounds to conduct a CCA search of Mr. Grant, the female passenger and the vehicle he was driving. This was a clear attempt to mislead the Court and PC Miller must have realized that he had no lawful basis to act as he did at the time. In my view the conduct of PC Miller in this case would not be countenanced by reasonable, right-thinking people in the community.

190 For these reasons, balancing all the factors as required by *Grant*, and considering the comments of the Court in *Le*, I must focus on the overall repute of the justice system, viewed in the long term by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights. I find that despite the fact that a substance the Crown alleges is cocaine was found on Mr. Grant's person, the

other *Grant* factors tip the balance of the s. 24(2) factors strongly in favour of the exclusion of the evidence. Society's immediate interest in an adjudication of the merits of this particular case must yield to the more important long-term interests served by excluding the evidence in this case. Admission of this evidence in the trial would bring the administration of justice into disrepute. This Court cannot condone the serious misconduct of PC Miller in this case notwithstanding the seriousness of the charge.

Disposition

191 For these reasons I find that Mr. Grant's s. 8 and 10(b) *Charter* rights were violated and that items found in his satchel when he was searched, and the items seized from the vehicle he was driving should be excluded as evidence at his trial pursuant to s. 24(2) of the *Charter*.

N.J. SPIES J.
