SUPREME COURT OF CANADA

CITATION: R. *v.* McColman, 2023 SCC 8

APPEAL HEARD: November 1, 2022
JUDGMENT RENDERED: March 23, 2023
DOCKET: 39826

2023 SCC 8 (CanLII)

BETWEEN:

His Majesty The King
Appellant

and

Walker McColman
Respondent

- and -

Director of Criminal and Penal Prosecutions and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 75)	Wagner C.J. and O'Bonsawin J. (Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ. concurring)

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* Brown J. did not participate in the final disposition of the judgment.

2023 SCC 8 (CanLII)

His Majesty The King *Appellant*

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Walker McColman *Respondent*

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Director of Criminal and Penal Prosecutions and Canadian Civil Liberties Association *Interveners*

Indexed as: R. *v.* McColman

2023 SCC 8

File No.: 39826.

2022: November 1; 2023: March 23.

Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Brown J. did not participate in the final disposition of the judgment.

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Criminal law — Impaired driving — Random sobriety stop — Power of police to stop vehicles on private property — Police following accused's ATV from convenience store parking lot to private driveway — Police forming intention to stop accused to check sobriety while on highway but only stopping him on driveway — Accused showing obvious signs of impairment on driveway and arrested — Accused convicted of driving with excessive blood alcohol at trial — Accused successfully appealing conviction on basis that trial judge erred in finding that police authorized to conduct random sobriety stops on private property — Whether police stop authorized — Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 48(1), 216(1).

Constitutional law — Charter of Rights — Arbitrary detention — Remedy — Exclusion of evidence — Accused arrested by police after random sobriety stop on private property — Accused convicted of driving with excessive blood alcohol at trial — Whether accused arbitrarily detained by police — If so, whether admission of evidence would bring administration of justice into disrepute warranting its exclusion — Canadian Charter of Rights and Freedoms, ss. 9, 24(2).

While on general patrol, police spotted M's all-terrain vehicle parked outside a convenience store. The police followed M when he drove out of the parking lot and onto the highway. The police formed the intention on the highway to conduct a random sobriety stop of M pursuant to s. 48(1) of Ontario's *Highway Traffic Act* ("*HTA*"). By the time the police caught up to M, he had pulled off the highway onto a private driveway that served his parents' home. After stopping M, the police observed

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obvious signs of impairment and arrested him. M was charged with impaired driving and with operating a motor vehicle with an excess of 80 milligrams of alcohol in 100 millilitres of blood, contrary to the *Criminal Code*.

The trial judge concluded that s. 48(1) of the *HTA* provided lawful authority for the random sobriety stop. He found M guilty of both charges and stayed the impaired driving conviction. The summary conviction appeal judge allowed M's appeal, finding that neither s. 48(1) nor s. 216(1) of the *HTA* permitted police to conduct random sobriety stops on private property absent reasonable and probable grounds. He found that the police breached M's s. 9 *Charter* right, and he excluded the evidence under s. 24(2) of the *Charter* and entered an acquittal. A majority of the Court of Appeal dismissed the Crown's appeal of the acquittal.

Held: The appeal is allowed, the acquittal set aside, and the conviction and the stay entered at trial restored.

Police do not have statutory authority under s. 48(1) of the *HTA* to conduct random sobriety stops on private property. While s. 48(1) of the *HTA* furnishes police officers with the statutory authority to randomly stop a motor vehicle to ascertain the sobriety of the driver, the *HTA*'s definition of the term "driver" places sharp limits on police officers' authority to conduct random sobriety stops under s. 48(1). The *HTA* contains two definitions of the word "driver". Section 1(1) states that "driver" means a person who drives a vehicle on a highway, and s. 48(18) provides that within s. 48, "driver" includes a person who has care or control of a motor vehicle. The definition

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in s. 1(1) is exhaustive and specifies the scope of the word "driver", whereas the definition in s. 48(18) is non-exhaustive and expands the ordinary meaning of the defined term. The definition of "driver" in s. 1(1) is two-pronged; it targets both an activity and the *locus* of such activity. To be a driver, one must be driving a vehicle (activity) and must do so on a highway (*locus*). The definition in s. 48(18) seeks only to expand the activity prong of the definition and not the *locus* element. Under a harmonious reading of the two definitions of "driver", for the purpose of s. 48(1), "driver" refers to a person who is driving, or has care or control of, a motor vehicle on a highway. A person who has care or control of a motor vehicle but who is no longer on a highway would not be a "driver" under the *HTA*.

Section 48(1) authority cannot be used by police to carry out a random sobriety stop on private property on the basis that the driver was on the highway at the time the police officer formed the subjective intention to stop them. While s. 48(1) sets out the circumstances under which police can stop drivers without reasonable and probable grounds to ascertain sobriety, s. 216(1) of the *HTA* sets out the mechanics of the general police power to stop vehicles, including the corresponding duty on drivers to stop when signalled or requested to stop. Sections 216(1) and 48(1) fit together to supply a police power to conduct random sobriety stops on highways and a correspondent duty on drivers to stop when signalled or requested to stop. Section 216(1) supplies a communication requirement, such that a police officer seeking to invoke s. 48(1) authority must, at a minimum, signal or otherwise request that the driver stop their vehicle on a highway. The police must therefore communicate their intention

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to a driver to effect a random stop on a highway in order to fall under s. 48(1) of the *HTA*.

In the instant case, M was not a driver for the purposes of s. 48(1) of the *HTA* when he was stopped by the police. Even if it can be said that he had care or control of the ATV, he was not on a highway when the police effected the stop. Therefore, the police stop was unauthorized by s. 48(1). Since the police waited until M had pulled into the private driveway before they signalled their intention to stop him, they did not properly invoke their authority to conduct a random sobriety stop under s. 48(1) of the *HTA*. Since the stop was unlawful, the police breached M's rights under s. 9 of the *Charter*, as a detention not authorized by law is arbitrary.

However, on the whole and considering all of the circumstances, the evidence obtained from the unlawful police stop should not have been excluded under s. 24(2) of the *Charter*. The police acted without statutory authority in effecting the stop of M but given the legal uncertainty that existed at the time of the random sobriety stop, the breach was not so serious as to require the Court to disassociate itself from the police actions. The legal uncertainty pulls in favour of exclusion, but only slightly. The unlawful police stop constituted a marked, although not egregious, intrusion on M's *Charter*-protected interests and moderately favours exclusion of the evidence. However, the evidence collected by the police was reliable and crucial to the Crown's case and impaired driving is a serious offence. Admission of the evidence would better

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serve the truth-seeking function of the criminal trial process and would not damage the long-term repute of the justice system.

Cases Cited

Applied: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; **distinguished:** *R. v. Lux*, 2012 SKCA 129, 405 Sask. R. 214; *R. v. Anderson*, 2014 SKCA 32, 433 Sask. R. 255; **referred to:** *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *Scott v. R.*, 2021 QCCS 3866; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *R. v. Sivarasah*, 2017 ONSC 3597, 383 C.R.R. (2d) 1; *R. v. Holland*, 2017 ONCJ 948; *R. v. Warha*, 2015 ONCJ 214; *R. v. Vander Griendt*, 2015 ONSC 6644, 331 C.C.C. (3d) 135; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Lafrance*, 2022 SCC 32; *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Alrayyes*, 2013 ONSC 7256; *R. v. Calder* (2002), 29 M.V.R. (4th) 292, aff'd (2004), 47 M.V.R. (4th) 20; *R. v. McGregor*, 2015 ONCJ 692, 92 M.V.R. (6th) 333; *R. v. George*, 2004 ONCJ 316; *R.*

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v. Nield, 2015 ONSC 5730, 88 M.V.R. (6th) 274; *R. v. Hajivasilis*, 2013 ONCA 27, 114 O.R. (3d) 337; *R. v. Larocque*, 2014 ONCJ 601; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Jacoy*, [1988] 2 S.C.R. 548; *R. v. Tim*, 2022 SCC 12; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Bernshaw*, [1995] 1 S.C.R. 254; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Beaver*, 2022 SCC 54; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599.

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Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 9, 24(2).

Criminal Code, R.S.C. 1985, c. C-46, s. 253 [rep. & sub. 2018, c. 21, ss. 14, 15], (1)(a), (b).

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 1(1) "driver", "highway", 48(1), (18) "driver", 216(1).

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APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Tulloch and Hourigan JJ.A.), 2021 ONCA 382, 156 O.R. (3d) 253, 407 C.C.C. (3d) 341, 485 C.R.R. (2d) 293, 83 M.V.R. (7th) 46, [2021] O.J. No. 3109 (QL), 2021 CarswellOnt 8154 (WL), affirming a decision of Gareau J., 2019 ONSC 5359, 381 C.C.C. (3d) 375, 59 M.V.R. (7th) 129, [2019] O.J. No. 4680 (QL), 2019 CarswellOnt

14737 (WL), setting aside the conviction of the accused for driving with excessive blood alcohol. Appeal allowed.

Davin Michael Garg, for the appellant.

Donald Orazietti, *K.C.*, and *Anthony Orazietti*, for the respondent.

Julie Nadeau and *Lina Thériault*, for the intervener the Director of Criminal and Penal Prosecutions.

Bruce W. Johnston and *Lex Gill*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND O'BONSAWIN J. —

I. Overview

[1] This case is about whether police can conduct a random sobriety stop on private property under s. 48(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("*HTA*"). A constable of the Ontario Provincial Police ("OPP") formed the intention on a highway to randomly stop the respondent to ascertain his sobriety, and followed him onto a private driveway to do so. Once the constable approached the respondent, he observed obvious signs of intoxication and the respondent indicated that he might

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have had 10 beers. Two subsequent breathalyzer tests revealed that the respondent's blood alcohol concentration was above the legal limit.

[2] In our view, the police officers did not have statutory authority under s. 48(1) of the *HTA* to follow the respondent onto the private driveway to conduct the random sobriety stop. Accordingly, the police officers breached the respondent's rights under s. 9 of the *Canadian Charter of Rights and Freedoms*. Nonetheless, for the reasons that follow, we would not exclude the evidence under s. 24(2) of the *Charter*. Accordingly, we would allow the appeal.

II. Facts

[3] At around 12:30 a.m. on March 26, 2016, Constables Jeff Lobsinger and Laura Hicks of the OPP were on general patrol in the vicinity of the Thessalon First Nation. While on patrol, Cst. Lobsinger spotted an all-terrain vehicle ("ATV") parked outside a convenience store. The respondent, Walker McColman, drove the ATV out of the parking lot and onto the highway, at which point Cst. Lobsinger directed Cst. Hicks to follow the ATV in their cruiser.

[4] The trial judge found as a matter of fact that Cst. Lobsinger formed the intention on the highway to conduct a random sobriety stop of Mr. McColman pursuant to s. 48(1) of the *HTA*. At trial, Cst. Lobsinger conceded that Mr. McColman had not manifested signs of impaired driving that would have otherwise warranted a stop. That is, the police officers did not have reasonable and probable grounds to stop him.

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[5] By the time the officers caught up to Mr. McColman, he had pulled off the highway onto a private driveway that served his parents' home as well as a commercial establishment. There was no suggestion at trial that Mr. McColman pulled onto the driveway to avoid the police officers. Approximately one minute elapsed between when Cst. Lobsinger spotted the ATV and when the police officers stopped him.

[6] After stopping Mr. McColman, Cst. Lobsinger spoke with him and observed obvious signs of impairment, ranging from a strong odour of alcohol to his inability to stand up straight. According to Cst. Lobsinger's testimony, Mr. McColman stated that he "might've had 10" beers that evening: A.R., at p. 154. Cst. Lobsinger arrested Mr. McColman for impaired driving at 12:36 a.m. and brought him to the police station.

[7] At the police station, the breathalyzer test was delayed because Mr. McColman vomited due to his alcohol consumption. A police officer eventually conducted 2 breathalyzer tests, which recorded his blood alcohol concentration level as 120 and 110 milligrams of alcohol in 100 millilitres of blood. The police charged Mr. McColman with impaired driving contrary to s. 253(1)(a) and with operating a motor vehicle with an excess of 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. Section 253 was repealed and replaced in 2018.

III. Relevant Provisions

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[8] Section 1(1) of the *HTA* defines a “driver” as “a person who drives a vehicle on a highway”. It further defines a “highway” as including:

> . . . a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

[9] Section 48(1) of the *HTA* furnishes police officers with the statutory authority to randomly stop a motor vehicle to ascertain the sobriety of the driver. It provides:

> A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 320.27 or 320.28 of the *Criminal Code* (Canada).

[10] Section 48(18) provides that, within s. 48, a driver “includes a person who has care or control of a motor vehicle”.

[11] Lastly, s. 216(1) of the *HTA* sets out the broader police power to stop vehicles and the corresponding duty on drivers. It provides:

> A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a vehicle, other than a bicycle, to stop and the driver of a vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

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IV. Judicial History

A. *Ontario Court of Justice*

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[12] Mr. McColman brought a *Charter* application alleging, among other things, that the random sobriety stop was unlawful and breached his rights under s. 9 of the *Charter*. He maintained that the police did not have the authority to conduct the stop on private property.

[13] The trial judge dismissed the application, concluding that s. 48(1) of the *HTA* provided lawful authority for the random sobriety stop. He found that the officers intended to stop Mr. McColman's vehicle for the purpose of checking the driver's sobriety, and that they had formed the intention to stop him while he was operating a vehicle on a highway. The trial judge reasoned:

> The mere fact that [Cst. Lobsinger] did not effect this stop until [Mr. McColman] had turned into a private driveway and was thus on private property did not eliminate or invalidate the officer's authority under s. 48 of the *Highway Traffic Act*.
>
> (*voir dire* reasons, at para. 54, reproduced in A.R., at p. 8.)

[14] In light of his conclusion on s. 48(1) of the *HTA*, the trial judge declined to consider whether the officers had authority under the common law to stop Mr. McColman on his private driveway.

[15] The trial judge subsequently found Mr. McColman guilty of impaired driving contrary to s. 253(1)(a) and operating a motor vehicle with an excess of 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(b) of the *Criminal Code*. The trial judge conditionally stayed the impaired driving conviction pursuant to this Court's guidance in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, and sentenced Mr. McColman to the mandatory minimums of a $1,000 fine (plus a $300 victim surcharge) and a 12-month driving prohibition.

B. *Ontario Superior Court of Justice, 2019 ONSC 5359, 381 C.C.C. (3d) 375*

[16] Mr. McColman appealed to the Ontario Superior Court of Justice, arguing, among other things, that the trial judge erred in finding that police officers are authorized to conduct random sobriety stops on private property pursuant to s. 48(1) of the *HTA*.

[17] The summary conviction appeal judge allowed the appeal, finding that neither s. 48(1) nor s. 216(1) of the *HTA* permitted police officers to conduct sobriety or highway safety stops on private property absent reasonable and probable grounds. Once Mr. McColman's vehicle left the highway and entered the private driveway, he was no longer a "driver" within the meaning of the *HTA*. As a result, the police officers did not have the statutory authority to randomly detain Mr. McColman to check his sobriety. The appeal judge also found that the stop was not authorized under the common law.

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[18] Since the random sobriety stop was unlawful, the appeal judge found that the police breached s. 9 of the *Charter*. In his analysis under s. 24(2) of the *Charter*, the appeal judge found that the actions of the police were serious, as the officers "pursued [Mr. McColman] onto private property when they had neither the statutory [nor] common law authority to do so": para. 49. The impact of the breach was also significant, as Mr. McColman had a high expectation of privacy on his own property. While society clearly had an interest in the adjudication of the matter on its merits, the balancing exercise favoured exclusion under s. 24(2) of the *Charter*.

C. *Court of Appeal for Ontario, 2021 ONCA 382, 156 O.R. (3d) 253*

[19] The Crown appealed the acquittal entered by the appeal judge, arguing that police are authorized to effect random sobriety stops on private property if they form the lawful intention to stop a driver on a highway.

[20] A majority of the Court of Appeal for Ontario (per Tulloch J.A., as he then was, Feldman J.A. concurring) dismissed the appeal. The court held that the plain language of s. 48(1) and the related definitions of "driver" and "highway" did not authorize random sobriety stops off the highway. The majority also held that the police did not have the common law authority to randomly check Mr. McColman's sobriety on private property. As a result, the stop was unlawful and breached Mr. McColman's rights under s. 9 of the *Charter*.

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[21] The majority agreed with the appeal judge that the evidence obtained from the unlawful stop should be excluded under s. 24(2) of the *Charter*. In assessing the seriousness of the *Charter*-infringing state misconduct, while the majority was not prepared to find that the police acted in bad faith, it found that their conduct was "brazen" and that a "lack of clarity in the law . . . does not give officers free licence to assume that they have authority": paras. 84-85. As for the impact of the breach, the majority found that there was a significant impact on Mr. McColman's liberty and privacy interests because the police questioned him and obtained evidence against him in the course of an unlawful detention in an area in which he had a reasonable expectation of privacy. Finally, while excluding the evidence would undermine the truth-seeking function of the trial, the majority concluded that, in the interest of having a justice system that is beyond reproach, the court should not condone conduct that tests the limits of police authority. Accordingly, the majority excluded the evidence and upheld Mr. McColman's acquittal.

[22] Justice Hourigan, dissenting, held that both s. 48(1) of the *HTA* and the common law authorized the random sobriety stop. He maintained that the majority's interpretation of the *HTA* runs counter to its public protection purpose because the legislature could not have intended for drivers to evade investigation by pulling over onto private property. Justice Hourigan adopted the Crown's interpretation of the *HTA* and found that the officers had the authority to make the stop in the circumstances.

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[23] In the alternative, Hourigan J.A. held that the evidence should not be excluded under s. 24(2) of the *Charter* and urged trial courts to conduct a more meaningful analysis of the *Grant* factors: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. He held that the first line of inquiry militated against excluding the evidence because the state misconduct was minor or technical in nature, and the law was not well settled, as there was jurisprudence supporting the officers' interpretation of their authority. The second line of inquiry similarly weighed against excluding the evidence because Mr. McColman's privacy expectations were minimal. The stop took place on a driveway shared with a commercial business, thereby giving the police an implied licence to enter. Finally, the third line of inquiry militated against excluding the evidence because the evidence was reliable and constituted overwhelming proof of Mr. McColman's guilt beyond a reasonable doubt on both counts. Accordingly, Hourigan J.A. would not have excluded the evidence under s. 24(2) of the *Charter*.

V. Issues

[24] The Crown's appeal raises two issues.

[25] First, the Crown argues that the random sobriety stop was authorized under s. 48(1) of the *HTA*. It submits that police may conduct a random sobriety stop off a highway if the police officer forms the intention on a highway to check the driver's sobriety. In support of this submission, the Crown notes that unlike s. 216(1) of the *HTA*, s. 48(1) does not include language pertaining to the communication of the decision to stop the driver. The Crown also suggests that the definition of "driver" in

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s. 48(18) may oust the general definition of "driver" in s. 1(1) for the purpose of s. 48. This would authorize police to conduct a random sobriety stop whenever a person has care or control of a motor vehicle, regardless of whether the intention to stop was formed on a highway.

[26] Second, if the *HTA* did not authorize the police stop, resulting in a breach of s. 9 of the *Charter*, the Crown submits that admission of Mr. McColman's impairment and blood alcohol concentration evidence would not bring the administration of justice into disrepute. It maintains that the *Charter*-infringing state conduct was not serious, since the police acted in good faith in the context of legal uncertainty about the geographic limitations of the power to conduct random sobriety stops. The Crown argues that the impact of the breach was neither intrusive nor significant. The Crown submits that driving is a regulated activity and the sobriety stops are brief and limited to their purpose. Finally, the Crown maintains that there is significant public interest in adjudicating these charges on their merits given the reliability and centrality of the evidence.

[27] It must be noted that this Court did not grant leave on the issue of whether the police had the common law authority to conduct the stop.

VI. Analysis

A. *Was the Random Sobriety Stop Authorized by Section 48(1) of the HTA?*

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[28] This case presents the first opportunity for this Court to address whether police officers can conduct random sobriety stops on private property pursuant to s. 48(1) of the *HTA*.

[29] On several occasions, this Court has stated that various forms of random vehicular stops violate s. 9 of the *Charter* but are justified under s. 1. In *R. v. Hufsky*, [1988] 1 S.C.R. 621, this Court held that statutorily authorized spot checks — random police checks conducted at stationary, predetermined locations — violate s. 9 but are justified under s. 1. Shortly after, this Court held in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, that statutorily authorized roving stops — random police stops to check licences, proof of insurance, the mechanical fitness of vehicles and the sobriety of drivers — violate s. 9 but are justified under s. 1.

[30] Police officers conducting random vehicular stops must exercise their powers vigilantly and ensure that they do not overstep the limits of their powers. Since these random stops constitute "arbitrary detention", the "detention will only be justified under s. 1 of the *Charter* if the police act within the limited highway-related purposes for which the powers were conferred": *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 22 (citations omitted).

[31] The question of whether police officers can effect random sobriety stops on private property has been addressed by various appellate courts across the country under their versions of the *HTA*: see, e.g., *R. v. Lux*, 2012 SKCA 129, 405 Sask. R. 214; *R. v. Anderson*, 2014 SKCA 32, 433 Sask. R. 255; *Scott v. R.*, 2021 QCCS 3866.

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However, Ontario's *HTA* differs in important ways from the other provincial statutes that regulate driving and drivers. In analyzing a provision of the *HTA*, a court must keep its focus on the text, context, and purpose of the provision at issue.

[32] Both the appellant Crown and the Court of Appeal for Ontario drew heavily upon jurisprudence of the Court of Appeal for Saskatchewan. In *Lux*, police officers observed a motor vehicle driving in a private parking area and conducted a random sobriety stop of the vehicle while it was still within the private parking area. The Court of Appeal held that s. 209.1 of *The Traffic Safety Act*, S.S. 2004, c. T-18.1, did not authorize peace officers to conduct random sobriety stops on private property: para. 31. Two years later, in *Anderson*, a case factually similar to the case at bar, the Court of Appeal held that a police officer who had formed his intention on a highway to randomly stop the vehicle could lawfully complete the stop on private property pursuant to s. 209.1 of *The Traffic Safety Act*: paras. 24-25.

[33] Despite the seeming relevance of *Lux* and *Anderson*, Ontario's *HTA* differs in relevant respects from *The Traffic Safety Act* from Saskatchewan. Notably, the latter does not define the term "driver"; in contrast, as we shall discuss, the *HTA*'s definition of driver places sharp limits on police officers' authority to conduct random sobriety stops under s. 48(1) of the *HTA*. Given that *Lux* and *Anderson* focus closely on the specific wording of s. 209.1 of *The Traffic Safety Act*, neither judgment sheds much light on how this Court should approach s. 48(1) of Ontario's *HTA*.

(1) The Meaning of Section 48(1) of the *HTA*

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[34] We turn now to s. 48(1) of the *HTA*, which states:

> A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 320.27 or 320.28 of the *Criminal Code* (Canada).

[35] Under the modern approach to statutory interpretation, "the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 117, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49, at para. 37. In determining the meaning of the text, a court cannot read a statutory provision in isolation, but must read the provision in light of the broader statutory scheme: *Rizzo*, at para. 21.

[36] In its written submissions and during oral argument, the Crown placed great weight on the broader purposes underlying the *HTA*. But a purposive analysis does not grant the interpreter licence to disregard the clear meaning of the statute: see *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 26.

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[37] The key question in this case is whether Mr. McColman was a “driver” for the purpose of s. 48(1) of the *HTA* at the time of the random sobriety stop. The *HTA* contains two definitions of the word “driver” that may apply to Mr. McColman. Section 1(1) of the *HTA* states that “‘driver’ means a person who drives a vehicle on a highway”. By contrast, s. 48(18) provides that, within s. 48, “‘driver’ includes a person who has care or control of a motor vehicle”. In its factum, the Crown suggests that it is possible to interpret s. 48(1) such that it authorizes police to conduct random sobriety stops whenever they see someone in the care or control of a motor vehicle, irrespective of whether they intended to check the person’s sobriety on a highway. In other words, the Crown submits that s. 48(18) sets out essential elements of what constitutes a “driver”. This argument must fail for two reasons.

[38] First, not all statutory definitions are exhaustive: R. Sullivan, *The Construction of Statutes* (7th ed. 2022). Exhaustive definitions “declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage”, whereas non-exhaustive definitions “do not purport to displace the meaning that the defined term would have in ordinary usage; they simply add to, subtract from or exemplify that meaning”: pp. 69-70. Exhaustive definitions are generally introduced using the verb “means”, while non-exhaustive definitions are introduced with the verb “includes”: pp. 69-70.

[39] Here, the definition in s. 1(1) is exhaustive and specifies the scope of the word “driver”, whereas the definition in s. 48(18) is non-exhaustive and expands the

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ordinary meaning of the defined term. Indeed, the definition of "driver" in s. 1(1) is two-pronged; it targets both an activity and the *locus* of such activity. To be a driver, one must be driving a vehicle (activity) and must do so on a highway (*locus*). The definition in s. 48(18) seeks only to expand the activity prong of the definition and not the *locus* element.

[40] Second, this Court has stated that, while the relative effects of ordinary meaning, context, and purpose on the interpretive process may vary, courts must seek to read the provisions of an act as a harmonious whole: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. As stated above, a non-exhaustive definition does not necessarily oust other definitions. Depending on the context, exhaustive and non-exhaustive definitions can be read together. Under a harmonious reading of the two definitions of "driver", for the purpose of s. 48(1), "driver" refers to a person who is driving, or has care or control of, a motor vehicle on a highway. A person who has care or control of a motor vehicle but who is no longer on a highway would not be a "driver" under the *HTA*.

[41] In the present case, Mr. McColman was not a "driver" for the purpose of s. 48(1) when he was stopped by the police. Even if it can be said that he had care or control of the ATV, he was not on a highway when the police effected the stop. Therefore, the police stop was unauthorized by s. 48(1) of the *HTA*.

[42] The Crown suggests that a core question in this appeal is whether police must communicate their intention to effect a random sobriety stop on a highway in

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order to fall under s. 48(1) of the *HTA*. The Crown argues that s. 48(1) authority is triggered when police form the intention to effect a random sobriety stop of a driver who is on a highway, and not when police communicate that intention to the driver. The Crown maintains that this interpretation is supported by s. 216(1) of the *HTA*.

[43] On the Crown's view, s. 216(1) exhibits a legislative choice to put communication of intent to stop a driver at issue. Since the legislature chose not to include the language of "signalled or requested to stop" in s. 48(1), that section does not require the police to communicate their decision to stop a driver. So long as the driver was on the highway at the time the police officer formed the subjective intention to stop them, the officer can avail themselves of s. 48(1) authority to carry out a random sobriety stop on private property. In our view, this argument must also fail.

[44] Sections 48(1) and 216(1) do not speak to differing legislative choices because the two provisions need not be read apart. In fact, the provisions are often cited together to furnish the statutory authority to conduct random sobriety stops: see, e.g., *R. v. Sivarasah*, 2017 ONSC 3597, 383 C.R.R. (2d) 1, at para. 108; *R. v. Holland*, 2017 ONCJ 948, at para. 11 (CanLII); *R. v. Warha*, 2015 ONCJ 214, at para. 5 (CanLII); *R. v. Vander Griendt*, 2015 ONSC 6644, 331 C.C.C. (3d) 135, at paras. 4 and 21. Section 216(1) sets out the mechanics of the general police power to stop vehicles, including the corresponding duty on drivers to stop "when signalled or requested to stop". By contrast, s. 48(1) sets out the circumstances under which police can stop drivers without reasonable and probable grounds to ascertain sobriety. The two

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provisions fit together to supply a police power to conduct random sobriety stops on highways and a corresponding duty on drivers to stop when signalled or requested to stop.

[45] On this reading, the absence of the phrase "when signalled or requested to stop" in s. 48(1) does not speak to any legislative choice to privilege the point in time when police form the intention to conduct a random sobriety stop. Section 216(1) supplies a "communication" requirement, such that a police officer seeking to invoke s. 48(1) authority must, at a minimum, signal or otherwise request that the driver stop their vehicle on a highway.

[46] Moreover, the inclusion of the word "require" in s. 48(1) implies the communication of an expectation or order to someone. The *Oxford English Dictionary* (online) defines "require" as "[t]o order, instruct, or oblige (a person) *to* do something" (emphasis in original). One cannot require someone to do something by merely *subjectively intending* it, as the Crown is arguing.

[47] Here, the police waited until Mr. McColman had pulled onto his parents' driveway before they signalled their intention to stop him. Accordingly, they did not properly invoke their authority to conduct a random sobriety stop under s. 48(1).

[48] Finally, the Crown submits that maintaining the majority of the Court of Appeal's reading of s. 48(1) of the *HTA* would create a sanctuary problem. The sanctuary problem refers to the idea that in the future, impaired drivers will simply pull

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onto private property whenever they spot a police cruiser. The dissenting judge below suggested that "[i]n many cases, this sanctuary will be fleeting, as the impaired driver will stay on the private property only for as long as the police cruiser is in the area. Once it is out of sight, the driver will be free to re-enter the public highway and continue to endanger public safety": para. 96, per Hourigan J.A. In our view, the sanctuary problem is overstated.

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[49] First, random sobriety stops are not the only tool available to police to combat impaired driving. While police officers may not conduct random sobriety stops of drivers on private property pursuant to s. 48(1) of the *HTA*, they may stop drivers if they have reasonable and probable grounds: *Ladouceur*, at p. 1287. This judgment does not constitute a blanket ban on police stops of drivers on private property. Various factual scenarios might give rise to reasonable and probable grounds. For example, if a driver is driving erratically, a police officer may have reasonable and probable grounds to pursue the driver onto private property. In addition, as the majority at the Court of Appeal noted, a "true case of flight might well contribute to reasonable grounds to detain the accused, depending on the circumstances": para. 42. Thus, police officers are not barred from stopping drivers on private property in all circumstances.

[50] Second, absent a successful constitutional challenge, this Court must respect the will of the legislature as expressed in valid legislation. It is not this Court's role to rewrite the law or to ask what law it would have enacted itself. When read contextually, s. 48(1) of the *HTA* does not authorize police officers to conduct random

sobriety stops on private property. This Court is duty-bound to respect the legislature's will. If the legislature believes that police officers ought to wield wider powers under s. 48(1), it may amend the provision.

(2) <u>The Random Sobriety Stop Breached Mr. McColman's Section 9 *Charter* Rights</u>

[51] While s. 48(1) of the *HTA* furnished the police officers with the legal authority to conduct random sobriety stops of drivers of motor vehicles, they did not have the authority to stop Mr. McColman because he was not a "driver" within the meaning of the *HTA* at the time of the stop. Since the stop was unlawful, the police officers breached Mr. McColman's rights under s. 9 of the *Charter*, which proclaims that "[e]veryone has the right not to be arbitrarily detained or imprisoned". This Court has affirmed that "a detention not authorized by law is arbitrary and violates s. 9": *Grant*, at para. 54. Given the above finding that the police officers did not have the legal authority to randomly stop Mr. McColman, it follows that they arbitrarily detained him.

[52] The next question is whether the evidence the police officers obtained on the driveway and later at the police station should be excluded under s. 24(2) of the *Charter*.

B. *Should the Evidence Obtained Have Been Excluded Under Section 24(2) of the Charter?*

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[53] Section 24(2) requires that evidence obtained in a manner that infringes the *Charter* rights of an accused be excluded from the trial 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". The s. 24(2) analysis is an objective one, evaluated from the perspective of a reasonable person, and the burden to persuade a court that admission of the evidence would bring the administration of justice into disrepute rests on the party seeking exclusion: *Grant*, at para. 68.

[54] Section 24(2) is focused on maintaining the long-term integrity of, and public confidence in, the justice system. Accordingly, the exclusion of evidence under s. 24(2) is directed not at punishing police misconduct or compensating the accused, but rather at systemic and institutional concerns: *Grant*, at para. 70. In *Grant*, this Court explained that the s. 24(2) analysis engages three lines of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. Courts are tasked with balancing the assessments under each of these lines of inquiry, but as recognized in *Grant*, "[t]he balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision": para. 140.

[55] Trial courts must evaluate each of the three lines of inquiry thoroughly. A cursory review of the *Grant* test prevents appropriate appellate review and transforms s. 24(2) from a contextual inquiry into a bright-line rule.

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[56] In the current case, the trial judge did not conduct a *Grant* analysis, since he found that s. 48(1) of the *HTA* authorized the random sobriety stop and there was no s. 9 violation. Accordingly, this Court must conduct the *Grant* analysis afresh.

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

[57] The first line of inquiry focuses on the extent to which the state conduct at issue deviates from the rule of law. As this Court stated in *Grant*, at para. 72, this line of inquiry "requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct". Or as this Court phrased it in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22: "Did [the police conduct] involve misconduct from which the court should be concerned to dissociate itself?"

[58] In evaluating the gravity of the state conduct at issue, a court must "situate that conduct on a scale of culpability": *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 43. As Justice Doherty observed in *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4, "the graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct": para. 23. To properly situate state conduct on the "scale of culpability", courts must also ask whether the presence of surrounding circumstances attenuates or exacerbates the seriousness of the state conduct: *Grant*, at para. 75. Were

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the police compelled to act quickly in order to prevent the disappearance of evidence? Did the police act in good faith? Could the police have obtained the evidence without a *Charter* violation? Only by adopting a holistic analysis can a court properly situate state conduct on the scale of culpability.

[59] It should be noted at the outset that the first and second lines of inquiry are distinct. The first line of inquiry evaluates the state conduct itself, while the second line of inquiry goes further and assesses the impact of the state conduct on the accused's *Charter*-protected interests. This Court has noted that "[w]hile the first two lines of inquiry typically work in tandem in the sense that both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion": *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 141. As noted in *R. v. Lafrance*, 2022 SCC 32, at para. 90, "it is the *cumulative* weight of the first two lines of inquiry that trial judges must consider and balance against the third line of inquiry when assessing whether evidence should be excluded" (emphasis in original). In certain situations, only one of the first two lines of inquiry will pull towards exclusion of the evidence. State conduct that is not particularly serious may nonetheless heavily impact the accused's *Charter*-protected interests. Conversely, state conduct that is egregious may minimally impact the accused's *Charter*-protected interests. Courts must be careful not to collapse the first two lines of inquiry into one, unstructured analysis.

[60] In the case at bar, the first line of inquiry pulls slightly in favour of exclusion. Although there was relevant case law to support the police officers' sobriety

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stop, given the legal uncertainty that existed at the time, the police officers should have acted with more prudence. When faced with legal uncertainty, "the police would do well to err on the side of caution": *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 80.

[61] At the time of the random sobriety stop, the applicable case law was in a state of uncertainty: see *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 71. The dissenting judge below pointed to several Ontario cases in support of his proposition that "there was jurisprudence that supported the officers' authority to make the stop on the shared driveway": para. 178, per Hourigan J.A. See especially *R. v. Alrayyes*, 2013 ONSC 7256; *R. v. Calder* (2002), 29 M.V.R. (4th) 292 (Ont. S.C.), aff'd (2004), 47 M.V.R. (4th) 20 (Ont. C.A.); *R. v. McGregor*, 2015 ONCJ 692, 92 M.V.R. (6th) 333; and *Warha*. For example, in *Alrayyes*, the Ontario Superior Court of Justice held that under s. 48(1) of the *HTA*, a police officer's authority to stop a vehicle driving on a highway did not evaporate merely because the vehicle had entered onto private property: para. 31 (QL, WL).

[62] However, not all of the applicable case law supported Cst. Lobsinger's decision to conduct a random sobriety stop. In *R. v. George*, 2004 ONCJ 316, the trial judge held that the police officer did not have the authority under s. 48(1) of the *HTA* to conduct a random sobriety stop of a person who had pulled off the highway onto his private driveway: paras. 15-16 (CanLII). Similarly, in *R. v. Nield*, 2015 ONSC 5730, 88 M.V.R. (6th) 274, the Ontario Superior Court of Justice held that s. 48(1) of the *HTA*

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did not apply to a person who was driving a vehicle, but who was not situated on a highway: paras. 26 and 29. See also *R. v. Hajivasilis*, 2013 ONCA 27, 114 O.R. (3d) 337, at para. 13; *R. v. Larocque*, 2014 ONCJ 601, at para. 11 (CanLII); and *Vander Griendt*, at paras. 19-21.

[63] Ultimately, however, the police officers in this case acted without legal justification. As outlined above, the *HTA* did not furnish them with authority to conduct a random sobriety stop on private property. Nor did they have reasonable and probable grounds. Given the legal uncertainty at play, the police officers had a duty to act cautiously and to question the limits of their authority. As Dickson C.J. noted in dissent in *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 10, "[i]t has always been a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the state, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law". Although Dickson C.J. was speaking in the context of the police common law power, his remarks apply equally to the police exercise of statutory power. Police officers can only exercise the powers granted to them by the law. In situations marked by legal uncertainty, police officers should not rely on that uncertainty but instead should err on the side of caution.

[64] Under the first line of inquiry, courts must also ask whether there are other extenuating circumstances that affect their view of the gravity of the state conduct. In the current case, the police could have conducted the random sobriety stop on the

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highway by activating the cruiser's lights or sirens as soon as Mr. McColman had departed from the convenience store on his ATV. Thus, the "evidence could have been obtained without a *Charter* violation": *R. v. Jacoy*, [1988] 2 S.C.R. 548, at p. 559. In short, the police officers could have conducted the random sobriety stop before Mr. McColman pulled onto private property.

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[65] In our view, on the whole, the first line of inquiry pulls slightly in favour of exclusion. The police acted without statutory authority in effecting the stop, and a body of case law confirmed their lack of authority to stop Mr. McColman. On the other hand, another body of case law supported their conduct. Given the legal uncertainty that existed at the time of the random sobriety stop, the breach was accordingly not so serious as to require this Court to disassociate itself from the police actions. In light of that same legal uncertainty, however, the police officers should have acted with more prudence. In our view, on balance, these two effects of the legal uncertainty pull in favour of exclusion, but only slightly.

(2) The Impact of the Breach on the *Charter*-Protected Interests of Mr. McColman

[66] The second line of inquiry is aimed at the concern that admitting evidence obtained in violation of the *Charter* may send a message to the public that *Charter* rights are of little actual avail to the citizen. Courts must evaluate the extent to which the breach "actually undermined the interests protected by the right infringed": *Grant*, at para. 76. Like the first line of inquiry, the second line envisions a sliding scale of

conduct, with "fleeting and technical" breaches at one end of the scale and "profoundly intrusive" breaches at the other: para. 76.

[67] For example, in *R. v. Tim*, 2022 SCC 12, the impact on the accused's s. 9 interests was found to fall somewhere in the middle of the spectrum. The impact of the accused's arbitrary arrest was mitigated to some degree because although he was arrested on the basis of a mistake of law about the legal status of a drug, he was lawfully detained for a traffic collision investigation: para. 92. By contrast, in *Harrison*, this Court found that the impact was more significant because the accused was stopped and his vehicle was subjected to a search without lawful justification: para. 31; see also *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 56.

[68] In the current case, the second line of inquiry moderately favours exclusion of the evidence. The stop impacted Mr. McColman's liberty interests because the police questioned him in the course of an unlawful detention. Although the police had the power to randomly stop Mr. McColman to check his sobriety, they did not act within the legal limits of that power. In addition, the fact that the arbitrary detention occurred on private property is relevant because "[r]etreat to a private residence (even if not one's own residence) will sometimes be the only practical way for individuals to exercise their right to be left alone": *Le*, at para. 155. As a result of the unlawful stop, Mr. McColman was arrested and brought to the police station, where he was detained for several hours. The police obtained significant evidence against him, including the officer's observations of signs of impairment, Mr. McColman's statements about his

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alcohol consumption, and the results of two breathalyzer tests. Therefore, the unlawful police stop constituted a marked, although not egregious, intrusion on Mr. McColman's *Charter*-protected interests.

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

[69] The third line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry requires courts to consider both the negative impact of admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence: *Grant*, at para. 79. In each case, "it is the long-term repute of the administration of justice that must be assessed": *Harrison*, at para. 36.

[70] Under this third line of inquiry, courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence, although this Court has recognized that the final factor can cut both ways: *Grant*, at paras. 81 and 83-84. While the public has a heightened interest in a determination on the merits where the offence is serious, it also has a vital interest in maintaining a justice system that is above reproach: para. 84.

[71] While there is an obvious impact upon the administration of justice in admitting evidence obtained in contravention of s. 9 of the *Charter*, admitting the evidence in the case at bar would not damage the long-term repute of the administration of justice. First, the evidence collected by the police was reliable and crucial to the

Crown's case. Cst. Lobsinger observed several signs of impairment at the scene, including a strong odour of alcohol and Mr. McColman's inability to stand up straight. Mr. McColman admitted to the officers that he "might've had 10" beers that evening. Two breathalyzer tests, conducted some time after he vomited due to his alcohol consumption, revealed that Mr. McColman's blood alcohol concentration level was significantly above the legal limit.

[72] Second, impaired driving is a serious offence. This Court has recognized that society has a vital interest in combatting drinking and driving. In *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 16, Cory J. noted:

> Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.
>
> (See also *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 8.)

[73] In light of the reliability and importance of the evidence as well as the seriousness of the alleged offence, the third line of inquiry pulls strongly in favour of inclusion. Admission of the evidence in this case would better serve the truth-seeking function of the criminal trial process and would not damage the long-term repute of the justice system.

(4) Balancing the *Grant* Factors

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[74] When balancing the *Grant* factors, the cumulative weight of the first two lines of inquiry must be balanced against the third line of inquiry: *Lafrance*, at para. 90; *R. v. Beaver*, 2022 SCC 54, at para. 134. Here, the first line of inquiry slightly favours exclusion of the evidence and the second line of inquiry does so moderately. However, the third line of inquiry pulls strongly in favour of inclusion and, in our view, outweighs the cumulative weight of the first two lines of inquiry because of the crucial and reliable nature of the evidence as well as the important public policy concerns about the scourge of impaired driving. On the whole, considering all of the circumstances, the evidence should not be excluded under s. 24(2).

VII. Conclusion

[75] We would allow the appeal on the basis that the evidence obtained from the unlawful police stop should not have been excluded under s. 24(2) of the *Charter*. Accordingly, we would set aside the acquittal entered below and restore the conviction and *Kienapple* stay entered at trial. The Crown is granted leave to appeal the sentence. We would eliminate the victim surcharge (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599) and otherwise restore the sentence imposed.

Appeal allowed.

Solicitor for the appellant: Ministry of the Attorney General — Crown Law Office, Criminal, Toronto.

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Solicitors for the respondent: Orazietti & Orazietti, Sault Ste. Marie.

Solicitor for the intervener the Director of Criminal and Penal Prosecutions: Director of Criminal and Penal Prosecutions, Québec.

Solicitors for the intervener the Canadian Civil Liberties Association: Trudel, Johnston & Lespérance, Montréal.

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