

CANADA / JUDGMENT

R. v. Hosang

2026 ONCA 51

COURT

Court of Appeal for Ontario

DECIDED

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Fairburn, J. Michal; Roberts, Lois B.; Madsen, Lene

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hosang, 2026 ONCA 51

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Fairburn A.C.J.O., Roberts and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Jim Hosang

Appellant

Theresa Donkor, for the appellant

Raoof Zamanifar, for the respondent

Heard: May 29, 2025, with additional written submissions June 5, 12, and 18, 2025

On appeal from the conviction entered by Justice Vanessa V. Christie of the Superior Court of Justice, on November 24, 2023, and from the sentence imposed on March 14, 2024.

Fairburn A.C.J.O.:

I. Overview [1] This is an appeal from conviction for possession of a loaded restricted firearm contrary to s. 95(1) of the Criminal Code, R.S.C., 1985, c. C-46.

[2] The appellant and a friend were seated in an idling motor vehicle. The appellant was in the passenger seat and the friend was in the driver’s seat. When the police knocked on the driver’s-side window, the friend opened the door and a “cloud of smoke” with the “strong odour of cannabis” wafted out. Open packages of cannabis were visible on the floor of the vehicle by the friend’s feet.

[3] The police searched the vehicle and its two occupants pursuant to s. 12(3) of the Cannabis Control Act, 2017, S.O. 2017, c. 26, Sched. 1 (“CCA”). It permits the search of vehicles and persons in vehicles:

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 ... and search any person found in it.

[4] Prior to physically searching the appellant, the police asked him for his name and date of birth and ran a database search using his identifying information. The police then searched him, starting with the satchel strapped to his body, where they found a loaded Glock handgun with the serial number obliterated. Police charged the appellant with possession of a loaded restricted firearm.

- [5] At trial, the appellant brought an application, seeking exclusion of the firearm from evidence based upon alleged breaches of ss. 8, 9, 10(a) and 10(b) of the Canadian Charter of Rights and Freedoms. Although the application judge dismissed the s. 8 Charter claim, he found that there were breaches of ss. 9, 10(a) and 10(b). Despite those breaches, the application judge concluded that the gun should not be excluded pursuant to s. 24(2) of the Charter and so dismissed the application: *R. v. Hosang*, 2024 ONSC 24, per Bale J.
- [6] The parties then filed an agreed statement of fact before a different judge. The appellant was convicted.
- [7] The focus of this conviction appeal is the application judge's Charter ruling. This appeal was initially predicated on alleged errors in the application judge's s. 8 and s. 24(2) analysis. Shortly before the appeal was heard, this court's decision in *R. v. McGowan-Morris*, 2025 ONCA 349, 447 C.C.C. (3d) 421, was released, which gave rise to an additional ground of appeal relating to the s. 10(b) Charter ruling. The parties were asked to address the new ground of appeal in follow-up written submissions. Accordingly, there are three grounds of appeal that must be addressed in these reasons – whether the application judge erred in his s. 8, s. 10(b) or s. 24(2) analysis.
- [8] I would dismiss the appeal. As I will explain, there was no error in the s. 8 analysis. Based upon this court's decision in *McGowan-Morris*, there was an error in the s. 10(b) analysis, requiring this court to undertake a fresh s. 24(2) analysis factoring in the additional s. 10(b) breach. Having undertaken that analysis, I would not exclude the firearm.

II. Background Facts [9] Police received a call at 1:37 a.m. on February 19, 2022. The caller said that a car had been parked in a visitors' parking lot since 9:00 p.m. with the lights on and the engine running. Two police officers in separate vehicles responded to the call. They arrived around the same time, at 1:52 a.m., and parked their cruisers behind the idling car to preclude the driver from driving away.

- [10] Cst. Pereira approached the idling vehicle and knocked on the driver's-side window. When the appellant's friend, who was in the driver's seat, opened the driver's-side door, cannabis smoke billowed out of the car. Cst. Pereira observed open packages of cannabis on the ground near the friend's feet. He engaged with the friend and spoke with her about impaired operation of a motor vehicle. Seemingly unaware of the problem with consuming cannabis behind the wheel of an idling motor vehicle, she responded that she and the appellant were not going anywhere. Cst. Pereira's body-worn camera was activated, and he can be heard saying that "it's the same thing as ...". According to the officer, he told the friend that having cannabis available to the driver in a car is the same thing as having alcohol available to the driver in a car.

- [11] Cst. Pereira collected the friend's identification and asked the appellant for his. The appellant told the officer that his identification was inside his house, which was across the street. Cst. Pereira then went to run an identification check on the friend and directed the other officer – Cst. Coutu – to obtain the appellant's identification.
- [12] At 1:54 a.m. (around two minutes after the police arrived), Cst. Coutu spoke to the appellant, who was still seated in the passenger's seat. The appellant told the officer that he wanted to call his mother, but the officer said that he had to first provide his name and date of birth. The appellant stepped out of the vehicle and complied, providing the information requested. He pointed to a house across the street and said that he wanted to go home but was told to wait.
- [13] Cst. Coutu then went to run a database check on the appellant's name. The database search revealed that the appellant had an outstanding charge for robbery. The search also showed his home address, that his date of birth was what he said it was, and that he was supposed to remain with his surety at night. There was no information about the identity of the appellant's surety and the police seemed unconcerned that the appellant may have been outside of his surety's presence. Instead, the police were focused on the CCA investigation.
- [14] At 1:56 a.m., the officers returned to the car and told the friend and the appellant that they would be conducting a search of the "vehicle and everyone inside it" pursuant to the CCA.
- [15] When searching the appellant's satchel, which was the first thing they did, the police located a loaded firearm with the serial number removed. The appellant was arrested, handcuffed and placed into the back of the police cruiser. The search of his person was completed a bit later, at which time Cst. Coutu asked the appellant: "What are you doing with a gun on you?". The appellant did not respond. He was cautioned and given his right to counsel.

III. The Charter Ruling [16] The appellant's Charter application rested on s. 8 (right to be secure against unreasonable search and seizure), s. 9 (right not to be arbitrarily detained), s. 10(a) (right to be informed promptly of reasons for detention), s. 10(b) (right to counsel) and s. 24(2) (Charter remedy).

- [17] His s. 8 claim had two elements. Only the second is at issue on appeal.
- [18] First, the appellant argued that the police had breached his s. 8 Charter right to be free from unreasonable search and seizure when they searched him based only on a "ruse". In essence, he argued that the police were not conducting a bona fide search pursuant to s. 12(3) of the CCA. Instead, the police were using the CCA as a ploy to search, as the application judge described it, a "black man with a satchel." The application judge rejected this argument, concluding that the search reflected a legitimate execution of police powers under s. 12(3) of the CCA.
- [19] Second, the appellant argued that it was unreasonable to seize his name and date of birth and to use this information to run a check against police databases prior to the physical search. In support of that argument, he leaned heavily on this court's decision in *R. v.*

Harris, 2007 ONCA 574, 87 O.R. (3d) 214. The application judge rejected the argument, concluding that Harris was not instructive here because the searches rested on different factual foundations. In the application judge's view, the request for the appellant to identify himself and the use of that information to check against police databases was reasonable in the circumstances.

- [20] As for the appellant's s. 9 claim, the application judge found that an arbitrary detention commenced at the moment the police cars pulled up behind the idling vehicle and ended when the police developed grounds to detain under the CCA. Their grounds essentially emerged at the outset, after the driver's door was opened and the police witnessed what was taking place in the car. Accordingly, the arbitrary part of the detention lasted less than two minutes, just enough time for the police to park their vehicles and walk to the suspect vehicle. This aspect of the Charter ruling is not at issue on appeal.
- [21] This left the alleged ss. 10(a) and (b) breaches.
- [22] As for the appellant's s. 10(a) claim, the application judge found that within a "minute or so" of the original detention starting, the appellant would have overheard Cst. Pereira telling the friend why she was being detained, including that it is unlawful to have open cannabis in a vehicle. Therefore, within a "minute or so, the [appellant] became aware of the reason for his continued detention under the CCA." This aspect of the ruling is not at issue on appeal.
- [23] Moving onto the alleged s. 10(b) breach, the appellant argued that the breach arose from the almost 12-minute delay between the time he was initially detained at 1:52 a.m. and the time he was informed of his right to counsel, which followed the discovery of the firearm and his arrest. The application judge concluded, leaning on three lower court decisions, that the appellant's s. 10(b) right to counsel was "suspended at the outset of the CCA investigation" and that the period of suspension was reasonable in the circumstances: *R. v. Tully*, 2022 ONSC 1852, 505 C.R.R. (2d) 87, at paras. 150-156; *R. v. Kanneh*, 2022 ONSC 5413, at paras. 59-65; and *R. v. Moulton*, 2023 ONCJ 140, 524 C.R.R. (2d) 168, at paras. 260-273. Following the appellant's arrest, it took only four minutes until he was informed of his right to counsel. The application judge found that this delay was not unreasonable. Even so, as the trial Crown conceded, Cst. Coutu should not have asked the accused, "What are you doing with a gun?". Although the appellant did not respond to the question, the question itself constituted a s. 10(b) breach because it risked a response.
- [24] In light of this court's subsequent decision in *McGowan-Morris*, released just prior to the hearing of this appeal, the respondent properly concedes that the s. 10(b) ruling – in particular the finding that there was a suspension of the right to counsel – was in error. I will return to the effect of this concession later in these reasons.
- [25] The application judge's s. 24(2) analysis followed the standard formula set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Although he found that the initial arbitrary detention triggering a s. 9 breach – the police parking their vehicles behind the idling car – was "a serious breach", he concluded that the s. 10(a) breach was "less serious". This was because

the appellant was informed within “a minute or so” of the reason for the continued detention. As for the s. 10(b) breach, the application judge found that the breach arose from the police asking, “What are you doing with a gun?”, after the loaded firearm was seized but before the appellant received his right to counsel, which was a serious breach. He added that if he was wrong that the appellant’s s. 10(b) right had been suspended (which it turns out he was), then this would have also constituted a serious breach.

[26] With respect to the impact of the breaches on the appellant’s Charter-protected interests, the application judge emphasized that no inculpatory evidence was elicited because of those breaches. In the end, he found that the impact was not serious, even if he were wrong in his s. 10(b) analysis and the appellant’s right to counsel had not been suspended because of the CCA-authorized search.

[27] Finally, the societal interest in adjudication of this serious case pushed away from exclusion. On balance, the application judge concluded that admission of the firearm would not bring the administration of justice into disrepute.

IV. ANALYSIS A. Overview [28] The appellant focusses on the ss. 8, 10(b) and 24(2) parts of the Charter ruling. Specifically, the appellant maintains that the application judge erred in:

- (1) finding no s. 8 breach arising from the seizure of his name and date of birth and the use of it to check against police databases;
- (2) finding no s. 10(b) breach arising from the failure to provide the right to counsel at the outset of the detention; and
- (3) failing to consider under s. 24(2),
 - (a) that Cst. Pereira provided the court with “misleading” evidence; and
 - (b) the cumulative effect of the multiple Charter breaches.

[29] As detailed below, I see no error in the application judge’s s. 8 analysis. As for the s. 10(b) breach, I accept the respondent’s concession that this court’s subsequent decision in McGowan-Morris renders the application judge’s analysis legally flawed. As for the s. 24(2) ruling, I see no error in the application judge’s approach. With that said, given the additional Charter breach that is now present, a new s. 24(2) analysis must be conducted. As I will explain, having undertaken that exercise, I would not exclude the firearm.

B. SECTION 8: Request for i.D./USE To SEARCH DATABASE WAS not a breach 1. Introduction [30] The s. 8 Charter issue arises in the context of s. 12 of the CCA and so I begin with s. 12, which reads as follows:

Transporting cannabis

12 (1) No person shall drive or have the care or control of a vehicle or boat, whether or not it is in motion, while any cannabis is contained in the vehicle or boat.

Exception

- (2) Subsection (1) does not apply with respect to cannabis that,
- (a) is in its original packaging and has not been opened; or
 - (b) is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle or boat. 2018, c. 12, Sched. 1, s. 12 (1).

Search of vehicle or boat

- (3) A police officer who has reasonable grounds to believe that cannabis is being contained in a vehicle or boat in contravention of subsection (1) may at any time, without a warrant, enter and search the vehicle or boat and search any person found in it. [Emphasis added.]
- [31] Section 12 is consistent with the decades-long statutory and common law push toward securing the public from unsafe drivers. Driving is an inherently dangerous activity, which is rendered significantly more dangerous when drivers are under the influence of stupefying substances. Legions of cases coming before the courts paint a clear and tragic picture of what results when those under the influence of alcohol or drugs get behind the wheels of motor vehicles, transforming them into lethal weapons. Given the inherent dangers of driving, the “community expects and accepts significant limitations on individual privacy” when it comes to the use of motor vehicles: *R. v. Singh*, 2024 ONCA 66, 432 C.C.C. (3d) 527, at para. 64.
- [32] Section 12 of the CCA is only one aspect of interconnected provincial and federal legislation that provides the police with enhanced investigative powers and procedures designed to permit targeted interventions before harm results. The s. 12 framework supports the public safety goal of preventing drivers and occupants of vehicles from using cannabis in those vehicles when they are in care or control: *McGowan-Morris*, at para. 64.
- [33] There is no dispute between the parties that a person who has care or control of a vehicle in which there is cannabis, contrary to the requirements of s. 12(2) of the CCA, commits an offence contrary to s. 12(1): “no person shall drive or have care or control of a vehicle ...”. Therefore, there can be no reasonable dispute in this case that, at a minimum, the police had reasonable grounds to believe that the appellant’s friend, who was seated in the driver’s seat of the idling vehicle, was committing a s. 12(1) offence. When the police arrived in response to the complaint that a vehicle had been idling for hours, they opened the driver’s-side door, cannabis smoke billowed out, and open packages of cannabis were seen at the driver’s feet.
- [34] Nor is there dispute between the parties that where the police have reasonable grounds to believe that s. 12(1) is being breached, as was the case here, that “any person found in” the vehicle under care or control may be searched pursuant to s. 12(3) of the CCA. Therefore, the appellant was searchable pursuant to s. 12(3).

- [35] The point of dispute – and the key issue – is whether the police could seize the appellant’s name and date of birth and conduct a database search based on that information before the s. 12(3) search of his person.
- [36] In answering that question, I begin by explaining why, contrary to the respondent’s argument, the answer does not turn on the appellant’s liability as a party. I then explain why this case is distinguishable from Harris, where this court concluded that the seizure and search of a roadside detainee’s identification breached s. 8, and reject the other related errors raised by the appellant. Finally, I explain why the search was reasonable.
2. Party liability not a justification for the search [37] In submitting that the appellant could be asked for his identification before the s. 12(3) search of his person, the respondent relies on the concept of party liability.
- [38] As the argument goes, the friend in the driver’s seat of the idling vehicle was the principal offender under s. 12(1). Someone smoking cannabis in a vehicle where another is in care or control is almost invariably a party to the s. 12(1) offence: see, Provincial Offences Act, R.S.O. 1990, c. P.33 (“POA”), ss. 77-78, which largely mirror the party provisions found at ss. 21 and 22 of the Criminal Code.[1] Here, the appellant, who was openly smoking cannabis in the car that was under the care and control of his friend, was, at a minimum, an aider and thus liable under s. 12(1) as a party to the offence: R. v. Chandi, 2020 BCCA 305, 394 C.C.C. (3d) 379, at para. 64; R. v. M.R., 2011 ONCA 190, 275 C.C.C. (3d) 45, at paras. 58-61; R. v. Akapew, 2009 SKCA 137, 249 C.C.C. (3d) 212, at paras. 2, 4, 7-10. As a party to the offence, the respondent argues that the appellant was arrestable under s. 12(1). Therefore, given he was arrestable, he had to provide his identifying information to the police upon request.
- [39] The appellant pushes back on the respondent’s position, claiming that this court’s decision in McGowan-Morris immunizes all party liability under s. 12(1) of the CCA. Specifically, the appellant points to the following passage from McGowan-Morris, which is said to support his position: “[O]nly the driver or a person in care or control of the vehicle...may be liable; the offence does not apply to passengers”: at para. 65 (emphasis added).
- [40] With respect, the passage from McGowan-Morris must be read in context. An important aspect of that context is that this court was not asked in McGowan-Morris to consider party liability pursuant to ss. 77 and 78 of the POA. Therefore, I do not read McGowan-Morris as necessarily precluding party liability. With that said, this is not the case in which to resolve the party liability issue.
- [41] As counsel for the appellant put it, this was “simply not the basis for [the appellant’s] detention or demand for identification in this case.” I agree. In short, the police did not testify that they were investigating the appellant for a breach of s. 12(1). In fact, Cst. Coutu went so far as to acknowledge that he was not doing so.

[42] As discussed below, when a court determines the lawfulness of the seizure of an accused's identifying information, it is important to focus upon the justification given by the police for obtaining that information.[2] Here the police testified that they obtained the information to determine whom they were dealing with before conducting the lawful search of the appellant's person pursuant to s. 12(3) of the CCA. This was entirely reasonable in the circumstances.

3. Seizure of identifying information and its use to perform a database search before physical search was reasonable a. Alleged errors [43] The appellant alleges that there are four errors in the application judge's s. 8 analysis, which are revealed in the following passage:

In his evidence, Coutu testified that his purpose in conducting the database search was to see if the accused was wanted or missing, or under any conditions that he might be breaching. He said that he wants to know who he is dealing with before going on with an investigation. That evidence might support the conclusion, as in Harris, that he asked for the accused's identification, simply as a matter of routine.

However, Coutu asked the accused for identification on instructions from Pereira who had taken the lead in the investigation. In his evidence, Pereira said that he would conduct a physical search differently in cases where a database search disclosed a history of firearms.

- [44] First, the appellant submits that the application judge erred in distinguishing this case from Harris, where this court found that the seizure of a roadside detainee's identification (also a passenger in a motor vehicle) and use of it to search a police database constituted a s. 8 breach.
- [45] Second, the appellant submits that s. 12(3) only permits physical searches of vehicles and their occupants; it does not authorize the seizure of occupant's identifying information prior to conducting the physical search. Therefore, even if the police had proper grounds to conduct a physical search of the appellant, this did not mean that they had the grounds to seize his identifying information and use it to search police databases.
- [46] Third, the appellant maintains that, contrary to the application judge's finding, there was no factual basis to conclude that the search of the appellant's identifying information was conducted for safety reasons.
- [47] Finally, the appellant contends that the application judge erred by relying on Cst. Pereira's grounds for justifying the search and seizure. Recall that it was Cst. Pereira who directed Cst. Coutu to obtain the appellant's identification. The appellant argues that, in circumstances where the seizing officer is in a position to develop his own grounds for the seizure, the court should not rely upon the directing officer's grounds to justify the police activity.
- [48] As the second, third and fourth grounds are inextricably linked to the first alleged Harris error, I will address them as they arise in the context of that issue.

- b. Harris is instructive but distinguishable [49] Although Harris is instructive, it is distinguishable.
- [50] Like the appellant, Mr. Harris was the passenger in a motor vehicle. In that case, the motor vehicle was stopped after a failure to signal a turn. Mr. Harris was not wearing his seatbelt. He was asked for and provided his identification. When his identification was run against the Canadian Police Information Centre (“CPIC”) database, it was determined that Mr. Harris was breaching a bail condition – specifically, that he was out after his curfew. Accordingly, he was arrested on the breach. He was then searched incident to arrest and found to be carrying cocaine.
- [51] Mr. Harris was in clear breach of the Highway Traffic Act, R.S.O. 1990, c. H.8 (“HTA”), and the detaining officer was entitled to ask Mr. Harris to identify himself as part of an HTA investigation into the seatbelt infraction. However, this is not how the detaining officer explained his conduct at trial. Rather, the officer testified that he asked for Mr. Harris’s identification because he: (a) had concerns for officer safety; and (b) wanted to conduct a CPIC search to determine whether, among other things, Mr. Harris was governed by bail or another form of judicial order.
- [52] The application judge rejected the officer’s suggestion that the identification was seized out of concern for officer safety. Instead, he found that the officer’s purpose was simply to conduct a CPIC search as a matter of routine, entirely unrelated to the HTA investigation. Therefore, the seizure and search of the information was unreasonable and amounted to a s. 8 breach. The evidence was excluded, and an acquittal followed.
- [53] The Crown appealed to this court from the acquittal. Although the appeal was ultimately allowed, Doherty J.A., writing for the majority, agreed with the trial judge that passengers who are detained at the roadside have a reasonable expectation of privacy over personal identifying information that may be used to obtain unrelated incriminating information about them. Therefore, Mr. Harris’s s. 8 rights were engaged and the question became whether, in the circumstances at work, the seizure of Mr. Harris’ identification was reasonable. Doherty J.A. concluded that, although the seizing officer would have had reasonable grounds to seize Mr. Harris’s identifying information as part of an HTA investigation, this was not his purpose. Rather, the seizing officer obtained Mr. Harris’ identification to conduct an “at large inquiry into Harris’s background” and his “status in the criminal justice system”: at para. 41. Such a broad and unrelated inquiry was not justified in the context of a traffic stop. Therefore, the majority found the seizure and subsequent search of the databases to be unreasonable and contrary to s. 8 of the Charter.
- [54] Returning to this case, I agree that Harris provides insight into whether the appellant enjoyed a reasonable expectation of privacy in relation to his identifying information. As in Harris, the application judge found that the appellant was detained when he was asked for his identifying information and that the identifying information was used to further unlock information about him. Therefore, I agree that Harris is binding to the extent that it

demonstrates that the appellant had a reasonable expectation of privacy over the subject matter of the search. Accordingly, I agree that his s. 8 rights were triggered. That, however, does not mean that they were breached.

- [55] It is worth remembering that the purpose of s. 8 of the Charter is to afford protection against unreasonable state intrusions into an individual's private sphere. How far that sphere extends depends upon a factual and normative inquiry into whether the individual has a reasonable expectation of privacy in relation to the subject matter of the search: *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at paras. 16-18; *R. v. El-Azrak*, 2023 ONCA 440, 167 O.R. (3d) 241, at para. 28; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 10-11.
- [56] The crucial question on appeal is not so much whether the appellant, as a detained individual, had a privacy interest in his identifying information and the way it was used. He did. The crucial question is whether it was unreasonable within the meaning of s. 8 of the Charter to seize that information to conduct the database search as was done in this case.
- [57] In the context of a warrantless search for or seizure of something over which the individual establishes they have a reasonable expectation of privacy, unless an exception applies,[3] the onus will shift to the Crown to establish why the search or seizure was nonetheless "reasonable". This inquiry calls upon the court to consider whether the state intrusion was authorized by law (including the common law), the law was reasonable and the execution of the search was reasonable: *Spencer*, at para. 68; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18; *El-Azrak*, at para. 29.
- [58] Of course, the line between a reasonable and an unreasonable state intrusion is not situated by looking at the matter solely from the perspective of the privacy holder. Indeed, the very use of the word "unreasonable" in s. 8 of the Charter reflects the need to resolve the competing interests at work. Accordingly, courts determine the question of reasonableness by looking to all the circumstances at work, including the public's interest in ensuring that the police can safely and effectively fulfill their duties.
- [59] The police are charged with the heavy responsibility of protecting the community. Executing their responsibilities can be difficult, time-consuming and dangerous work. Undoubtedly, the police cross the line from time to time, and the Charter rightfully steps in. But courts must approach the matter with a healthy dose of common sense. This calls for a reasonable balancing. To be sure, the Charter must protect the individual against state abuse and overreach. But, it must do that while ensuring that it does not unreasonably paralyze law enforcement or deny the police the means to secure their own, a detainee's and the community's safety.

- [60] Respectfully, I disagree with the appellant's suggestion that this case aligns with Harris in that the request for the appellant's name and date of birth was untethered from the purpose of the overall investigation. In Harris, the police officer was off on a frolic, conducting an "at large inquiry into Harris's background" and his "status in the criminal justice system" that had nothing to do with an HTA investigation into his seatbelt infraction: Harris, at para. 44.
- [61] In this case, by contrast, there was a clear nexus between the purpose for obtaining the appellant's identifying information and the lawful s. 12(3) search of his person that was about to take place. As found by the application judge, the officers were both clear in their evidence that they requested the appellant's identification because they were pursuing an active investigation under s. 12(1) of the CCA and, as part of that investigation, they needed to search the appellant pursuant to s. 12(3).
- [62] As Cst. Coutu said, he wanted to identify who the appellant was to see if he was "wanted" before moving forward with the search: "[W]ith the Cannabis Control Act he's detained. And I wanted to see who he said he was before going forward with the cannabis search" (emphasis added).
- [63] As for Cst. Pereira, he testified that he was going to "continue the investigation for the Cannabis Control Act, search the vehicle, and the occupants". Before conducting those searches, Cst. Pereira testified that he would normally check the names of individuals "[f]or the purpose of seeing if there's potential warrants, if the person is licensed to drive, to ensure who I'm dealing with there" (emphasis added).
- [64] In my view, it was entirely open to the police to determine whom they were dealing with before conducting the lawful, physical search.
- [65] It was only reasonable that the police would want to know "who they were dealing with" prior to conducting the physical search - a search that was authorized by s. 12(3). Although a police officer may choose in these circumstances not to ascertain identity before conducting such a search, seizing that identity is, for all intents and purposes, part and parcel of a reasonable exercise of the explicit statutory search power.
- [66] Section 8 of the Charter does not demand that the police go about executing their duties with a blindfold on. In this case, they were about to search a man, in the dark, at 2:00 a.m. in the morning. It was entirely reasonable that before doing so they would want to know, among other things, if he was unlawfully at large, he had committed past crimes of violence, or he was known to have been previously in possession of weapons. As noted by Cst. Pereira, he would conduct a physical search differently if he knew, for example, that someone had a "history of firearms."
- [67] Therefore, this case is not like Harris. Here, the police were already authorized under s. 12(3) to conduct a physical search of the appellant, what one might reasonably suggest was a far more invasive search than ascertaining his identity and checking it within police databases. Indeed, if the appellant had been carrying his identification at the time of the

legally authorized search, the police could have obtained the exact same information by simply reaching into his pocket and pulling out the identification as part of the statutorily authorized s. 12(3) search.

- [68] As for the appellant's argument that the application judge erred in finding that the search was conducted for safety reasons, I would defer to his finding that the identifying information was obtained so that the police could understand whom they were dealing with prior to conducting this search, something they needed to know for safety reasons. That was reasonable.
- [69] As for the appellant's argument that it was improper for the application judge to rely upon Cst. Pereira's grounds for directing Cst. Coutu to obtain the appellant's information when Cst. Coutu was in a position to form his own grounds, I see no issue.
- [70] It is open to an officer to rely upon another officer to direct an investigative step and, when directing a search, it is the directing officer who must have reasonable grounds for the search: *R. v. Debot*, [1989] 2 S.C.R. 1140, at pp. 1166-7; *R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718, at para. 72; *R. v. Fyke*, 2025 ONCA 602, at para. 17. Although it may be relevant for purposes of the reasonableness assessment whether Cst. Coutu developed his own grounds, it is Cst. Pereira's grounds that govern the reason for the search. Both officers provided ample reason to ask the appellant for his name and date of birth.
- [71] In conclusion, this case is distinguishable from the result in *Harris*. The application judge's findings of fact are owed deference. In the circumstances, the search was reasonable.

C. Section 10(b): Additional Breach - NO suspension of right to Counsel [72] Recall that the application judge found that the appellant's s. 10(b) rights were breached only when Cst. Coutu asked the appellant, prior to being afforded the informational component of the right to counsel, why he had a firearm on his person. Although the appellant did not respond to the question, the application judge found that the fact the question was posed was a s. 10(b) breach.

- [73] The more significant s. 10(b) breach relates to the respondent's concession, made in the wake of this court's decision in *McGowan-Morris*, that the appellant should have received his right to counsel at the outset of the police encounter. Although the application judge originally rejected that argument, finding that the appellant's s. 10(b) rights were suspended at the outset of the interaction, *McGowan-Morris* concluded otherwise. As *Trotter J.A.* held, "once the police have reasonable grounds for a search, and form an intention to search the vehicle and its occupants, the occupants are entitled to their full rights under s. 10(b) of the Charter:" at para. 98. Suspension of the right to counsel will only be justified in exceptional circumstances, where there is an imminent risk to police or public safety. Safety concerns "of a general or non-specific nature applicable to virtually any search" will not qualify as exceptional circumstances: at para. 102.

[74] Accordingly, the parties agree that the application judge's conclusion that the appellant's s. 10(b) rights were suspended at the outset of the CCA investigation cannot stand. The respondent agrees that there was nothing in the circumstances of this case that would have justified a suspension of the right to counsel. Therefore, once the police had reasonable grounds for the CCA search and formed the intention to conduct that search, they were obligated to immediately provide the right to counsel. That was not done and, therefore, the appellant's s. 10(b) rights were infringed.

D. Section 24(2): No exclusion of firearm 1. Overview [75] The appellant argues that there are two errors reflected in the application judge's s. 24(2) analysis. For the reasons that follow, I would not accept either argument. Even so, I must conduct a fresh s. 24(2) analysis to factor in the additional s. 10(b) breach: *R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at para. 92.

2. Alleged reasoning errors raised by the appellant [76] First, the appellant maintains that the application judge erred by failing to consider that Cst. Pereira was found to be "dishonest" in his testimony. As the appellant points out, conduct of state actors that misleads the court can serve to seriously undermine the administration of justice: *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 26. The failure to consider Cst. Pereira's dishonesty is said to have constituted a legal error.

[77] I can address this issue briefly because I do not read the application judge's reasons in the same way as the appellant.

[78] The application judge did not find that Cst. Pereira was dishonest or that he endeavoured to mislead the court. Indeed, the defence advanced this submission at the application and it was rejected. Although the application judge agreed with the defence that Cst. Pereira was not "entirely forthright" in his evidence and "appeared several times to change his evidence in an attempt to justify his actions as Charter-compliant", his testimony was ultimately accepted by the court. The application judge observed that the body-worn camera evidence corroborated that Cst. Pereira was engaged in a legitimate investigation and search under the CCA. The application judge therefore concluded that Cst. Pereira's justification for the search of the appellant was "not a ruse" and rejected the s. 8 Charter claim on the basis of his testimony. This is unlike cases where the court has felt compelled to distance itself from dishonest police evidence. I understand the application judge's reasons to be saying that, despite concerns, he was satisfied that Cst. Pereira was pursuing a bona fide CCA investigation, as he testified. Therefore, I do not read the reasons as suggesting that the application judge found that Cst. Pereira misled the court.

[79] Second, the appellant argues that the application judge failed to take the cumulative effect of the breaches into account when considering whether to exclude the evidence.

[80] Again, I can deal with this quite briefly.

- [81] The application judge's s. 24(2) analysis deals with each breach he found through a proper Grant lens. His concluding remarks are telling: "[W]hile serious, the Charter breaches, when considered together with their impact on the accused, were not sufficiently serious to warrant exclusion" (emphasis added). I am not satisfied that the application judge failed to take the cumulative effect of the breaches into account. He said he considered them together and I accept what he said.
3. The fresh s. 24(2) analysis: the effect of the new s. 10(b) breach [82] Finally, I turn to the fresh s. 24(2) analysis that must be conducted, which takes into account the new s. 10(b) breach that is now in the mix.
- a. Seriousness of the Charter-infringing state conduct [83] The application judge found a brief s. 9 breach, from the time that the police cars were parked behind the idling vehicle to the time the driver's door was opened. Although brief, the application judge concluded this was a "serious breach". I see no reason to depart from that finding.
- [84] There was a s. 10(a) breach that involved the very brief period, "a minute or so", between when the detention commenced and when the appellant was informed of the reason for his detention. The application judge found this breach "less serious" in nature. I see no reason to depart from that finding. It was indeed not that serious. As soon as the police had the driver's-side door opened and started conversing with the friend, it became obvious what was happening and the officer immediately told the friend that it was unlawful to have cannabis open in the vehicle. The appellant overheard what the officer said and so was aware of the reason for his continued detention under the CCA.
- [85] The application judge then addressed the s. 10(b) breach, which related to the officer asking the appellant, after his arrest but before advising him of his right to counsel, what he was doing with a gun. The appellant did not answer. The application judge found that this was "serious" because it risked self-incrimination.
- [86] On appeal, the s. 10(b) breach has been expanded to include the period between when the appellant was detained for the CCA search and when he was given his s. 10(b) rights after having been arrested. The total period of time - from parking behind the idling vehicle, to the police interacting with its occupants, to the time when they decided to search them, to the discovery of the loaded firearm, to the arrest and placing of the appellant into the police vehicle, where he received his right to counsel - amounted to 12 minutes. The application judge specifically noted that if he was wrong about the suspension of the right to counsel issue, then the s. 10(b) breach would have been "serious". I see no reason to part company with any of those findings.
- [87] The s. 10(b) breach was a serious breach, but I would qualify its seriousness in the following way. At the time that the police breached the appellant's s. 10(b) rights by failing to provide the right to counsel, the law was unclear as to whether a cannabis search, as was conducted in this case, operated much like a search for alcohol-impaired driving. Indeed, so live was the issue at the time that this search was done, and at the time that the application judge

decided the issue, that there was a significant body of caselaw that had built up around the issue going in both directions. I do not intend to review that body of caselaw since it is well reviewed by Trotter J.A. in McGowan-Morris, at paras. 72-83. The point is that even judges were not in agreement at the time of this search as to whether a suspension of the right to counsel was s. 10(b)-compliant or offside.

- [88] In these circumstances, it can hardly be said that the police conduct was egregious, or the breach was particularly serious. Although that assessment may shake down differently today, now that the law has been clarified by this court, it was not clear at the time. This is relevant to the seriousness of the breach: Grant, at para. 140.
- b. Impact of the breach on Charter-protected interests [89] As for the impact of the breaches on the appellant's Charter-protected interests, the application judge emphasized that no inculpatory evidence was elicited because of those breaches. In the end, he found that the impact was not serious. The application judge specifically noted that, even if he was wrong in his s. 10(b) analysis and the appellant's right to counsel was not suspended as a result of the CCA-authorized search, the impact of this breach on his Charter-protected interest was "minimal."
- [90] I see no error in the application judge's assessment of the matter. The breaches, even though there were several, did not in any way contribute to the discovery of the firearm and the appellant did not incriminate himself: Beaver, at para. 125; R. v. Keshavarz, 2022 ONCA 312, 413 C.C.C. (3d) 263, at paras. 114-5.
- c. Society's interest in the adjudication of the case on the merits [91] The societal interest in adjudication of this serious case pushes away from exclusion. As the application judge noted, the evidence was entirely reliable and existed independent of the breaches. Society has a strong interest in seeing firearms offences adjudicated on their merits.
- d. Balancing [92] On balance, I would not exclude the firearm. The administration of justice would not be brought into disrepute by its admission.

V. Conclusion [93] I would dismiss the appeal.

Released: "January 29, 2026 JMF"

"Fairburn A.C.J.O."

"I agree. Roberts J.A."

"I agree. L. Madsen J.A."

- [1] Section 22 of the CCA says that "A person who contravenes any provision of this Act or the regulations, or any order made under this Act, is guilty of an offence."
- [2] Of course, broader considerations may apply in a s. 24(2) context.

- [3] For example, exceptions include exigent circumstances, plain view, and search incident to arrest.
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