NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Myers*, 2022 NSCA 69

Date: 20221116
Docket: CA 505531
Registry: Halifax

Between:

Luke Jacob Daniel Myers

Appellant

v.

His Majesty the King

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: April 7, 2022, in Halifax, Nova Scotia

Subject: Inventory search; s. 8 of the *Charter of Rights and Freedoms*; exclusion of evidence

Summary: The appellant, Luke Jacob Daniel Myers, was a passenger in a truck stopped for various infractions under the *Motor Vehicle Act*. The investigating police officer determined that summary offence tickets would be issued to the driver for driving with no insurance (contrary to s. 230(1)) and driving an unregistered vehicle (contrary to s. 13).

Given the truck was not insured, the officer called for it to be towed to a third-party lot and commenced "an inventory search" of the contents of the vehicle. While detaining both the driver and the appellant, the officer began the inventory search by opening a backpack located on the floor on the passenger side of the truck. Various prohibited drugs and drug paraphernalia were located in the appellant's backpack. The appellant was arrested, provided a statement to the police, and was subsequently charged with two counts of possession

for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

At trial, the appellant argued the inventory search was not reasonable in the circumstances and constituted a violation of his rights under s. 8 of the *Canadian Charter of Rights and Freedoms*. He submitted the evidence resulting therefrom, namely the drugs and a statement given to police following his arrest, ought to be excluded as evidence, and acquittals entered.

The appellant was convicted. The trial judge was satisfied that the inventory search was authorized, conducted reasonably, and therefore did not give rise to a breach of s. 8. On appeal to this Court, the appellant said that although the trial judge cited the correct law in relation to inventory searches, he did not apply it correctly. He asked this Court to find the search was conducted unreasonably and gave rise to a *Charter* infringement. The appellant further requested that the Court consider whether his s. 9 rights protecting against arbitrary detention were infringed and undertake a fresh s. 24(2) analysis. He submitted this Court should exclude the evidence arising from the *Charter* breaches and enter acquittals in relation to the *CDSA* charges.

Issues: Did the trial judge err in his application of the law governing inventory searches to the circumstances of this case?

Did the trial judge err in failing to address whether the evidence gave rise to a potential breach of the appellant's rights guaranteed by s. 9 of the *Charter*?

Should this Court undertake a fresh s. 24(2) analysis, and if so, what is the result?

Result: Appeal allowed.

The trial judge misapplied the law relating to inventory searches to the circumstances before him. He failed to

undertake a contextual analysis and erred in concluding the appellant's s. 8 rights had not been infringed.

The trial judge also erred in not considering whether the appellant's s. 9 rights had been infringed. This had been placed before him in argument, raised in the evidence, and ought to have been considered.

Finally, this Court undertook a fresh s. 24(2) analysis and concluded that the evidence obtained flowing from the s. 8 breach ought to be excluded, as its admission into evidence would bring the administration of justice into disrepute. Without the impugned evidence, there was no basis for a conviction, and as such, the Court set aside the convictions and entered acquittals in relation to the two *CDSA* charges.

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His Majesty the King

Respondent

Judges:	Bryson, Bourgeois and Beaton, JJ.A.
Appeal Heard:	April 7, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bourgeois, J.A.; Bryson and Beaton, JJ.A. concurring
Counsel:	David J. Mahoney, for the appellant Lee-Ann Conrod, for the respondent

Reasons for judgment:

[1] The appellant, Luke Jacob Daniel Myers, was a passenger in a truck stopped for various infractions under the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, as amended ("the *MVA*"). The investigating police officer determined that summary offence tickets would be issued to the driver, Mr. Fraser, for driving with no insurance (contrary to s. 230(1)) and driving an unregistered vehicle (contrary to s. 13).

[2] Given the truck was not insured, the officer called for it to be towed to a third-party lot and commenced "an inventory search" of the contents of the vehicle. While detaining both the driver and the appellant, the officer began the inventory search by opening a backpack located on the floor on the passenger side of the truck. Various prohibited drugs and drug paraphernalia were located in the backpack. The appellant was arrested, provided a statement to the police, and was subsequently charged with two counts of possession for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*").

[3] At trial, the appellant argued the inventory search was not reasonable in the circumstances and constituted a violation of his rights under s. 8 of the *Canadian Charter of Rights and Freedoms*. He submitted the evidence resulting therefrom, namely the drugs and a statement given to police following his arrest, ought to be excluded as evidence, and an acquittal entered.

[4] The appellant was convicted. The trial judge, Judge Alain Bégin of the Nova Scotia Provincial Court, was satisfied the inventory search was authorized, conducted reasonably, and therefore did not give rise to a breach of s. 8 (*R.* v. *Myers*, 2020 NSPC 54)

[5] On appeal to this Court, the appellant says that although the trial judge cited the correct law in relation to inventory searches, he did not apply it correctly. He asks this Court to find the search was conducted unreasonably, and gave rise to a *Charter* infringement. The appellant further requests that we give consideration to whether his s. 9 rights protecting against arbitrary detention were infringed and undertake a fresh s. 24(2) analysis. He says this Court should exclude the evidence arising from the *Charter* breaches and enter acquittals in relation to the *CDSA* charges.

[6] For the reasons to follow, I would allow the appeal. I am satisfied the trial judge erred in law when he concluded the search of the appellant's backpack was a reasonable inventory search. I would exclude the tainted evidence, and enter an acquittal.

Decision Under Appeal

[7] The proceeding was conducted as a blended *voir dire*. In his decision, the trial judge set out the facts most relevant to the appeal as follows:

> [8] Sgt. Rose testified that he was on patrol in Truro in a marked cruiser on Dec. 23, 2018. He testified that:
>
> - He saw a red truck with the license plate was that crooked, and only partially attached
> - He sees the driver spit out of the vehicle and this gets his closer attention
> - There was also an issue with one of the taillights being burnt out
> - He runs the plate and learns that the plate is not attached to the red truck
> - He observes the driver being "antsy" and acting "nervous" so Sgt. Rose advises the other police via the radio of his concerns
> - Cst. Jordan advises Sgt. Rose on the radio that the truck he is observing could be the same truck that he recently had issues with
> - A traffic stop is made by Sgt. Rose due to the *Motor Vehicle Act* infractions noted
> - Sgt. Rose immediately recognizes the driver as TJ Fraser who had recently been arrested on drugs and weapons charges
> - The accused, Mr. Myers, was the passenger in the vehicle and he was of no immediate concern to Sgt. Rose
> - Sgt. Rose also noted concerns with the Motor Vehicle Inspection Sticker
> - TJ Fraser advises Sgt. Rose at the start of their interactions that he did not have insurance for the red truck, and in his statement to the police Mr. Myers states that TJ Fraser told Sgt. Rose "the truck is not legal"
> - Sgt. Rose goes back to his car to call for back-up due to officer safety concerns with TJ Fraser, and Sgt Rose also orders a tow truck for the red truck at that time as he could not allow it to be driven due to the lack of insurance and no proper license plate

- Sgt. Rose also sees a large wad of cash on the dash of the red truck when he had stopped it, along with a Pictou County biker support patch, and a portable debit machine
- Sgt. Rose advises the other police on the radio that he was going to do an inventory search of the truck
- **The purpose of the inventory search is for officer liability reasons as the police do not want to be blamed, or held liable, for items that allegedly disappear from a vehicle once it has been towed away. The inventory search is also to conduct a cursory search to ensure that there are no weapons or other hazards in the vehicle before it is towed away**
- To effect the inventory search, Sgt. Rose places TJ Fraser in the back of his cruiser, in cuffs
- Mr. Myers is positioned on the sidewalk in sight of Sgt. Rose and Sgt. Rose commences the inventory search on the sidewalk side of the vehicle. The first thing he looks at is the backpack that was in front of the passenger seat
- Upon opening the backpack he sees an unsigned bank card, marijuana and cocaine
- Sgt. Rose looks up at Mr. Myers and states "this is cocaine" and immediately stops the inventory search "everything more or less stopped" as there was "a change in jeopardy" and there was now going to be a need for the truck to be towed to the police station instead of the tow truck compound
- The change in jeopardy was that the matter had changed from a *Motor Vehicle Act* matter to a *Criminal Code* matter
- Mr. Myers and TJ Fraser asked to speak with counsel
- The truck was secured in the police detachment and searched the following day pursuant to a search warrant
- The following items were seized from the truck:
    - A money clip with money along with TJ Fraser's bank card
    - A Samsung phone with 20 missed calls
    - Money in the ashtray
    - A scoresheet
    - A USB stick
    - A pellet handgun under the driver's seat
    - A .22 cal bullet
- The following were seized from the backpack:

- Bag of cannabis
- RBC bank card belonging to an unknown individual named A.M.
- Cocaine
- ICE pills
- Spoon
- Cash
- Weigh scale
- Baggies

[9] On cross-examination Sgt. Rose testified that:

- TJ Fraser and Mr. Myers were cooperative
- The intention was for Sgt. Rose to do a detailed inventory of the items in the truck before it was towed, but matters never progressed that far in this case as he "hadn't even gotten to that"
- He started his search on the passenger side as it was safest for him to start from the sidewalk side of the truck
- He confirmed that he did not immediately seize the truck and get a warrant to search as he did not initially think that he was going to seize the truck, but that it would be going to the tow truck compound, not the police station
- "Once it became clear it was going down the *Criminal Code* route, I immediately stopped the search"
- Mr. Myers and TJ Fraser were initially detained for officer safety due to the recent dealings with police and TJ Fraser involving drugs and weapons, and for reasons of conducting an inventory search as he knew the truck was going to be towed due to no insurance or license plate.

[8] The issue before the court was described as:

> [3] **The legal issue for this Court is the determination of whether the search of Mr. Myers' backpack that was located in the front of the motor vehicle was a legal, or illegal, search. If the search was illegal it would be as a result of a breach of Mr. Myers' s.8 *Charter* rights which protects everyone against unreasonable search or seizure, and the backpack and its contents would not be in evidence before the Court. Neither would Mr. Myers' statement to the police, nor the expert report of Cpl. Lane, that were both resultant from the search of the backpack.**

[9] With respect to the applicable legal principles, the trial judge noted:

> [12] The Courts must be extremely vigilant in any situations where an individual is stopped roadside by the police, and the police then proceed to search that person's vehicle to purportedly conduct an "inventory search" of the vehicle. An inventory search **cannot** be a roundabout way of conducting a fishing expedition/search of a vehicle in the hopes of possibly finding evidence of a crime versus simply a *Motor Vehicle Act* infraction.
>
> [13] Each situation must be closely scrutinized based on the facts as they existed at the time of the motor vehicle stop.

[10] The trial judge reviewed the two case authorities relied upon by the Crown, *R. v. Cooper*, 2016 BCPC 259 and *R. v. Wint*, 2009 ONCA 52. With respect to *Cooper*, he noted:

> [21] I accept that the law as noted in **Cooper** applies equally to Nova Scotia, and in particular **that where authority is granted to the police pursuant to the *Motor Vehicle Act*, or other authorizing legislation, to take possession of a vehicle and store it in a safe place, it is implicit in the legislation that the police have the duty and responsibility when exercising that authority to ensure the safety of the vehicle and its contents and conduct an inventory search to that end, and, in order to properly fulfil their lawful duty and responsibility to secure the property, entitled to conduct an inventory of the vehicle's contents. The police must be able to take reasonable steps to meet their duty to safeguard the property, including entering the vehicle and itemizing any property of apparent value therein.**
>
> (Bold and underline in original)

[11] The trial judge considered the import of *Wint*, noting:

> [22] In ***R.* v. *Wint***, 2009 ONCA 52, the Ontario Court of Appeal held that the police were entitled to conduct an inventory of the car pursuant to s. 175 of their *Highway Traffic Act*. The Court also held that the police were not restricted to itemizing the visible property of apparent value as such a narrow interpretation would not achieve the purpose of inventory searches, which is to protect the interests of any person with property in the car when it is seized and who would look to the police to safeguard their property while it is in police custody.
>
> [23] At para 15 (emphasis added):
>
> > "…Thus, if the police find a purse and could not look inside it, they would have no way of knowing whether it contained pennies or thousands of dollars, and if the latter, what steps should be taken to safeguard the large sum of money. That, in our view, would defeat the purpose of the exercise. **In short, if inventory searches are to be meaningful and serve**

> **the purpose for which they are intended, the police cannot be hobbled…They must be able to search and itemize the contents of objects such as purses, wallets and bags like the one observed in this case, to determine their contents. Of course, any inventory search must be executed in a reasonable manner and as is the case with other warrantless searches, reasonableness of police conduct will be judged against the totality of the circumstances revealed in the case.**"
>
> [24] Pursuant to **Wint**, Sgt. Rose's search of the backpack in conducting the inventory search was reasonable.
>
> (Bold in original)

[12] The trial judge ultimately concluded:

> [34] I find that the search of the backpack belonging to Mr. Myers was as a result of a legal inventory search and that it is admissible as evidence in this trial. There was no breach of Mr. Myers' s. 8 *Charter* rights.[1]
>
> [35] Consequently, the voluntary statement by Mr. Myers to the police acknowledging that he was possessing the drugs for the purpose of trafficking is also admissible. As is the expert report, and testimony, of Cpl. Lane that are as a result of the discovery of the backpack contents by Sgt. Rose.

Issues

[13] In November 25, 2021, the appellant filed an amended Notice of Appeal in which he set out the following allegations of error:

> 1. That the trial judge erred in law when he both failed to consider and failed to find that the investigating officer breached the appellant's rights under s. 9 of the Canadian Charter of Rights and Freedoms ("the *Charter*") by unlawfully detaining the appellant at the roadside on December 23, 2018;
>
> 2. That the trial judge erred in law when he determined that the investigating police officer did not breach the appellant's rights under s. 8 of the *Charter* when he searched the appellant's backpack on December 23, 2018; and,
>
> 3. That the trial judge erred in law and/or principle when he failed to exclude the contents of the appellant's backpack, and the appellant's

[1] The ownership of the backpack was never raised as an issue at trial. The defence never suggested it did not belong to the appellant.

> subsequent statement to the police, from the evidence at trial under s.24(2) of the *Charter*.

[14] Given the record and arguments advanced on appeal, I would re-order and restate the issues to be determined as follows:

1. Did the trial judge err in his application of the law governing inventory searches to the circumstances of this case?
2. Did the trial judge err in failing to address whether the evidence gave rise to a potential breach of the appellant's rights guaranteed by s. 9 of the *Charter*?
3. Should this Court undertake a fresh s. 24(2) analysis, and if so, what is the result?

Standard of Review

[15] The appropriate standard of review in relation to the issues raised on appeal is well known. In *R. v. Campbell*, 2018 NSCA 42, this Court approved the Manitoba Court of Appeal's summary of the principles:

> [17] The standard of review with respect to alleged *Charter* breaches was discussed by this Court in *R. v. West*, 2012 NSCA 112. The Court endorsed the standard as articulated by the Manitoba Court of Appeal in *R. v. Farrah (D.)*, 2011 MBCA 49 where Chartier, J.A. (as he then was) wrote:
>
> > 7 By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
> >
> > a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
> >
> > b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant* at para. 129).

c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).

d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant* at para. 86, and *R. v. Beaulieu*, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).

[16] I will apply the above principles in the analysis to follow.

Analysis

Issue 1: Did the trial judge err in his application of the law governing inventory searches to the circumstances of this case?

[17] The appellant does not take issue with the legal principles identified by the trial judge; rather, he says they were not properly applied. As I will explain, I agree.

[18] Section 8 of the *Charter* provides:

> Everyone has the right to be secure against unreasonable search and seizure.

[19] It has long been recognized that a warrantless search, as in this case, is presumptively unreasonable. The burden rests on the Crown to prove, on a balance of probabilities, that (i) the search was authorized by law; (ii) the law is reasonable; and (iii) the search was carried out in a reasonable manner (*R. v. Collins*, [1987] S.C.J. No. 15, at para.23).

[20] The Crown justifies the search of the appellant's backpack as being an authorized and reasonable inventory search. Neither at trial, nor on appeal, did the Crown justify the opening of the backpack as being an investigatory search, or incidental to arrest. I will confine my analysis accordingly.

[21] The appellant acknowledges that the search of the vehicle was authorized by s. 273 of the *MVA* which provides:

> **Seizure of vehicle involved in offence**
>
> **273 (1)** The Registrar, any official of the Department or any peace officer may seize a motor vehicle with which an offence has been committed under this Act or under any section of the *Criminal Code* (Canada) having particular relation to motor vehicles and may detain the same until the final disposition of any prosecution instituted for such offence but such motor vehicle may be released on such security for its production being furnished as the Registrar may require.

[22] Courts have recognized that the right to impound a vehicle under provincial legislation includes the ability to inventory the contents thereof. In *R. v. Nicolosi*, [1998] O.J. No. 2554, Justice Doherty wrote:

> **28** Under s. 221(1) of the H.T.A., the police are authorized to do the following:
>
> -- take the vehicle into the custody of the law;
>
> -- cause it to be taken to a place of storage; and
>
> -- store the vehicle in a suitable place.
>
> **29** Custody is defined in the Shorter Oxford Dictionary as "safekeeping, protection, charge, care, guardianship." Taking a vehicle into "the custody of the law" entails more than simply assuming possession and control of the vehicle. It involves the preservation and safekeeping of the vehicle while in the care and control of the police. Nor do I draw any distinction between the vehicle and its contents when the vehicle is impounded. Both are equally in the "custody of the law."
>
> **30** With the responsibility to keep the impounded property safe, must come the ability to take reasonable steps to achieve that end. Entering the vehicle for the purpose of itemizing visible property of apparent value is entirely in keeping with the responsibility to safeguard the vehicle and its contents **while they are in the custody of the law**. . .
>
> (Emphasis added)

[23] More recently, the British Columbia Court of Appeal in *R. v. Strilec*, 2010 BCCA 198, recognized the authority of police to impound a vehicle under that province's motor vehicle legislation, "…carries with it the duty and responsibility to take care of the vehicle and its contents, and to do that the police must be able to conduct an inventory of the vehicle's contents". (at para. 62)

[24] The appellant concedes that the law (permitting an inventory search of a vehicle detained by police) is reasonable. The issue on which the parties disagree is whether the trial judge erred in finding the inventory search was carried out in a reasonable manner.

[25] The appellant says the search exceeded the parameters of an inventory search, and was therefore unreasonable. In short, the appellant should have been given his backpack and sent on his way, before the inventory of the truck contents began. There was no justifiable reason for the backpack to be part of an inventory search of the vehicle contents. The Crown says the trial judge was correct in concluding a search of the backpack was reasonable.

[26] I return to *Cooper*, where the reasonableness of an inventory search was also one of the key issues for determination. There, police attended the scene of a single vehicle accident. The driver was lying on the ground injured and being treated by paramedics when the police arrived. The vehicle was severely damaged and located partially in the ditch and extending onto the roadway. The investigating officer determined that due to the position and condition of the vehicle and status of the driver, it needed to be towed to a safe location. The officer decided to conduct an inventory search.

[27] The officer located the driver's wallet in the front of the vehicle. It appeared to contain a significant amount of money, however, the officer did not open it. Rather, it was returned to the driver. The officer subsequently located a significant number of vials in the trunk of the vehicle, which upon testing was determined to contain steroids.

[28] The inventory search in the context of that case was found to be reasonable. In reaching that conclusion, Cutler, J. set out a number of legal principles. He wrote:

> Propriety of the Search
> [20] ...It is trite that any search must be executed in a reasonable manner **and the reasonableness of the police conduct will be judged against the totality of the circumstances revealed in each case**. The Court must guard against abuses of police authority to search, including authority created pursuant to statutory schemes. Police officers must not be allowed to take possession of and search a vehicle as a result of a contrived reason employed as a means to conduct a search of the vehicle. The Court must assess all the evidence to determine the *bona fides* of the officer's actions.

And further:

> [36] The purpose of the inventory search is to allow the officer an opportunity to identify and record property **which the police are retaining control of** as a result of taking control of the vehicle. Once the police decide to take control of a vehicle, the driver or owner is not immediately foreclosed from taking possession of property contained in the vehicle which he or she wishes to retain**. It is reasonable that a driver or owner will be given an opportunity to retain items in the vehicle at the time of the impoundment assuming that in doing so they do not interfere in the execution of the officer's duties**. The objective of most if not all vehicle impoundment legislation, and s. 188(1)(d) of the *Motor Vehicle Act* is no exception, is to remove the vehicle from public roadways. **The objective is not to impound the contents of the vehicle.**
>
> [37] With this in mind, it was quite reasonable for the officer to allow the wallet to remain with the accused so he had access to its contents while continuing with his activities that day, including attending at the hospital for medical attention. I do not believe the officer was required to conduct an inventory of the contents of the wallet. The officer was not retaining the wallet. **I do not believe it would be wise or appropriate to expect the officer to perform a complete search of an individual's wallet in such cases.**
>
> (Emphasis added)

[29] The following principles apply in assessing whether an inventory search triggered by the detention of a vehicle pursuant to the *MVA*, was conducted reasonably:

- Courts must exercise vigilance in assessing whether an inventory search was conducted reasonably. The power of police to search the contents of a vehicle under the detention power contained in the MVA is one fraught with the risk of purposeful or inadvertent misapplication. Police must be vigilant that the manner in which an inventory search is conducted does not go beyond its purpose;
- The purpose of an inventory search is to document the contents of a vehicle that will be taken into possession of the police;
- Whether an inventory search is conducted reasonably will depend on an assessment of the totality of the circumstances in a particular case;
- Given its purpose, a reasonable inventory search does not extend to personal property of occupants that will not remain in the vehicle when taken into police custody;

- Occupants should be given the opportunity to remove their personal belongings from the vehicle prior to it being placed under police control, unless doing so would interfere with the investigation being conducted;
- As the Crown has the burden of establishing the inventory search was conducted reasonably, police should explain why personal belongings which could have been taken by occupants were retained and/or searched; and
- As per *Wint*, if personal belongings such as a purse, backpack or bag remain in the vehicle after it is placed in police control, it is reasonable, as part of an inventory search, to document the contents thereof. It is important to recognize the opening of a purse (or bag) in one situation may be found to be part of a reasonable inventory search, whereas the context in another case may lead to the conclusion such action is unreasonable.

[30] The above principles are entirely consistent with *Cooper*, which was adopted by the trial judge as the law applicable in this Province. I am satisfied, however, that the trial judge failed to properly apply them. Specifically, the trial judge failed to undertake a full contextual analysis of the reasonableness of the inventory search.

[31] The trial judge concluded that an inventory search was appropriate in the circumstances. I agree with his conclusion. However, in assessing whether the search was conducted in a reasonable manner, he failed to consider if all of the contents needed to be inventoried.

[32] The decision to detain the vehicle arose due to the *MVA* infractions committed by the driver. The inventory search flowed from the officer's decision to detain the vehicle given the lack of insurance and improper registration. The appellant carried no liability in relation to these offences, he was simply a by-stander. Although Sgt. Rose expressed having "officer safety concerns" due to the driver's criminal history, the appellant had no such involvement and had been completely cooperative. He had been subjected to a pat down search which disclosed a small pocket knife, which caused the officer no safety concerns.

[33] As the principles stated earlier establish, an inventory search only applies to the contents which will be remaining with the vehicle after it is taken into police control. This does not give the police *carte blanche* to search personal belongings,

unrelated to the particular investigation, which the occupants may wish to remove from the vehicle. The trial record does not support there being any necessity to search the appellant's backpack as part of the *MVA* investigation, indeed, such a justification was never advanced either at trial, or on appeal.

[34] Before commencing the inventory search, the appellant ought to have been invited to remove his personal belongings from the vehicle. There was no justification to search his backpack as part of an inventory search. Sgt. Rose's search of the appellant's backpack exceeded what was required to effect an inventory search in these circumstances. As such, I am satisfied the appellant's rights under s. 8 of the *Charte*r were infringed, and the trial judge erred in concluding otherwise.

Issue 2: *Did the trial judge err in failing to address whether the evidence gave rise to a potential breach of the appellant's rights guaranteed by s. 9 of the Charter?*

[35] Section 9 of the *Charter* states:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

[36] In his reasons, the trial judge made no mention of any alleged breach of the appellant's s. 9 rights. The appellant says this issue was raised at trial as a result of evidence adduced through police witnesses, and the trial judge erred in failing to address it. The Crown says that an alleged breach of the appellant's s. 9 rights is an entirely new issue being raised on appeal, and as such, this Court should not consider it.

[37] I am satisfied the issue of the appellant's arbitrary detention was raised, albeit briefly, at trial. At the outset of his submissions, the appellant's trial counsel acknowledged that the Notice of Application and *Charter* issue filed with the court only referenced s. 8. However, he asked the court to consider whether the evidence gave rise to an improper detention. The following exchange between the appellant's trial counsel and the trial judge is informative:

> **MR. HOEHNE:** Thank you, Your Honour. I take the direction of the Court; however, it's my understanding that while the **Charter** notice may have been simply for s. 8 upon hearing the evidence of … of the officers testifying, that it would open up to ... to more than … to any **Charter** breaches that ... that would

have been … would have been heard and therefore, not necessarily just limited to … to s. 8.

THE COURT: Yeah, yeah, that's fair.

MR. HOEHNE: Thank you.

THE COURT: If something else pops up, I'll flag it.

MR. HOEHNE: So, in ... in starting, I'd suggest that the ... the evidence that ... that was found was a result firstly, improper detention; secondly, the improper ... improper search and that ... and that there was no grounds.

[38] Trial counsel continued, raising concerns about the appellant's detention:

He had no grounds to ... to search the vehicle and in fact, no grounds ... for the detention. I would say that further detention of either, but...even more so for the detention of ... Mr. Myers, who...was merely the passenger...in a traffic stop. He was detained for … some 15 minutes before he was … was finally arrested and read his rights.

[39] There is no question that the appellant was detained by police, up to and including the time when his backpack was opened and searched by Sgt. Rose. There was a real issue placed before the trial judge as to whether his continued detention was arbitrary in the circumstances of the case. Although the issue of a potential s. 9 breach was first raised in submissions, the trial judge had an obligation to turn his mind to it. He did not do so.

[40] The appellant invites this Court to decide whether the appellant's s. 9 rights were breached. On this record, I would decline to do so. If not for my findings relating to the inventory search, and the resulting s. 24(2) analysis to follow, I would have ordered a new trial as a result of the trial judge's failure to consider this issue.

Issue 3: Should this Court undertake a fresh s. 24(2) analysis, and if so, what is the result?

[41] Having found a breach of the appellant's right to be secure against unreasonable search and seizure, I turn now to his request that the tainted evidence be excluded. The Crown submits this Court should not undertake a s. 24(2) analysis, but rather, defer to the trial judge's conclusion.

[42] Although the trial judge found no *Charter* breach arising from the inventory search, he addressed the request for the exclusion of evidence as follows:

> [36] Should it be necessary, I can provide a detailed ***Grant*** analysis. I have turned my mind to a ***Grant*** analysis and I have determined that even if it is found that the search of the backpack was as a result of an illegal search, that I would still admit the contents of the backpack into evidence as any breach of Mr. Myers' *Charter* rights was minor. The voluntary statement by Mr. Myers, and the evidence of Cpl. Lane, would also be admitted into evidence. This was a traffic stop that involved serious considerations for officer safety and some steps would have had to be taken to ensure the safety of the officer, and of the public, by conducting an inventory search.

[43] It has long been recognized that this Court owes no deference to a trial judge's s. 24(2) analysis where their reasons demonstrate an error of law. The Supreme Court has recently reaffirmed this standard of review in *R. v. Tim*, 2022 SCC 12:

> [72] Because the trial judge erred in law in assessing the nature and extent of the *Charter* breaches, no appellate deference is owed to his "alternative" conclusion to admit the evidence. This Court must therefore consider that issue afresh (see *Grant*, at para. 129; *Le*, at para. 138; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 42).

[44] Section 24(2) states:

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[45] The Crown says this Court should decline to undertake a s. 24(2) analysis because the appellant has failed to establish the evidence he seeks to have excluded was "obtained in a manner" that infringed his rights. Specifically, the Crown argues that if a breach is found, there was an insufficient connection between it and the appellant's statement to police.

[46] In *Tim*, the Court reiterated the principles that apply to this threshold issue:

> [78] This Court has provided guidance as to when evidence is "obtained in a manner" that breached an accused's *Charter* rights so as to trigger s. 24(2):
>
> 1. The courts take "a purposive and generous approach" to whether evidence was "obtained in a manner" that breached an accused's *Charter* rights (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38).

2. The "entire chain of events" involving the *Charter* breach and the impugned evidence should be examined (*R. v. Strachan*, [1988] 2 S.C.R. 980, at pp. 1005-6).

3. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct" (*Mack*, at para. 38; see also *Wittwer*, at para. 21).

4. The connection between the *Charter* breach and the impugned evidence can be "temporal, contextual, causal or a combination of the three" (*Wittwer*, at para. 21, quoting *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45). A causal connection is not required (*Wittwer*, at para. 21; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 83; *Strachan*, at pp. 1000-1002).

5. A remote or tenuous connection between the *Charter* breach and the impugned evidence will not suffice to trigger s. 24(2) (*Mack*, at para. 38; *Wittwer*, at para. 21; *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40; *Strachan*, at pp. 1005-6). Such situations should be dealt with on a case by case basis. There is "no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote" (*Strachan*, at p. 1006).

[47] In the circumstances of this case, I have no difficulty concluding the discovery of the contents of the appellant's backpack and his subsequent statement to police were directly related to the unreasonable manner in which the inventory search was conducted. The drugs were discovered directly due to the s. 8 breach, and the subsequent statement flowed therefrom.

[48] I now turn to the application of s. 24(2), and the framework set out in *R. v. Grant*, 2009 SCC 32, which directs the court to consider three lines of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact on the *Charter*-protected interests of the accused; and (3) society's interest in adjudication on the merits.

[49] The appellant acknowledges the third line of inquiry favours inclusion of the evidence because the drugs located in the backpack is real and reliable evidence of drug trafficking. However, he submits that the other two lines of inquiry favour exclusion of the evidence.

Seriousness of the Charter-infringing conduct

[50] The Supreme Court in *Tim* has recently reviewed the principles which guide a consideration of the seriousness of the *Charter*-infringing conduct:

> [82] The first line of inquiry under s. 24(2) considers the seriousness of the *Charter*-infringing state conduct. It asks whether the police engaged in misconduct from which the court should dissociate itself (see *Grant*, at para. 72). The concern of this inquiry is "not to punish the police", but rather to "preserve public confidence in the rule of law and its processes" (*Grant*, at para. 73). The court must situate the *Charter*-infringing conduct on a "spectrum" or a "scale of culpability" (*Grant*, at para. 74; *Paterson*, at para. 43; *Le*, at para. 143). At the more serious end of the culpability scale are wilful or reckless disregard of *Charter* rights, a systemic pattern of *Charter*-infringing conduct, or a major departure from *Charter* standards. Courts should dissociate themselves from such conduct because it risks bringing the administration of justice into disrepute. At the less serious end of the culpability scale are *Charter* breaches that are inadvertent, technical, or minor, or which reflect an understandable mistake. Such circumstances minimally undermine public confidence in the rule of law, and thus dissociation is much less of a concern (see *Grant*, at para. 74; *Le*, at para. 143; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22).

[51] I would place the improper search of the appellant's backpack at the moderately high end of the culpability spectrum for the following reasons:

- The inventory search was prompted due to infractions under the *MVA*, which attract liability to a driver, not a passenger of the vehicle. The Crown advanced no other justification for the search of the appellant's backpack, other than it was part of a purportedly reasonable inventory search triggered by a detention of the vehicle due to it being uninsured. To follow the Crown's argument, a passenger's personal belongings can be subject to an inventory search because of the *MVA* infractions of the driver. Even a cursory review of the law demonstrates the frailty of this approach;
- Although courts have determined there is a decreased expectation of privacy in the contents of vehicles; here, the inculpatory evidence was found in a closed backpack located on the floor by the passenger seat. The appellant had been sitting in that seat when the truck was stopped by Sgt. Rose. In his cross-examination, he acknowledged he did not ask either the driver or the appellant permission before opening the bag and starting a search. Unlike visible contents of the vehicle, a passenger would have an expectation of privacy in regard to a closed backpack. In my view, although Sgt. Rose was justified in undertaking an inventory search, his search of the backpack showed a unwarranted disregard to his obligation to undertake the search in a reasonable fashion and in accordance with the law;

- Unjustified searches of the personal belongings of the travelling public should not be condoned by this Court. In viewing the search of the appellant's backpack as behaviour this Court should disassociate itself from, I call to mind the words of Justice Binnie in *R. v. A.M.*, 2008 SCC 19:

> [61] Canadian courts have accepted as correct the proposition that s. 8 protects "people, not places". People do not shed their reasonable expectations of privacy in their person or in the concealed possessions they carry when they leave home, although those expectations may have to be modified depending on where they go, and what "place" they find themselves in.
>
> [62] The backpacks from which the odour emanated here belonged to various members of the student body including the accused. **As with briefcases, purses and suitcases, backpacks are the repository of much that is personal, particularly for people who lead itinerant lifestyles during the day as in the case of students and travellers. No doubt ordinary businessmen and businesswomen riding along on public transit or going up and down on elevators in office towers would be outraged at any suggestion that the contents of their briefcases could randomly be inspected by the police without "reasonable suspicion" of illegality.** Because of their role in the lives of students, backpacks *objectively* command a measure of privacy.
>
> [63] As the accused did not testify, the question of whether or not he had a *subjective* expectation of privacy in his backpack must be inferred from the circumstances. While teenagers may have little expectation of privacy from the searching eyes and fingers of their parents, I think it obvious that they expect the contents of their backpacks not to be open to the random and speculative scrutiny of the police. This expectation is a reasonable one that society should support.
>
> (Emphasis added)

[52] This line of inquiry supports an exclusion of the evidence flowing from the breach.

The impact on the Charter-protected interests of the appellant

[53] The second line of inquiry was described in *Tim* as follows:

> [90] The second line of inquiry under s. 24(2) considers the impact of the breach on the accused's *Charter*-protected interests. It asks whether the breach "actually undermined the interests protected by the right infringed" (*Grant*, at para. 76; *Le*, at para. 151). This involves identifying the interests protected by the relevant *Charter* rights and evaluating how seriously the breaches affected those interests (see *Grant*, at para. 77). As with the first *Grant* line of inquiry, the court must situate the impact on the accused's *Charter*-protected interests on a spectrum, ranging from impacts that are fleeting, technical, transient, or trivial, to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed. The greater the impact on *Charter*-protected interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. This is because "admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute" (*Grant*, at para. 76; see also *Le*, at para. 151; *Harrison*, at para. 28).

[54] Here, the infringement did not involve the bodily integrity of the appellant. However, as noted above, as a member of the travelling public, the appellant would have a distinct expectation of privacy in his closed backpack. The breach here had a direct impact on the appellant's right not be subjected to unreasonable search and the result thereof lead directly to the charges that followed. This line of inquiry also supports an exclusion of the impugned evidence, and falls on the moderately high end of the spectrum given the circumstances of this case.

[55] As noted earlier, the appellant concedes that the third factor, society's interest in the merits, would favour inclusion of the evidence in this instance. I agree. I turn now to the final step in the s. 24(2) analysis.

Balancing the factors

[56] A properly conducted s. 24(2) analysis requires a final balancing of the three lines of inquiry. The Court in *Tim* reviews the approach to the task as follows:

> [98] The final step in the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term repute of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision (see *Grant*, at paras. 86 and 140; *Harrison*, at para. 36). Each factor must be

> assessed and weighed in the balance, focussing on the long-term integrity of, and public confidence in, the administration of justice (see *Grant*, at para. 68). The balancing is prospective: it aims to ensure that evidence obtained through a *Charter* breach "does not do further damage to the repute of the justice system" (*Grant*, at para. 69). The balancing is also societal: the goal is not to punish the police, but rather to address systemic concerns by analyzing "the broad impact of admission of the evidence on the long-term repute of the justice system" (*Grant*, at para. 70; see also *Le*, at para. 139).

[57] I acknowledge the nature of the evidence flowing from the search creates a strong pull towards admissibility. However, the other two factors, although falling slightly lower on the seriousness spectrum, lead me to conclude the drugs and the appellant's police statement ought to be excluded. In the circumstances of this case, the admission of the evidence garnered from a passenger who had no involvement with the *MVA* investigation, would risk bringing the administration of justice into disrepute, and set a poor precedent for the future use of inventory searches by police in this Province.

Disposition

[58] For the reasons above, I find that the manner in which the inventory search was conducted infringed upon the appellant's right to be free from unreasonable search and seizure. I further find that the admission of the evidence flowing from the breach, namely the contents of the backpack and the appellant's subsequent statement to police, would bring the administration of justice into disrepute.

[59] Without the impugned evidence, there was no reasonable prospect of conviction. As such, I would set aside the two convictions under s. 5(2) of the *CDSA*, and enter acquittals on both charges.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Beaton, J.A