COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Attard, 2024 ONCA 616
DATE: 20240816
DOCKET: COA-22-CR-0049

Gillese, van Rensburg and Roberts JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Wendel Attard

Respondent

Molly Flanagan, for the appellant

Glen Henderson, for the respondent

Heard: May 29, 2024

On appeal from the acquittal entered on July 29, 2022, by Justice Paul T. O'Marra of the Ontario Court of Justice.

Gillese J.A.:

I. INTRODUCTION

[1] This appeal turns on the admissibility of data found in a motor vehicle's Event Data Recorder ("EDR"). An EDR is an airbag deployment device that

records five seconds of vehicle data before a crash.[1] Its main purpose is airbag activation on a "deployment event" – that is, on a collision. It captures limited data with respect to the speed, throttle, and braking of the vehicle in the five seconds before an event or near-deployment event. It does not capture any other data. Data cannot be inputted into the EDR or changed.

[2] Two Canadian appellate decisions have held that there is no reasonable expectation of privacy in EDR data following lawful seizure of a car as evidence of a criminal offence: *R. v. Fedan*, 2016 BCCA 26, 333 C.C.C. (3d) 287, leave to appeal refused, 2016 CanLII 44776 (SCC), and *R. v. Major*, 2022 SKCA 80, leave to appeal refused, 2023 CanLII 14940 (SCC). Trial courts in Ontario are divided on the issue of whether EDR data attracts a reasonable expectation of privacy. While it appears to be generally accepted that the owner/operator of a vehicle may have a subjective expectation of privacy in its EDR data, the decisions diverge on whether such an expectation is objectively reasonable.

[3] In the present case, the trial judge relied on *R. v. Hamilton*, 2014 ONSC 447, 65 M.V.R. (6th) 239, and *R. v. Glenfield*, 2015 ONSC 1304, 321 C.C.C. (3d) 483, to find that the expectation of privacy in EDR data is objectively reasonable. Other

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[1] The same kind of pre-collision data has been referred to in caselaw as the ACM (Airbag Control Module), SDM (Sensing Diagnostic Module), and CDR (Crash Data Retrieval).

Ontario cases to the same effect include *R. v. Patterson*, 2020 ONCJ 536, and *R. v. Yogeswaran*, 2021 ONSC 1242.

[4] In a conflicting line of Ontario cases, the courts have come to the same conclusion as in *Fedan* and *Major*: there is no reasonable expectation of privacy in EDR data, and any limited territorial privacy interest in the EDR is extinguished after a s. 489(2) seizure of a vehicle. These cases include *R. v. Anastasis*, [2016] O.J. No. 7344, *R. v. Anstie*, 2019 ONSC 976, and *R. v. J.S.*, 2023 ONCJ 216. For the reasons that follow, I share this view.

II. OVERVIEW

[5] Following a serious motor vehicle accident, Wendel Attard (the "respondent") was charged with dangerous operation of a motor vehicle causing bodily harm, contrary to s. 249(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.[2] At the scene of the accident, the police seized the respondent's car and the car that it hit. Both were inoperable.

[6] Later, the police extracted the EDRs from both cars and downloaded the data they contained. The police did not obtain the respondent's consent or judicial authorization to seize his car or to extract the EDR and its data.

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[2] The *Code* provisions governing this offence were repealed in 2018 and a new regime was implemented. The new regime is found in Part VIII.1 of the *Code*, beginning at s. 320.13(1).

[7] Before trial, the respondent challenged the admissibility of the EDR evidence. He argued that his car had not been lawfully seized pursuant to s. 489(2) of the *Criminal Code* and, even if it had been, the warrantless seizure of the EDR and search of its data violated his s. 8 *Charter* rights. The trial judge accepted both arguments and excluded the EDR evidence pursuant to s. 24(2) of the *Charter.* After a short trial, he acquitted the respondent of dangerous driving.

[8] The Crown appeals.

[9] I would allow the appeal. In my view, the trial judge erred in law both in finding the police did not have reasonable grounds to seize the cars pursuant to s. 489(2)(c) and in finding there was a reasonable expectation of privacy in the EDR data. In my view, the trial judge also erred in his s. 24(2) analysis.

[10] In the result, I would order a new trial at which the EDR evidence shall be admitted.

III. SECTION 489(2) OF THE *CRIMINAL CODE*

[11] Section 489(2) gives a police officer the power to seize "any thing", without a warrant, in certain circumstances. Because s. 489(2) plays a key role in the resolution of this appeal, I set it out now for ease of reference.

> **489(2)** Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to

> a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
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> (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
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> (b) has been used in the commission of an offence against this or any other Act of Parliament; or
>
> (c) will afford evidence in respect of an offence against this or any other Act of Parliament. [Emphasis added.]

IV. BACKGROUND

[12] Much of the following is drawn from the agreed statement of facts entered at the *Charter* hearing and a second such statement filed at trial.

[13] The charge against the respondent arose from a serious motor vehicle collision that occurred at the intersection of Highway 50 and Queen Street in Brampton, Ontario, on March 23, 2018. Highway 50 is a busy six-lane roadway that runs north and south. There are three lanes for northbound traffic and three lanes for southbound traffic. The posted speed limit was 80 kilometers per hour at the time of the accident. Vehicles can turn on and off Highway 50 at various intersections.

[14] In Brampton, Highway 50 intersects with Queen Street East, which is also a six-lane highway. There are dedicated left-hand turn lanes for both northbound and southbound traffic at this intersection.

[15] At approximately 4:18 p.m. on the day of the accident, the respondent was driving a Lexus southbound on Highway 50, approaching the Queen Street East intersection in Brampton. At that time, Ms. Xao was travelling northbound on Highway 50 in a Toyota Corolla. Having reached the intersection, she was waiting in the dedicated left turn lane to turn west onto Queen Street East. As she was crossing the southbound lane to complete the left-hand turn, the respondent's car sped through the intersection at high speed and struck her car. Three of the wheels of Ms. Xao's vehicle came off the ground as it spun 540 degrees. The respondent's car slid across the road, over a median, across a sidewalk, and flipped on its roof as it rolled into a ditch.

[16] Both drivers were injured in the accident and taken to hospital. Ms. Xao suffered serious injuries, including a fractured left femur, a fractured left clavicle, a fractured left wrist, a pulmonary laceration, and a head contusion. She required surgery to remove her spleen and one side of her colon.

[17] Police officers attended and processed the scene of the accident. Officer Jeff Ball was with the Major Collision Bureau. He was the officer in charge of the investigation and had 14 years' experience as a police officer. When he arrived on site, he suspected the crash was due to excessive speed.

[18] The police officers saw what the trial judge later described as a scene of "carnage". Ms. Xao's vehicle had massive front-end damage – its windshield was

smashed, its hood was ripped off on one side, and the rear passenger side was dented. The front end of the respondent's car was "smashed in", its airbags were deployed, and the roof dented.

[19] On arrival at the scene of the accident, Officer Ball observed the extensive damage to both vehicles. Over the course of several hours on the scene, he spoke with witnesses, including an off-duty police officer who had recorded the collision on his dashcam. He watched the dashcam footage while at the scene; the footage showed that the respondent's car was driving faster than the other southbound cars. Later that same evening, both the respondent's car and the one belonging to Ms. Xao were towed to a police storage facility.

[20] At trial, Officer Ball testified that when he first arrived on the accident scene, he had a suspicion that excessive speed was involved in the accident but, by the time the cars were seized, he had concluded that he might be investigating the offence of dangerous driving. Accordingly, he testified, he seized the cars under s. 489(2) of the *Criminal Code* because he "believed that those cars contained evidence of the offence". Officer Ball also told the court that he had seized cars before from accident scenes pursuant to s. 489(2) and, in so doing, he was following the decision of the British Columbia Court of Appeal in *Fedan*.

[21] Five days after the accident, with the assistance of the non-emergency fire department, the EDRs were extracted from both vehicles. The fire department

used hydraulics to extract the EDR from the respondent's car. Hand tools were used to remove the EDR from the Toyota.

[22] The EDR data was downloaded. That data showed, for the five seconds prior to the collision, the vehicles' speed, engine RPM, motor RPM, brake pattern, brake oil pressure, steering input, shift position, drive mode, cruise control, and longitudinal/latitudinal acceleration.

[23] The EDR data from the respondent's car showed he was going 120 km/h 4.75 seconds before the crash, accelerated to 130 km/h 0.75 seconds before the crash, and was going 113 km/h at the time of impact. It will be recalled that the posted speed limit was 80 km/h.

[24] Some weeks later, the respondent was charged under s. 249 of the *Criminal Code,* the provision that then governed the dangerous operation of motor vehicles causing bodily harm. The relevant parts of s. 249 read as follows:

> **249 (1)** Everyone commits an offence who operates
>
> (a)a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;
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> […]
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> **(3)** Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[25] Prior to trial, the respondent brought a *Charter* application alleging the police violated his s. 8 rights. He argued that: the police had no basis for a warrantless seizure of his vehicle; he had a subjective expectation of privacy in the data contained in the EDR; and his subjective expectation was objectively reasonable.

[26] The trial judge agreed with the respondent and excluded the EDR evidence under s. 24(2) of the *Charter*.

[27] The trial proceeded without the EDR evidence.

[28] The issue at trial was whether the respondent's driving was a marked departure from what a reasonable and prudent driver would have done in the same circumstances. The Crown relied largely on the dashcam footage that captured the collision and an expert report interpreting that footage. The Crown's expert explained that he was not able to determine how fast the respondent's car was going just before it entered the intersection and at the point of impact with the Toyota. The respondent relied on two experts who also interpreted the footage.

[29] The trial judge acquitted the respondent because, based on the available evidence, he "could not say with absolute certainty that [the respondent] was accelerating into the intersection" nor could he find beyond a reasonable doubt "how much faster [the respondent] was travelling as he approached the intersection".

[30] The evidentiary gap about acceleration and speed would have been filled by the EDR data.

V. THE *CHARTER* APPLICATION RULING

[31] The trial judge concluded that the police breached the respondent's s. 8 *Charter* right to be "secure from unreasonable search and seizure" when they seized his car and extracted the EDR. He reached this conclusion because he found the police did not seize the respondent's car under s. 489(2) of the *Criminal Code* and, even if they did, the respondent had a reasonable expectation of privacy in the EDR and its data.

a) Police seizure of the respondent's car

[32] The trial judge accepted that, in this case, to protect public safety, the police had the lawful right to remove the respondent's car from the roadway and take it to a storage facility for safe keeping. However, he concluded that the Crown had not met the test to justify a warrantless seizure of the car under s. 489(2) of the *Criminal Code*. He gave two reasons for so concluding.

[33] First, the trial judge noted that while the "thing" seized under s. 489(2) can include a vehicle, s. 489(2)(c) requires the seizing officer to have reasonable grounds to believe the "thing" will "afford evidence with respect to an offence". He found that when Officer Ball seized the respondent's car, he had only a "suspicion" about excessive speed, rather than "reasonable grounds" to believe the collision

was the result of the offence of dangerous driving. The trial judge also said that "Officer Ball relied on section 489(2) of the *Criminal Code* retrospectively". In so doing, he observed that Officer Ball's notes did not mention a criminal investigation into dangerous driving.

[34] Second, the trial judge found that even if Officer Ball did rely on s. 489(2) to seize the respondent's car, the car should be not treated as "a thing" that would afford evidence of the commission of an offence. Relying on *R. v. Belnavis*, [1997] 3 S.C.R. 341, the trial judge stated that motor vehicles are "places" – rather than "things" – in which individuals have a reasonable but "reduced" expectation of territorial privacy and this is not lost simply because the vehicle was involved in a collision. He said that if the EDR could be searched pursuant to a valid s. 489(2) seizure of the car, on any allegation of dangerous driving, the police could seize "whatever might be in the car without prior judicial authorization". The trial judge also opined that the EDR is "an on-board computer that collects the vehicle's data which is owned and created by the owner".

b) Whether there is a reasonable expectation of privacy in the EDR and its data

[35] The Crown did not contest that the respondent had a subjective expectation of privacy in the EDR and its data. Accordingly, the trial judge focused on whether his subjective expectation was objectively reasonable. Relying on *Hamilton* and *Glenfield*, the trial judge concluded that it was.

[36] The trial judge observed that the nature of the data recorded in the EDR is different from information that a member of the public could reasonably observe. A witness to the collision might observe the movement of the vehicles before impact or provide an educated guess on speed and whether there was any braking. However, unlike the EDR, a witness would not be able to provide "engine speed, throttle position, the state of the driver's seatbelt switch, whether the passenger air bag was abled or disabled, the time between impact and airbag deployment, ignition cycle counts, engine RPM, brake oil pressure, cruise control, steering input, or longitudinal acceleration". The trial judge summed up by stating the "category of information that is accurately stored in the EDR is not exposed to the public and is inherently different than the tangible mechanical parts of a vehicle".

[37] The trial judge also likened the respondent's privacy interests in the EDR data to those in *R. v. Wise*, [1992] 1 S.C.R. 527, where the Supreme Court of Canada held that the warrantless use of a car tracer would create a risk that the police would track an individual's every move. He further compared the EDR data to *R. v. Duarte*, [1990] 1 S.C.R. 30, finding that warrantless access to the EDR data from a lawfully seized car was analogous to recording private communications.

c) The EDR evidence was excluded under s. 24(2)

[38] The trial judge used the three-step *Grant*[3] analysis to determine that the EDR evidence should be excluded under s. 24(2) of the *Charter*.

[39] On the first step, the trial judge considered the state *Charter*-infringing conduct. He found the police conduct amounted to an “unlawful trespass” to the respondent’s car and that the police had acted in “bad faith”. In his view, the seriousness of the police conduct was aggravated by Officer Ball’s “disregard” for “judicial guidance in the Province of Ontario” on this matter and his “misguided efforts” to justify his unconstitutional actions by failing to follow the Superior Court decisions in *Hamilton* and *Glenfield*, instead choosing to follow *Fedan*. He concluded that the s. 8 violation was at the serious end of the spectrum and favoured exclusion, referring to the police conduct as “wilful blindness and an apathetic attitude towards upholding the law”.

[40] On the second step, the trial judge considered the impact of the breach on the respondent’s *Charter*-protected interests. He found the impact fell at the “moderate” end of the spectrum. He observed that the respondent’s car was seized without his consent and the EDR was extracted when he was not present but there had been no interference with the respondent’s dignity or bodily integrity. The trial

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[3] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32.

judge added that, if the police had applied for a warrant to seize and search the EDR, he was “confident that judicial authorization would have been granted”.

[41] On the third step, the application judge considered the societal interest in the case being adjudicated on its merits. He found the alleged offence was serious and the EDR evidence reliable but, in his view, the long-term repute of the administration of justice was better served by the exclusion of the EDR evidence.

VI. THE GROUNDS OF APPEAL

[42] The Crown submits the trial judge erred in law in:

1. finding that the police lacked reasonable grounds to seize the respondent’s car, at the scene of the accident, pursuant to s. 489(2)(c) of the *Criminal Code*;
2. finding that, if the respondent’s car was lawfully seized, the police were not authorized to extract the EDR and its data; and
3. excluding the EDR evidence pursuant to s. 24(2) of the *Charter*.

VII. THE STANDARD OF REVIEW

[43] The Crown’s ability to appeal an acquittal is circumscribed by s. 676(1)(a) of the *Criminal Code*, which limits the appeal to an error involving “a question of law alone”. Limiting the scope of Crown appeals of acquittals is fundamental to the core tenets of our legal system: *R. v. Hodgson*, 2024 SCC 25, at paras. 22, 26 to 31. Exceptionally, a trial judge’s alleged shortcomings in assessing the evidence

may constitute an error of law: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, affirmed in *Hodgson*, at para. 34. This may occur when a trial judge assesses the evidence based on a wrong legal principle, makes a finding of fact for which there is no evidence, or fails to consider all of the evidence on the ultimate issue of guilt or innocence: *Hodgson*, at para. 35.

[44] Moreover, for a Crown appeal to succeed, the Crown must show that the error of law "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal": *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

[45] Section 489(2)(c) provides a police officer with the power to seize "any thing" that the officer believes, on reasonable grounds, will "afford evidence in respect of an offence". The existence of reasonable belief and the legal impact of a seizure under s. 489(2) both involve the application of a legal standard to the facts of a case, which is a question of law subject to review for correctness: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20; *R. v. Chow*, 2022 ONCA 555, 163 O.R. (3d) 242, at para. 46.

[46] Accordingly, correctness is the standard of review for both Issues 1 and 2. A different standard of review applies to Issue 3; it is dealt with at the outset of the analysis on that issue.

Issue 1 The respondent's car was lawfully seized pursuant to s. 489(2)(c) of the *Criminal Code*

[47] Whether the respondent's car was lawfully seized from the accident scene depends on whether Officer Ball had reasonable grounds, at the time it was seized, to believe it would afford evidence in respect of an offence. Reasonable grounds to believe must be founded in objective facts: *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 27. The reasonableness of a police officer's belief must be determined having regard to the objective and ascertainable facts as seen through the eyes of a reasonable person with the same knowledge, training, and experience as the police officer: *Chow*, at para. 47.

[48] The trial judge found the investigating officer did not have the requisite belief on reasonable grounds. He found Officer Ball only had a "suspicion" that the collision was the result of excessive speed, and there was nothing in his notes about seizing the cars pursuant to s. 489(2) because he was embarking on an investigation into dangerous driving. He also found that Officer Ball's reliance on s. 489(2)(c) to seize the cars was "retrospective".

[49] In my view, the trial judge erred in law in finding that Officer Ball did not have reasonable grounds to believe the cars, at the time they were seized, would afford evidence in respect of the offence of dangerous driving. Respectfully, the trial judge erred by focusing on a single comment the seizing officer made when he first arrived on the scene instead of considering the totality of the circumstances.

[50] Officer Ball was an experienced police officer with the Major Collision Bureau. He had over 14 years of policing under his belt when he arrived at the scene of the accident – a scene which the trial judge described as “carnage”.

[51] Officer Ball testified that his initial impression raised a “suspicion” that the crash was due to excessive speed. However, as he also testified, after his initial impression he spent several hours of investigation on the scene. He reviewed the dashcam footage of the crash, which showed Ms. Xao’s car becoming airborne and spinning 540 degrees. He spoke with witnesses, one of whom told him that the respondent’s car was “speeding”. He observed the severe damage to both cars involved in the collision, and their positions in the intersection, which showed extensive displacement. Further, he knew that the crash led to both Ms. Xao and the respondent being hospitalized.

[52] Officer Ball testified that it was his investigation at the accident scene that gave him reasonable grounds to believe he could seize the cars pursuant to s. 489(2)(c) because they contained evidence relating to the offence of dangerous driving. In my view, an objective consideration of the totality of circumstances bears out that, after investigating the scene, Officer Ball’s initial suspicion had solidified into belief on reasonable grounds, and the trial judge erred in law in concluding otherwise.

[53] As for the trial judge's remark that Officer Ball did not record his reliance on s. 489(2)(c) in his notes, I would simply point out that is not determinative. There was a large body of evidence from which it could be reasonably inferred that Officer Ball had the requisite grounds. No express reference to s. 489(2) in his notes was necessary: *Chow*, at para. 51.

[54] With respect to the trial judge's finding that Officer Ball justified the seizures retrospectively, I simply observe that it is inconsistent with his finding that Officer Ball knew of the *Fedan* case and had relied on it previously to seize cars at accident scenes. While it is unreasonable for the police to undertake a warrantless search or seizure without some notion of their legal authority – even if, after-the-fact, or "retrospectively," some legal authority is identified and applicable: *R. v. Lambert*, 2023 ONCA 689, 169 O.R. (3d) 81, at para. 82; *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 29, that is not what happened in this case. Officer Ball knew both of the warrantless seizure power under s. 489(2)(c) and that *Fedan* had judicially sanctioned the exercise of that power in similar circumstances.

[55] Because the police had reasonable grounds to seize the respondent's car at the scene of the accident pursuant to s. 489(2), the car was lawfully seized.

Issue 2 The police were authorized to extract the EDR and its data

[56] *Fedan*, at para. 78, and *Major*, at para. 70, hold that the lawful seizure of a car under s. 489(2): (a) extinguishes a driver's territorial privacy interest in the

EDR; and (b) eliminates any reasonable expectation of informational privacy in the EDR data. I agree. In explaining why, I will first discuss the extraction of the EDR and then the extraction of its data.

Extraction of the EDR

[57] On the matter of the extraction of the EDR, existing law from this court supports the view that lawful seizure of a vehicle extinguishes privacy interests in the vehicle and its component parts. For example, in *Ontario (Labour) v. Miller Group Inc.*, 2021 ONCA 879, at para. 35, Trotter J.A., writing for the court, states that lawful seizure of a car includes the right to conduct a mechanical inspection of it.[4] The EDR is a component of the car just as much as its engine, steering wheel, and brakes. Therefore, the police acted lawfully in extracting the EDR. Accordingly, the trial judge erred in law in finding that police entry into the lawfully seized cars to remove the EDRs amounted to trespass.

[58] In my view, the trial judge further erred in law in finding the respondent's car was a "place", rather than a "thing" within the meaning of s. 489(2)(c). In so finding, the trial judge appears to have confused the EDR (a component of the car) with the contents inside a car. For example, he expressed concern that if police can "seize" the EDR, they can seize whatever is in the car. This concern is misguided.

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[4] See also *Fedan*, at para. 73, where the British Columbia Court of Appeal states that the authorized seizure of an item generally includes a right of examination of that item.

Section 489(2) does not purport to give police the power to conduct a warrantless seizure of things within a vehicle. It empowers the police to seize a “thing”, which in this case were motor vehicles, including the EDRs as components of those vehicles.

Extraction of the EDR data

[59] In terms of the extraction of the EDR data, the question was whether that act by the police violated the respondent’s s. 8 *Charter*-protected interests. To answer that question, the trial judge had to determine whether there was a reasonable expectation of privacy in the EDR data. It is the respondent’s onus to establish that he did, failing which s. 8 protection is not extended.

[60] Three broad categories of privacy interests have emerged over time: territorial, personal, and informational: *R. v. El-Azrak*, 2023 ONCA 440, at para. 30; *R. v. Spencer*, 2014 SCC 43, at para. 38.

[61] At paras. 31-32 of *El-Azrak*, Fairburn A.C.J.O., writing for this court, summarized the legal framework - whatever the form of privacy is at issue – for whether someone has a reasonable expectation of privacy. That determination necessitates both a factual and a normative inquiry. The factual inquiry necessitates a command of all the circumstances in play in the case. The normative inquiry is broader in nature, with an eye to protecting that for which we ought to expect protection from a privacy perspective in a free and democratic

society. The test for determining whether someone has a reasonable expectation of privacy asks the following:

1. What is the subject matter of the search?
2. Does the accused have a direct interest in that subject matter?
3. Does the accused have a subjective expectation of privacy in the subject matter?
4. Would an expectation of privacy be objectively reasonable in the circumstances of the case?

[62] The respondent claimed an informational privacy interest in the EDR data. The first three questions in the test were easily answered, as they were not in dispute: (1) the EDR data was the subject matter of the search; (2) the respondent, as driver of the car, had a direct interest in the EDR data; and (3) the Crown conceded that the respondent had a subjective expectation of privacy in the EDR data. The parties were divided on the answer to the fourth question.

[63] The trial judge found that, in the circumstances, there was an objectively reasonable expectation of privacy in the EDR data. In my view, he erred in law in so finding.

[64] In finding that there was a reasonable expectation of privacy in the EDR data, the trial judge analogized an EDR to personal computers, location trackers, and wiretaps. However, those analogies are not apt.

[65] The EDR is completely objective. It contains no information going to the driver's biological core, lifestyle, or personal choices, nor information that could be said to directly compromise his "dignity, integrity and autonomy": *Fedan*, at para. 82. The recorded EDR data has information limited to a five-second window before the crash on the vehicle's speed, throttle, and braking. There is no data on driving patterns, driving history, or average driving speed. There is no data on location or GPS coordinates. EDRs are not reprogrammable and cannot be reinstalled once removed.

[66] While an EDR is an electronic data storage device just as are personal computers, cell phones, and location trackers, the similarities end there. There is no personal information in the EDR akin to that which could potentially be found on a computer, cell phone or location tracker. EDR data is impersonal, automatically deleted, and limited to five seconds of information regarding the operations of the car. It has no link to any location or person. It does not identify the driver. It does not broadcast or receive data. As the court observed in *Major*, at paras. 68-71, the data provides no independent insight into the behaviours of anyone in the car.

[67] In short, the EDR data provides no personal identifiers that could link the driver to its captured data. Accordingly, the respondent had no reasonable expectation of informational privacy in the EDR data after the vehicle he was driving had been lawfully seized.

[68] This conclusion is reinforced by a recognition that EDR data is about the manner of driving, which is a public, highly regulated activity. Indeed, in the present case, the respondent's driving was caught on camera and dashcam video. While EDR data contains more detailed information than what a member of the public might observe, the information is qualitatively similar – the speed of the vehicle and whether it is braking can be seen.

[69] For these reasons, I agree with the courts of appeal in *Fedan* and *Major* that a driver/owner does not have a reasonable expectation of privacy in the EDR and its data after the vehicle has been lawfully seized under s. 489(2).

[70] The trial judge's errors in law on Issues 1 and 2 had a material bearing on the respondent's acquittal because, as previously noted, the evidentiary gap on acceleration and speed would have been filled by the EDR data.

Issue 3 The EDR evidence should not have been excluded under s. 24(2) of the *Charter*

[71] In light of my conclusions on the first two issues, it is not strictly necessary to address the trial judge's determination under s. 24(2). I do so, however, to address the Crown's submission that the trial judge made legal errors in arriving at that determination. I accept that submission.

The Standard of Review

[72] The standard of appellate review of a trial judge's s. 24(2) determination of what would bring the administration of justice into disrepute is well known. Where

a trial judge has considered the proper factors and not made any unreasonable finding, his or her determination under s. 24(2) of the *Charter* is owed considerable deference on appeal: *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 77; *R. v. Cote*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44. While appellate review is deferential, this deference is displaced and the appellate court can conduct a fresh analysis if the trial judge overlooks or disregards relevant factors, errs in law or principle, or makes an unreasonable determination: *R. v. Szilagyi*, 2018 ONCA 695, 142 O.R. (3d) 700, at para. 41. The Crown can appeal these legal errors: *R. v. Harris*, 2007 ONCA 574, 87 O.R. (3d) 214, at para. 51.

[73] Applying this standard of review, in my view, there is a basis for appellate intervention in this case.

Analysis

[74] While the trial judge considered the three *Grant* factors, on each, he made unreasonable findings amounting to errors of law. Even if there had been a breach, the EDR evidence should have been admitted because: (1) there was uncertainty in the law on whether consent or judicial authorization was required before the EDR data could be extracted and analyzed; (2) if there was an impact on the respondent's *Charter*-protected interests as a result of the alleged police breaches, it was minimal; and, (3) of its reliability and significance to the Crown case.

The first *Grant* factor

[75] On the first *Grant* factor, in my view, the trial judge unreasonably found serious police misconduct and bad faith. In making that finding, the trial judge failed to fairly consider the uncertainty in the law regarding whether prior judicial authorization or the owner's consent is required before an EDR can be seized. *Charter* breaches are in good faith and, thus, less serious, if officers were acting consistently with what they reasonably believed to be the law: *R. v. Pike*, 2024 ONCA 608, at para. 127.

[76] The trial judge was critical of the investigating officer for not following the Superior Court decisions in *Hamilton* and *Glenfield*. He did so despite the conflicting decisions in *Anastasis* and *Anstie*, in which the Superior Court followed *Fedan* and held there was no reasonable expectation of privacy in EDR data.[5] In light of the conflicting caselaw, the trial judge unreasonably found there was "clear judicial direction" on the question of privacy interests in EDRs and their data, and faulted Officer Ball for "disregarding" it. Similarly, it was unreasonable to find the police conduct in extracting the EDR and its data, in reliance on *Fedan,* was "wilful blindness" and "an apathetic attitude" towards the respondent's s. 8 rights.

[77] When the conflicting Ontario first instance decisions are taken into consideration, along with the appellate decision in *Fedan*, it is apparent that the

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[5] *J.S.* also recently adopted the reasoning in *Fedan* and *Major*.

state of the law on this matter was unclear at the time the respondent brought his *Charter* application. Although the trial judge was not bound by *Fedan* and was entitled to prefer the reasoning in *Hamilton* and *Glenfield*, it was unreasonable for him to dismiss the investigating officer's reliance on *Fedan* as a "misguided" attempt to justify what he viewed as an unconstitutional act. Officer Ball was acting consistently with what he reasonably believed to be the law. Thus, even if Officer Ball had been mistaken on the law, he was acting in good faith when he seized the cars and extracted the EDRs and their data: *Pike*, at para. 127.

[78] In any event, however, in light of the conflicting jurisprudence, the trial judge unreasonably found the seizing officer's reliance on *Fedan* was an act of "bad faith" – especially as the trial judge opined that had the police applied for a warrant to seize and search the EDR, he was "confident" that judicial authorization would have been granted.

[79] In these circumstances, in my view, it was unreasonable to place the police conduct at the serious end of the spectrum, favouring exclusion of the EDR evidence, as the trial judge did.

[80] I recognize the admonition in *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 94, that "the police cannot choose the least onerous path whenever there is a gray area in the law. In general, faced with uncertainty, the police should err on the side of caution by choosing a course of action that is more respectful of

the accused's privacy rights." However, *Fearon* was a very different case than the present one.

[81] In *Fearon*, the Supreme Court was required to decide whether the common law police power of search incident to arrest permitted a warrantless search of a cell phone. In this case, as the trial judge acknowledged, the respondent's car was capable of being lawfully seized, and the seizing officer was aware of appellate authority permitting warrantless seizure of the car and search of the EDR.

The second *Grant* factor

[82] On the second *Grant* factor, the trial judge found there had been no interference with the respondent's *Charter*-protected personal privacy interests, including his dignity and bodily integrity. However, he found that the respondent's privacy interests in the EDR and its data had been breached. Even if the trial judge had been correct in so finding, the impact on the respondent's privacy interests was minimal. Thus, it was unreasonable for the trial judge to find that interference with the respondent's *Charter*-protected interests fell at the "moderate" end of the spectrum.

The third *Grant* factor

[83] The third *Grant* factor required the trial judge to consider the societal interest in having the case adjudicated on its merits. For the reasons given, neither of the first two factors pushed toward exclusion of the evidence. The seriousness of the

offence and reliability of the EDR data is unquestionable. Its significance to the Crown is also clear – the evidentiary gap on acceleration and speed would have been filled by that data. In these circumstances, it was unreasonable to find that the third factor favoured exclusion of the evidence.

[84] I conclude on this factor by observing that, while the trial judge relied on *Hamilton* and *Glenfield*, in both cases the court found s. 8 breaches but did not exclude the EDR evidence.

VIII. DISPOSITION

[85] Accordingly, I would allow the appeal, set aside the acquittal, and order a new trial at which the EDR data shall be admitted.

Released: August 16, 2024 "E.E.G."

"E.E. Gillese J.A."
"I agree. K. van Rensburg J.A."
"I agree. L.B. Roberts J.A."