

CANADA / JUDGMENT

R. v. Dupray

2025 BCSC 300

COURT

Supreme Court of British Columbia

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2025 BCSC 300 R. v. Dupray

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dupray,

2025 BCSC 300

Date: 20250225

Docket: 74074-2; 74074-3

Registry: Prince George

Rex

v.

Justin David Dupray

Tor Liam Green

Before: The Honourable Madam Justice Ker

Reasons for Judgment

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Place and Date of Hearing:

Prince George, B.C.

June 6, 2024

Date of Ruling with Written Reasons to follow:

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Place and Date of Judgment:

Prince George, B.C.

February 25, 2025

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Introduction

- [1] Justin David Dupray is jointly charged with Tor Liam Green with one count of possession of cocaine for the purpose of trafficking. He is solely charged with one count of possession of a loaded restricted firearm (a Glock nine-millimetre handgun) without a valid authorization or licence.
- [2] In the early morning hours of February 6, 2021, members of the Prince George RCMP Street Crew executed search warrants at two adjoining residences: 199 and 203 McIntyre Cres. Mr. Dupray and his domestic partner, Sheri Thomas, lived in 199 McIntyre Cres. Mr. Green was found inside 203 McIntyre Cres. when the search warrants were executed.
- [3] RCMP officers seized the following items from Mr. Dupray's 199 McIntyre Cres. residence:
- a) 2.62 grams of hard cocaine inside a distinctive dime bag;
 - b) a total of \$7,490 in currency;
 - c) a Ziploc sandwich bag that had residue of cocaine and levamisole (a cutting agent);
 - d) a food saver bag with residue of phenacetin (a cutting agent) on the inside of the bag; and
 - e) the loaded Glock handgun.

The cocaine and currency were found in a woven storage box inside the drawer of a coffee table in the living room. The packaging was found in the basement area of the residence. An officer clearing the lower floor of the residence observed the handgun in plain view in the entertainment room adjacent to the basement area.

- [4] Officers seized the following items from 203 McIntyre Cres., where Mr. Green was located:
- a) approximately 761.06 grams of cocaine in three separate packages of varying purity;^[1]
 - b) a large amount of cocaine in chunk and powder form;
 - c) \$20,870 in currency, bundled in groupings of about \$1,000;
 - d) an extended, loaded nine-millimeter magazine; and
 - e) drug trafficking paraphernalia, including:

- i. a scale;
- ii. Ziploc bags;
- iii. many of the same distinctive dime bags as the one found in Mr. Dupray's residence.

The bulk of the cocaine seized in the searches was located in 203 McIntyre Cres. The cocaine, cash and loaded, extended magazine were all in an open Gucci shoebox resting on a shelving unit inside an upstairs room that appeared to be being used as a storage room at 203 McIntyre Cres.

- [5] The investigation of this offence commenced with a tip from a confidential informant that "cocaine is being sold out of 199 McIntyre." After receiving this tip, investigators formally began conducting surveillance non-continuously of Mr. Dupray's residence on January 27, 2021. The surveillance period concluded on February 5, 2021. Officers observed two short duration stops ("SDS") at 199 McIntyre Cres. on January 22 and 26, 2021, prior to formally commencing the surveillance period. During the formal surveillance period, they observed a total of seven SDS at 199 McIntyre Cres. and movement by Mr. Dupray back and forth between 199 and 203 McIntyre Cres. In total, all nine SDS observations of activities consistent with trafficking a controlled substance out of 199 McIntyre Cres. were included in the Information to Obtain ("ITO") in support of the search warrants.
- [6] Based on the information received and the surveillance conducted in this case, the investigators theorized that this was a "store-front operation". 203 McIntyre was the location used to store the bulk of the cocaine, proceeds, and packaging items, whereas 199 McIntyre was the location where customers attended to purchase cocaine from Mr. Dupray.[2] Members of the RCMP surveillance team observed Mr. Dupray accessing both residences.
- [7] The trial of this matter commenced with a voir dire. Mr. Dupray contended that his rights under ss. 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11 [Charter] were breached when the police searched his residence shortly after 03:00 a.m. on February 6, 2021, pursuant to a search warrant that authorized a night time entry. Mr. Green joined Mr. Dupray in his challenge to the validity of the search warrants, alleging a breach of his s. 8 Charter rights. The s. 8 challenge focused on a facial and sub-facial challenge to the search warrants issued in this investigation.
- [8] Mr. Dupray also advanced a s. 9 breach arguing that Cpl. Braden Chamberlain did not have reasonable grounds to arrest him. The Crown conceded a breach of Mr. Dupray's s. 10(b) rights as he was not promptly or fully advised of his s. 10(b) rights immediately when the police entered the residence. Police only fully and properly advised Mr. Dupray of his s. 10(b) rights after they had located the firearm and Mr. Dupray had made incriminatory admissions about what the police would find. The Crown conceded that Mr. Dupray's s. 10(b) Charter rights had been breached.

- [9] Following the voir dire, I provided oral reasons on June 4, 2024, upholding the validity of the search warrants issued and dismissing Mr. Dupray's claims of a breach of his ss. 8 and 9 Charter rights. I accepted the Crown's concession of a breach of Mr. Dupray's s. 10(b) Charter rights.
- [10] The parties then made submissions on s. 24(2) of the Charter and Mr. Dupray's contention that his statements to the police and the restricted firearm found in his entertainment room ought to be excluded pursuant to the analytical framework established in *R. v. Grant*, 2009 SCC 32 [Grant] as the admission of the evidence would bring the administration of justice into disrepute. The next day, on June 6, 2024, I advised the parties of the result of the s. 24(2) argument with written reasons to follow, stating:
- [1] THE COURT: Having considered the evidence from the voir dire, the submissions of counsel on s. 24(2), and the jurisprudence cited in support of exclusion of the handgun and Mr. Dupray's statements prior to being advised of his right to counsel, and in applying the analytical framework mandated by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, and affirmed in *R. v. McColman*, 2023 SCC 8, I have applied this to the circumstances of this case and I have concluded as follows.
- [2] The statements made by Mr. Dupray inside his home before Constable Dela Torre advised him of his s. 10(b) Charter rights and formally warned him at 0324 hours on February 6, 2021, are to be excluded. They are not admissible in this trial.
- [3] The loaded Glock handgun found in plain view on the sofa in the basement by Corporal Chamberlain as he cleared the basement is admissible. Exclusion under the Grant analysis would, in the circumstances, bring the administration of justice into disrepute. So the statements are out, the handgun is in.
- [11] These are my written reasons on the s. 24(2) result wherein I excluded the statements made by Mr. Dupray but admitted the restricted firearm found in the entertainment room of his residence.

Background Facts Relevant to the Breach of s. 10(b) of the Charter

- [12] The search warrants in this case were for the two adjacent residences, a duplex/townhouse style configuration. Mr. Dupray and his partner lived in one residence: 199 McIntyre Cres. When the search warrants were executed, Mr. Green was found in the adjacent unit, 203 McIntyre Cres. Documentation found in 203 McIntyre Cres. in Mr. Green's name and observations of his unique Mitsubishi right-hand drive van at that address during the surveillance period formed part of the grounds for the belief that he was involved in what the police believed to be a "store front drug operation" being run out of both units.

- [13] The search warrants were executed shortly after 03:00 a.m. on February 6, 2021. The entries were dynamic entries with a team of officers "stacked" behind an officer with a ram device to be used to gain access to the residences, if necessary. As the court is only addressing Mr. Dupray's Charter interests in this ruling, I will only briefly summarize the entry to his 199 McIntyre Cres. residence when the search warrant was executed.
- [14] As I outlined in my ruling on the voir dire into the various Charter challenges brought by both accused, the entry was dynamic and chaotic. Cpl. Braden Chamberlain, who was the primary investigator in this case, was immediately behind Cpl. Ryan Underhill in the stack. At 03:14 a.m. on February 6, 2021, Cpl. Chamberlain knocked on the door of 199 McIntyre Cres. and announced that the police were in attendance to execute a search warrant. When they received no response, Cpl. Underhill was directed to breach the front door lock with the ram. He did so and, upon breaching the door, the officers were confronted by two large dogs barking aggressively. Mr. Dupray, who was in the front hall area with the dogs, was directed to control his dogs. He complied with that direction by securing them in the backyard.
- [15] When Mr. Dupray returned from the backyard, Cpl. Chamberlain advised him that he was under arrest for possession for the purpose of trafficking and cautioned him that anything he might say could be used as evidence against him. Cpl. Chamberlain did not advise Mr. Dupray of his s. 10(b) right to counsel.
- [16] After Cpl. Chamberlain advised Mr. Dupray that he was under arrest, he left the accused with Cst. James Dela Torre. Earlier in the evening, Cst. Dela Torre had been assigned the task of doing "legals", meaning advising anyone detained of their Charter rights--specifically providing their s. 10(b) right to counsel. However, Cst. Dela Torre did not provide Mr. Dupray with his s. 10(b) Charter rights until 03:24 a.m., some 10 minutes after the door was breached and after Mr. Dupray had made five arguably incriminating admissions.
- [17] Immediately following Mr. Dupray's arrest, Cpl. Chamberlain and another officer, Cpl. Adam Moleski, set about "clearing the residence", which took only two to three minutes. Cpl. Chamberlain went down to the lower level of the residence and Cpl. Moleski went to the upper level of the residence. While these two officers cleared the residence, Cpl. Underhill and Cst. Dela Torre remained with Mr. Dupray and his partner, Sheri Thomas, on the main level in the front hall of the residence.
- [18] A number of events occurred before Cst. Dela Torre formally provided Mr. Dupray with his Charter rights. In the earlier voir dire ruling, I found the following sequence of events to have occurred after the door to the residence was breached and Mr. Dupray had secured his dogs in his backyard:
- a) Mr. Dupray returned to the front hall and was arrested by Cpl. Chamberlain but not advised of his s. 10(b) rights.

- b) Mr. Dupray remained in the hallway with Ms. Thomas, Cpl. Underhill, and Cst. Dela Torre, while Cpls. Chamberlain and Moleski cleared the residence. Mr. Dupray was not formally "Charter-ed" at this time, despite Cst. Dela Torre's specific assignment to do so.
 - c) Once Cpl. Moleski cleared the upstairs level, he returned to the main floor of the residence. At about 03:18 a.m., he took Mr. Dupray up to the master bedroom to permit Mr. Dupray to get dressed. While in the upper level of the house, Mr. Dupray made an incriminating admission to the effect of, "This is bad, especially what [you are] going to find on the couch in the basement". Cpl Moleski asked a follow up question to the effect of: "What will we find?", to which Mr. Dupray replied, "We'll see".
 - d) Once Mr. Dupray was dressed, he was handcuffed by Cpl. Moleski and taken back downstairs and returned to Cst. Dela Torre.
 - e) At approximately 03:20 a.m., Mr. Dupray made a comment to his partner that "they are only going to find one thing". Cpl. Underhill overheard this comment and immediately gave Mr. Dupray a truncated caution about making incriminating statements, but no formal s. 10(b) warning. Mr. Dupray responded that he understood, saying, "I don't care, you are going to find it anyway".
 - f) Cpl. Chamberlain returned from clearing the basement and directed Cst. Dela Torre to arrest Mr. Dupray for possession of a firearm that he had located in plain view between the seat cushion and the arm rest of a sofa in the entertainment room on the lower level of the residence.
 - g) Cpl. Underhill heard Mr. Dupray make a comment to the effect of "There, you found it; you can stop searching". At this point in time, Cst. Dela Torre had still not formally Charter-ed and warned Mr. Dupray.
 - h) Cst. Dela Torre formally took custody of Mr. Dupray at about 03:22 a.m., after Cpl. Chamberlain directed the former to arrest Mr. Dupray for possession of the firearm. It was only after Cpl. Underhill overheard Mr. Dupray's comments that Cst. Dela Torre formally Charter-ed and warned Mr. Dupray at 03:24 a.m.
- [19] Shortly after being advised of his right to counsel, Mr. Dupray was transported to the Prince George RMCP Detachment. Once in the cells, Cst. Dela Torre re-advised him of his right to counsel at approximately 03:56 a.m. Mr. Dupray declined the offer to contact counsel.
- [20] In the voir dire ruling, I concluded that there were no safety issues preventing Cst. Dela Torre from immediately advising Mr. Dupray of his s. 10(b) rights once the latter had secured the dogs in the backyard and the officers had cleared the residence. Indeed, it was apparent that Cst. Dela Torre had a clear opportunity to provide Mr. Dupray with his s. 10(b) rights while the other officers cleared the residence. At the latest, Cst. Dela Torre had this opportunity before Cpl. Moleski took Mr. Dupray upstairs to get dressed. Cst. Dela Torre did not discharge this duty, notwithstanding the fact that he had been specifically assigned the task of providing legals for this planned arrest, and that he and Cpl. Underhill waited with

Mr. Dupray while the other officers cleared the residence. I find that the officers should have advised Mr. Dupray of his s. 10(b) rights immediately upon detention and certainly no later than before being taken upstairs by Cpl. Moleski to get dressed.

- [21] In accepting the Crown's concession that Mr. Dupray's s. 10(b) rights had been breached, I recognized in my oral ruling that the immediacy requirement for advising a detainee with their right to counsel is set out in *R. v. Suberu*, 2009 SCC 33 at para. 42. Additionally, *R. v. Waboose*, 2019 BCSC 1929 at para. 64 articulates exceptions to the immediacy requirement. Neither exception was present in this case. In my ruling, I acknowledged that the court should not falsely equate the notion of immediacy with instantaneousness; practical considerations play a role in assessing the overall circumstances. Nonetheless, I concluded that in this case, by the time the dogs were under control and the other officers were engaged in clearing the residence, Cst. Dela Torre could easily have provided Mr. Dupray with his s. 10(b) rights before Mr. Dupray was taken upstairs to get dressed. Cst. Dela Torre's failure to do so in these circumstances resulted in a breach of Mr. Dupray's s. 10(b) rights.
- [22] The search warrants were executed after the residences were secured and the occupants removed. Two teams, one for each residence, conducted the twin searches. The items found therein are described above at paras. 3-4 of these reasons.
- [23] I have already enumerated at para. 3 the items found in the search of Mr. Dupray's residence. I note that the currency in the coffee table drawer was bundled in groupings similar to that for the currency found inside 203 McIntyre. The dime bag of cocaine was identical to the dime bags seized from the storage room in 203 McIntyre. Finally, the used packaging found in a garbage bag in the basement of 199 McIntyre was similar to that found in the storage room of 203 McIntyre.
- [24] Following entry into 199 McIntyre, officers began clearing the residence. While doing so, and before formally commencing the search of the residence, Cpl. Chamberlain found the abovementioned loaded restricted firearm (a nine-millimetre Glock handgun) in plain view, stuck between the armrest and seat cushion of a sofa in the entertainment room located on the lower level of the residence. As the handgun was readily visible upon entry, I find that it was discoverable without any of Mr. Dupray's admissions. Indeed, Cpl. Chamberlain located the handgun either before or contemporaneously with Mr. Dupray's utterances. Moreover, there is no evidence to connect these utterances with the officer's discovery of the handgun.
- [25] Nevertheless, defence seeks to exclude under s. 24(2) of the Charter the following evidence: (i) the loaded restricted firearm observed by Cpl. Chamberlain sticking out of the sofa in the entertainment room as he cleared Mr. Dupray's residence; and (ii) Mr. Dupray's various utterances made to the officers prior to being advised of his s. 10(b) right to counsel.

Governing Legal Principles

- [26] Section 24(2) of the Charter provides as follows:

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

- [27] The purpose of excluding evidence under s. 24(2) has always been grounded in preserving the repute of the administration of justice, consistent with the language of the section. The Supreme Court of Canada held in *Grant* that the s. 24(2) inquiry should be long-term and prospective in scope, and focused on systemic concerns: *Grant* at paras. 36, 68-71; see also *R. v. McColman*, 2023 SCC 8 [McColman] at para. 57. Regardless, the Court has also held that the section is not used for the purpose of deterring police or compensating for wrongs done: *Grant* at para. 70; *R. v. Harrison*, 2009 SCC 34 at para. 36. The Supreme Court of Canada held in *Grant* that the inquiry is long-term, prospective, and focused on systemic concerns: *Grant* at paras. 36, 68-71; see also *McColman* at para. 57. The Supreme Court also held in *R. v. Morelli*, 2010 SCC 8 at para. 102 that judicial indifference to unacceptable police conduct jeopardizes the repute of the administration of justice.
- [28] The court assesses disrepute from the standard of the reasonable citizen who is "dispassionate and fully apprised of the circumstances of the case" and who represents reasonable community values: *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 33; *R. v. Calder*, [1996] 1 S.C.R. 660 at para. 34.
- [29] The language of s. 24(2) sets out a reverse onus of proof. Evidence is presumed admissible unless the applicant establishes: (i) that the evidence was obtained through a Charter violation and (ii) that any evidence thereby obtained should be excluded: *R. v. Lauriente*, 2010 BCCA 72 at para. 6; *R. v. Fearon*, 2014 SCC 77 at para. 89. These are the 'threshold' and 'evaluative' components of the s. 24(2) analysis, respectively.

First Stage: Threshold Requirement

- [30] At the first stage of the s. 24(2) analysis the court must determine whether there is a sufficient nexus between the breach of the Charter right and the evidence sought to be excluded, such that the evidence was "obtained in a manner" that breached the Charter. In *R. v. Tim*, 2022 SCC 12, the Supreme Court of Canada summarized the threshold inquiry:
- [78] This Court has provided guidance as to when evidence is "obtained in a manner" that breached an accused's Charter rights so as to trigger s. 24(2):
1. The courts take "a purposive and generous approach" to whether evidence was "obtained in a manner" that breached an accused's Charter rights (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38).
 2. The "entire chain of events" involving the Charter breach and the impugned evidence should be examined (*R. v. Strachan*, 1988 CanLII 25 (SCC), [1988] 2 S.C.R. 980, at pp. 1005-6).

3. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct" (Mack, at para. 38; see also Wittwer, at para. 21).
4. The connection between the Charter breach and the impugned evidence can be "temporal, contextual, causal or a combination of the three" (Wittwer, at para. 21, quoting *R. v. Plaha* (2004), 2004 CanLII 21043 (ON CA), 189 O.A.C. 376, at para. 45). A causal connection is not required (Wittwer, at para. 21; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 83; Strachan, at pp. 1000-1002).
5. A remote or tenuous connection between the Charter breach and the impugned evidence will not suffice to trigger s. 24(2) (Mack, at para. 38; Wittwer, at para. 21; *R. v. Goldhart*, 1996 CanLII 214 (SCC), [1996] 2 S.C.R. 463, at para. 40; Strachan, at pp. 1005-6). Such situations should be dealt with on a case by case basis. There is "no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote" (Strachan, at p. 1006).

Second Stage: Evaluative Component

- [31] If the threshold is satisfied, the second component is an evaluative inquiry utilizing the framework established in *Grant* at para. 71. In *R. v. Bottomley*, 2023 BCSC 603 at paras. 37-40 [Bottomley], Justice Devlin comprehensively and succinctly outlined the three-pronged evaluative exercise mandated by *Grant*:
- [37] In *Grant*, the Supreme Court of Canada identified three lines of inquiry for determining whether evidence obtained in a Charter-infringing manner should be excluded under s. 24(2) of the Charter. The factors to consider and weigh are (at para. 71):
- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
 - (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and
 - (3) society's interest in the adjudication of the case on its merits.
- [38] These factors do not operate as a disjunctive three-part test. There are no particular findings under the three lines of inquiry that mandate particular results, and it "is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case": *R. v. Harrison*, 2009 SCC 34 at para. 36 [Harrison]. The balancing mandated by s. 24(2) is "qualitative in nature and therefore not capable of mathematical precision": *Grant* at para. 140.

- [39] Rather, courts must assess and balance considerations under all three factors to determine whether, on balance and having regard to all the circumstances, admitting the impugned evidence would bring the administration of justice into disrepute in the long-term. In doing so, the trial judge assumes the objective perspective of a reasonable person, informed of all relevant circumstances and the values underlying the Charter. See Grant at paras. 68, 85-86.
- [40] The Grant factors look to the long-term integrity of, and public confidence in, the justice system: Grant at para. 68; Harrison at para. 36. The focus of s. 24(2) is also prospective. It starts from the proposition that damage has already been done to the public's confidence in the administration of justice by the Charter violation or violations that gave rise to the s. 24(2) analysis. Thus, the Grant analysis concerns itself with whether admitting the impugned evidence will do further damage to the reputation of the justice system: Grant at para. 69. Finally, s. 24(2) has a societal focus, and is aimed not at punishing the police or compensating the accused, but rather at systemic concerns, focusing on the broad impact of the admission of the evidence on the long-term reputation of the justice system: Grant at para. 70.
- [32] Having regard to all the circumstances of the case, the court must weigh each line of inquiry in the balance to determine whether admission of the evidence would bring the administration of justice into disrepute. In Harrison at para. 36, the Supreme Court elaborated on the nature of the second stage of the Grant analysis:
- [36] The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term reputation of the administration of justice that must be assessed.

[Emphasis added.]

Positions of the Parties

- [33] As is apparent from my earlier ruling on this case, the Crown conceded a breach of Mr. Dupray's s. 10(b) Charter rights. The onus is now on the defence to establish that exclusion of the evidence is warranted.

Defence Counsel

- [34] Counsel for Mr. Dupray contends that both the incriminating admissions and the handgun should be excluded pursuant to s. 24(2) of the Charter as the admission of the evidence would bring the administration of justice into disrepute.

- [35] The defence concedes that providing Mr. Dupray with his s. 10(b) right to counsel properly had to be suspended until the dogs were secured as that situation raised a possible safety issue. Counsel argues that, once the dogs were secured and Cpl. Chamberlain arrested and cautioned Mr. Dupray before the clearing of the residence commenced, nothing prevented the officers from providing Mr. Dupray with his right to counsel. I agree with counsel's point here, as my findings outlined above confirm.
- [36] Counsel emphasizes the context of this breach: this investigation had been in place for several days with a planned arrest. Defence counsel argues that the heightened vulnerability that Mr. Dupray found himself in--police officers entering his home in the middle of the night in a dynamic fashion by breaching his front door to execute a search warrant--cried out for greater care in ensuring Mr. Dupray was immediately provided his right to counsel once he had secured his dogs. Although only 10 minutes elapsed between the breach of the door and Cst. Dela Torre providing the s. 10(b) rights, a number of events unfolded in that short time. Collectively, these events may have had the effect of subjectively diminishing the importance of understanding the need to exercise the right to counsel. Furthermore, the chaos of the situation denied Mr. Dupray the chance to obtain that information immediately before any of the incriminating admissions were made.
- [37] The defence contends that the first two lines of inquiry under the Grant analysis militate heavily in favour of exclusion of both items of evidence. Concerning the third line of inquiry (society's interest in adjudication on the merits) the defence acknowledges that exclusion of the handgun will end the Crown's case on the firearm. Therefore, counsel concedes that this factor pulls towards admission of the handgun, but not overwhelmingly so in the circumstances.
- [38] The same cannot be said for inclusion of Mr. Dupray's incriminating admissions. This search included a planned arrest, replete with an officer expressly designated to provide Mr. Dupray with his s. 10(b) right to counsel. Nevertheless, this operation featured the officer's abject failure to do so in a timely fashion--this ought not to be tolerated. The conduct in this case, argues the defence, was a significant departure from the standard of conduct expected of the police some 15 years post-Suberu.
- [39] Counsel for Mr. Dupray relies primarily on *R. v. Rover*, 2018 ONCA 745 and *R. v. Wong and Truong*, 2017 BCSC 1643 to support his position that both the impugned items of evidence, the utterances and the handgun, should be excluded. According to counsel, once all three lines of the evaluative inquiry are conducted and the appropriate balancing is undertaken, the administration of justice would be better served by exclusion of both items. In other words, admission of the evidence will bring the administration of justice into disrepute.

Crown Counsel

- [40] Counsel for the Crown relies primarily upon the more recent decision of the Supreme Court of Canada in *McColman* to argue that the factual matrix of the case at bar--highlighting the dynamic entry into a residence--attenuates the severity of the Charter breaches. Crown counsel argues that a proper assessment of all three Grant factors tends towards admission of the evidence: the breaches are not at the serious or flagrant end of the spectrum; the impact on the accused's rights are attenuated; and society's interest in an adjudication on the merits of the case all balance in favour of admission.
- [41] At the first stage of the analysis, the threshold requirement, Crown counsel distinguishes between Mr. Dupray's utterances and the firearm. Insofar as the utterances are concerned, the Crown acknowledges a clear contextual and temporal connection between the Charter breach and the various statements made by Mr. Dupray to Ms. Thomas, to Cpl. Underhill, and to Cpl. Moleski, but argues there is little causal connection. For the firearm, the Crown argues that at best there is a temporal connection. However, Crown argues that the contextual connection is difficult to discern, and that the causal connection does not exist with regards to the firearm.
- [42] The Crown relies upon *R. v. Choi*, 2021 BCCA 410 at paras. 94-100 to argue that the nature and strength of the nexus between the evidence sought to be excluded and the breach of the Charter rights of an accused are relevant at both the threshold and evaluative stages of the Grant analysis. Where there is a weak nexus that barely clears the threshold requirement, this will militate more strongly in favour of admission of the evidence at the evaluative inquiry.

The Section 24(2) Inquiry

- [43] Crown and defence counsel agree on the general legal principles governing the s. 24(2) analysis mandated by Grant.

The Threshold Requirement that the Evidence was "Obtained in a Manner" Violating Charter Rights of Accused

- [44] In the case at bar, the Crown concedes a clear causal nexus between the utterances made by Mr. Dupray and the breach of his s. 10(b) rights. Therefore, the threshold requirement is satisfied for this item of evidence.
- [45] Although I understand the Crown to question the strength of the connection between the discovery of the firearm and the s. 10(b) breach, I do not understand counsel's submission to support the proposition that the threshold requirement has not been met with regards to this second piece of evidence. Nevertheless, I am not satisfied that the firearm was "obtained in a manner" that was connected to the s. 10(b) breach. In light of the fact that the firearm was (i) in plain view and discoverable during the clearing exercise; (ii) seized pursuant to a valid search warrant; and (iii) located and seized without the assistance or benefit of Mr. Dupray's utterances, it is the Court's view that the first stage has not been satisfied.

- [46] I would add that the only real connection on this breach is that the utterances were made by Mr. Dupray and that the firearm was found in the same residence when police entered to execute a search warrant. These two events occurred at the same time, so in this way may be temporally connected, but only very tenuously. Apart from that, the connection between the Charter breach and the impugned evidence is too remote or tenuous to trigger s. 24(2). I would end the s. 24(2) inquiry into the firearm at this stage.
- [47] For completeness, however, I will conduct the second stage evaluative inquiry pursuant to the balancing of the three Grant factors in relation the s. 10(b) breach as it relates to both items of evidence.
- [48] Relying upon Choi at para. 98 in particular, the Crown contends there is no contextual or causal connection between the breach of Mr. Dupray's s. 10(b) right to counsel and the discovery of the firearm. To that end, the lack of a causal connection is one aspect of the overall circumstances to be considered in the final balancing exercise: Choi at para. 98.
- [49] In *R. v. Bottomley* at paras. 23-24, Justice Devlin reviewed the remoteness issue of the threshold stage in the context of a s. 10(b) breach for one accused and noted:
- [23] a breach of an accused's s. 10(b) right that on its own is likely too "remote and tenuous" to engage s. 24(2) may nonetheless assist an applicant in satisfying the threshold where a denial of their right to counsel "occurred in the context of one single transaction" involving several other Charter breaches, and which resulted in the discovery of evidence: e.g., *R. v. Moonie*, 2013 BCSC 1866 at para. 70 [Moonie].
- [24] That said, where the requisite (temporal and contextual) nexus exists to engage s. 24(2), the absence of a causal connection between the breach and discovery of evidence may count as a factor militating against exclusion under s. 24(2)'s evaluative component: e.g., *R. v. Cade*, *Ceal*, and *Whaling*, 2023 BCSC 158 at para. 131 [Cade]; *R. v. Lenhardt*, 2019 ONCA 416 at para. 11; *R. v. Griffith*, 2021 ONCA 302 at para. 71 [Griffith]; and *R. v. Choi*, 2021 BCCA 410 at paras. 98-99 [Choi]
- [50] In the case at bar, there is no causal connection between the discovery of the firearm and the s. 10(b) breaches committed by Cst. Dela Torre. On the strength of the court's reasoning in Choi, the s. 10(b) breach remains relevant at the evaluative stage of the analysis. Indeed, the Crown acknowledges that this is an appropriate way to proceed in the circumstances.

The Grant Evaluative Exercise: Exclusion of the Evidence

- [51] Having found that the utterances from Mr. Dupray were obtained in a manner that infringed his s. 10(b) right to counsel, I must now engage in the evaluative exercise mandated by s. 24(2) and objectively determine whether the admission of the evidence would bring the administration of justice into disrepute: *R. v. Reilly*, 2020 BCCA 369 at para. 75, *aff'd* in part 2021 SCC 38; *Bottomley* at paras. 36-40. Despite my finding at the first stage of the analysis for the firearm, I will conduct the Grant evaluative exercise for this item of evidence as well.

i. Seriousness of the Charter-Infringing State Conduct

[52] The first line of inquiry is a review of state conduct considering:

- the degree or gravity of state offending (Grant at paras. 73-74; Harrison at para. 22)
- extenuating circumstances such as the need to prevent the disappearance of evidence (Grant at para. 75)
- whether the breach was committed in good faith or merely technical (Grant at paras. 75, 108; Harrison at para. 22)
- any pattern of abuse (Grant at para. 75; Harrison at para. 25)
- other police conduct, such as an officer's misleading in-court testimony (Harrison at para. 22).

[53] Under this first branch of the evaluative inquiry, the court takes an objective approach to the analysis. Essentially, the question is: how serious were the Charter violations? To determine the level of seriousness, the court must situate the impugned state conduct on a scale of culpability: Le at para. 141; Tim at para. 82. The focus is on the extent to which the state conduct deviates from the rule of law: McColman at para. 57.

[54] In R. v. Beaver, 2022 SCC 54, Justice Jamal, writing for the majority, explains:

[120] The first line of inquiry under s. 24(2) considers whether the Charter-infringing state conduct is so serious that the court needs to dissociate itself from it. This inquiry requires the court to situate the Charter-infringing conduct on a scale of culpability. At one end of the scale is conduct that constitutes a wilful or reckless disregard of Charter rights, a systemic pattern of Charter-infringing conduct, or a major departure from Charter standards. At the other end of the scale are less serious Charter breaches, including breaches that are inadvertent, technical, or minor or those that reflect an understandable mistake. The more severe the state's Charter-infringing conduct, the greater the need for courts to disassociate themselves from it. [Citations omitted.]

[55] I have found that Mr. Dupray's right to counsel pursuant to s. 10(b) of the Charter right was breached. The Crown concedes that the breach was relatively serious. I agree. This case involved a planned arrest with an officer specifically tasked with providing the s. 10(b) rights while other members of the team conducted the safety clearing. There was no evidence proffered to explain this delay. I accept that Cst. Dela Torre would not have been able to provide Mr. Dupray with his s. 10(b) rights as soon as he made entry into the residence, as Mr. Dupray was securing his dogs. However, by the time Mr. Dupray had returned and Cpl. Chamberlain had advised him he was under arrest for possession for the purpose of trafficking, there appears to have been no impediment to providing the s. 10(b) right immediately thereafter.

The Admissions of Mr. Dupray

- [56] Had the arresting officers discharged this s. 10(b) duty, it is questionable whether Mr. Dupray would have made the utterances he did. Moreover, Cpl. Chamberlain's initial caution was not the sort of full-bodied caution that included warning Mr. Dupray that he had the right to remain silent and that anything he said could be used in evidence against him. Cpl. Chamberlain only provided Mr. Dupray with the latter branch of the caution, concerning the use component.
- [57] In my view, the failure to provide Mr. Dupray with his right to counsel at the first available opportunity, in advance of any utterances made by him, is inexplicable. I acknowledge the entry was a dynamic and chaotic affair. But it was quickly quelled and completely under control by the time the dogs were secured, a matter of two to three minutes at most. While not an egregious breach in the line of bad faith, it is also not minimal or technical. This was careless conduct on the part of the officer. I find that for the admissions component of the evidence, the breach of s. 10(b) falls between the middle and upper end of the culpability spectrum and it pulls strongly in favour of exclusion.

The Firearm

- [58] As previously mentioned, there is no causal connection between the s. 10(b) breach and the discovery of the firearm. Mr. Dupray's admissions had nothing to do with locating that item. Indeed, there is no evidence that Cpl. Chamberlain was even aware of the utterances when he located the firearm in the entertainment room as he cleared the lower level of the residence or that the utterances had even been made when the firearm was found. Rather, it was in plain view. Seizure of the firearm was done pursuant to a valid search warrant. The absence of any causal connection between the s. 10(b) breach and the discovery of the firearm militates against exclusion of this piece of evidence under the first step of the Grant analysis: Bottomley at para. 24 and authorities cited therein. Accordingly, the first line of inquiry pulls strongly in favour of admission of the firearm.

ii. Impact of the Breach on the Charter-protected Interests of the Accused

- [59] This branch of the evaluative inquiry focuses on the seriousness of the state's Charter-infringing conduct from the perspective of the accused. The court must examine the interests engaged by the impugned rights, and the extent to which the breaches impacted upon those interests. In Bottomley, Justice Devlin succinctly outlined the approach as follows:
- [78] The court must identify the interests protected by the relevant Charter rights and evaluate "how seriously the breaches affected those interests": see Tim at para. 90. Under this analysis, the court must examine the interests engaged by the infringed right and the degree to which the Charter infringement impacts or intrudes upon those interests: Grant at para. 77. Yet, as Ker J. noted in Moonie, this line of inquiry "encompasses not only the impact of the breach on the accused but also focuses on society's interest in respect for Charter

rights": Moonie at para. 98.

- [79] Impacts of a breach on an accused's Charter-protected interests, like a breach's seriousness, must be situated on a spectrum. Impacts can range from those "that are fleeting, technical, transient, or trivial, to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed": *R. v. Berry*, 2022 BCCA 389 at para. 244, quoting from *Tim* at para. 90. For instance, a search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans their dignity, is more serious than one that does not: *Grant* at para. 78. Placing the impacts of a breach on a spectrum is important because the more serious the impact on the accused's protected interests, the greater the risk that the admission of the evidence may send a signal that Charter rights count for very little, bringing the administration of justice into disrepute: *Grant* at para. 76.
- [80] Although they often work in tandem, and call for a similar methodology, the first and second lines of inquiry are distinct. The Court recently discussed this point in *McColman*:
- [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.
- [Emphasis added.]
- [60] With these principles in mind, I now turn to an assessment of the particular breach at issue on this application. The jurisprudence makes it clear that the purpose of s. 10(b) of the Charter is to provide a detainee with the ability to obtain legal advice relevant to their legal situation. In light of the power imbalance between the state and a detainee, the court must employ a purposive and generous understanding of s. 10(b). The requirement that police effect a detainee's right to consultation with counsel upon detention immediately is meant to ensure that a detainee's decision to cooperate with the police or not is free and informed.

The Admissions of Mr. Dupray

- [61] In the case at bar, the s. 10(b) breach was fairly significant in that Mr. Dupray had no information about his right to counsel or was even offered access to counsel before he made a number of incriminating utterances that could assist in supporting inferences as to knowledge and control, and therefore possession, of the firearm. To that end this failure to provide him with the basics of his right to counsel, and even the right to silence component of the standard police caution, no doubt assisted the police in gathering evidence in the form of the admissions that related to knowledge and possession of the firearm.
- [62] Mr. Dupray may well have inadvertently incriminated himself in the circumstances. It cannot be forgotten that this search warrant was executed in the dead of night. It was chaotic at the start. Dogs had to be subdued. The accused was dressed only in boxer shorts and officers fanned out through his home as they cleared the residence. Considering the totality of the circumstances and the abject failure to properly provide Mr. Dupray with his right to counsel in a timely fashion, I find the second branch of the analysis pulls towards exclusion of Mr. Dupray's admissions.

The Firearm

- [63] The firearm itself is a completely different matter. It was not found as a result of the admissions Mr. Dupray made. Therefore, discovery of the firearm is not causally connected to the s. 10(b) breach. The impact of the breach is not just qualitatively different for this piece of evidence--it is entirely unrelated.
- [64] Taking the sum of the impacts and not the average, I find the overall impact to Mr. Dupray's rights and interests to be moderate. It was not technical, transient, or trivial, but it was not profoundly intrusive either: Tim at para. 91; McColman at paras. 67-68. There was no impact of the s. 10(b) breach on Mr. Dupray's rights insofar as locating the handgun was concerned. The second factor of the Grant analysis therefore pulls strongly towards admission of the firearm.

iii. Society's Interest in Adjudicating the Case on the Merits

- [65] The third factor to be considered is society's interest in adjudication of the case on its merits. This line of inquiry looks at the infringement from the perspective of the public and asks whether the truth-seeking function of the criminal trial process would be better served by admission or exclusion of the evidence: Grant at para. 79; McColman at para. 69. The court must ask "whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial": Grant at para. 82. The following considerations are relevant:
- the reliability of the evidence: Grant at para. 81;
 - the importance of the evidence to the Crown's case: Grant at para. 83; and

- the seriousness of the offence, though this factor "cuts both ways" Grant at para. 84; Harrison at para. 34.
- [66] Where the nature of the Charter breach undermines the reliability of the impugned evidence (for example, where an accused was effectively compelled to speak to the police), this will militate towards exclusion. On the other hand, where the evidence is highly reliable, such as real evidence, its existence and reliability are unrelated to the Charter breaches, and it is essential to the prosecution of serious offences, this will generally militate in favour of admission. Exclusion of relevant and reliable real evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute: Grant at para 81.
- [67] However, admission of real evidence will not be automatic under this branch of the evaluative inquiry simply because the evidence is reliable. Indeed, as Justice Kalmakoff noted in *R. v. Chapman*, 2020 SKCA 11:
- [124] Disrepute to the administration of justice may also result from admitting even highly reliable evidence that deprives the accused of a fair trial or amounts to condonation of unacceptable conduct by the investigatory and prosecutorial bodies. An adjudication on the merits, in a state governed by the rule of law, presupposes an adjudication grounded in legality and respect for longstanding constitutional norms: Le at para 158.
- [125] It is also crucial not to allow societal interest in adjudication on the merits to trump all other interests implicated in the s. 24(2) analysis: Paterson at para 56. In practical terms, the third line of inquiry becomes important when one, but not both, of the first two inquiries pushes strongly towards the exclusion of the evidence. If the first and second lines of inquiry make a strong case for exclusion of the evidence, the third line of inquiry will seldom, if ever, tip the balance in favour of admissibility. But if the first two inquiries provided weaker support for exclusion of the evidence, the third inquiry will weigh heavily in favour of admissibility: McGuffie at para 63; Le at para 142.

[Emphasis added].

The Firearm

- [68] The firearm found in the accused's residence is of considerable importance in the calculus of the societal interest. Society has a significant interest in seeing the adjudication of cases involving firearms, particularly those found in cases tied to drug dealing, and so there are important public policy concerns about eradicating the scourge of illegal firearms from the streets and neighbourhoods of Canadian communities. The safety of the community from the dangers created by the presence of illegal firearms cannot be underscored enough, as Justice Brown noted in his dissenting opinion in *R. v. Omar*, 2018 ONCA 975 at paras. 134-138. A majority of the Supreme Court of Canada allowed the Crown's appeal and restored the conviction in *R. v. Omar*, 2019 SCC 32.

[69] In the case at bar, the firearm is highly reliable physical evidence that is vital to the Crown's case on count #2. Indeed, the Crown has no case on count #2 if it is excluded. The evidence was obtained pursuant to a valid search warrant and as I have already noted, it was in plain view and discoverable without the assistance of Mr. Dupray's admissions. As a result, this line of inquiry pulls very strongly towards admissibility of the firearm. 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 reputé of the justice system.

The Admissions of Mr. Dupray

[70] The incriminating admissions are another matter. While they assist the Crown in establishing knowledge and control of the handgun, they are not essential. While there may be a societal interest in having the statements admitted in order to assist the Crown in proving count #2, the Crown's case will not be gutted on count #2 if the admissions are excluded. As such, I find that this line of the inquiry pulls moderately in favour of exclusion of Mr. Dupray's admissions.

iv. The Final Balancing

[71] As the Supreme Court observed in *Reilly* at para. 2, the balancing contemplated in *Grant* must be conducted only after the court has individually examined each line of the three lines of inquiry and determined the 'pull' on the exclusion or admission of the impugned evidence. My findings for each *Grant* line in the evaluative inquiry on the admissibility of the evidence challenged in this application are set out in the preceding paragraphs.

[72] As previously mentioned, the balancing exercise is a qualitative one, not one determined by mathematical calculations: *Harrison* at para. 96; *Bottomley* at para. 109. And so, the analysis cannot be reduced to a 'two-strikes-and-the-evidence-is-out' formula: *Bottomley* at para. 109, citing *R. v. Omar*, 2018 ONCA 975 at para. 119 (per Brown J.A., dissenting, *aff'd* 2019 SCC 32) and *Choi* at para. 64.

[73] As the Supreme Court noted in *Tim* at para. 98, the overarching question in the balancing exercise is the impact of admission or exclusion on the reputé of the administration of justice:

[98] The final step in the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term reputé of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision (see *Grant*, at paras. 86 and 140; *Harrison*, at para. 36). Each factor must be assessed and weighed in the balance, focussing on the long-term integrity of, and public confidence in, the administration of justice (see *Grant*, at para. 68). The balancing is prospective: it aims to ensure that evidence obtained through a Charter breach "does not do further damage to the reputé of the justice system" (*Grant*, at para. 69). The balancing is also societal: the goal is not to punish the police, but rather to address systemic concerns by analyzing "the broad impact of admission of the evidence on the long-

term reputé of the justice system" (Grant, at para. 70; see also Le, at para. 139).

The Firearm

- [74] There is no direct causal connection between the s. 10(b) breach and the discovery of the handgun, attenuating the gravity of the situation considerably: Choi at para. 98. The evidence of the handgun was not obtained through the s. 10(b) breach and was not found as a result of the admissions made by Mr. Dupray. Rather, police discovered the firearm while clearing the residence pursuant to the execution of a valid search warrant. The only temporal connection between the discovery of the handgun to the s. 10(b) breach was that they occurred at about the same time. This is to say, the handgun was discovered during the same time frame that Mr. Dupray should have been advised of his rights. However, it was not discovered because his s. 10(b) rights were breached.
- [75] In my view, Wong and Truong is a completely different situation to the case at bar. There, Justice Kent found multiple Charter breaches including a wilful and flagrant disregard of the s. 10(b) rights of the accused as they were held incommunicado for approximately six hours pending the execution of a search warrant. The overall course of conduct in Wong and Truong included a deeply flawed, deliberate, egregious course of conduct to deny the accused access to counsel until the search warrant was executed. The facts of this case are not remotely close to those present in Wong and Truong.
- [76] A similar approach by police was used in Rover: the accused was arrested before the police applied for a search warrant, notwithstanding the fact that the police had grounds to do so before they arrested him. The accused was advised of his right to counsel and asked to exercise this right immediately. However, the police delayed access to counsel until they had obtained the warrant and executed it. In their evidence, the officers testified that it was a routine policy to prevent accused persons from talking to counsel until a search warrant had been executed without regard to whether there were public safety issues or preservation of evidence concerns in any given case.
- [77] On appeal, Justice Doherty, writing for the Court, concluded the trial judge erred by understating the seriousness of the state misconduct by failing to connect it to a police practice routinely employed wherein accused persons were denied access to counsel pending the execution of a search warrant: Rover at paras. 40, 42. It was the seriousness of the police misconduct employed as a routine policy that was so alarming and necessitated exclusion of the evidence: Rover at para. 49. Rover is also distinguishable to the circumstances of this case and represents an egregious course of conduct that the police routinely engaged in in that jurisdiction.
- [78] As I have outlined above, all three lines of the Grant inquiry favour admission of the handgun. It is highly reliable physical evidence essential to the prosecution of Count #2, a serious offence. Society has a significant interest in an adjudication of this case on the merits. Only one result can follow from these findings. Namely, I find a reasonable person,

informed of the entirety of the circumstances, would conclude that admitting the firearm found in Mr. Dupray's residence, pursuant to a valid search warrant, rather than excluding it, would best serve the long-term interests of the administration of justice.

The Admissions of Mr. Dupray

[79] The same cannot be said for the incriminatory admissions made by Mr. Dupray prior to being advised of his right to counsel. Indeed, all three lines of the Grant inquiry favour exclusion of this aspect of the evidence. Only one result can follow from these findings. Namely, I find a reasonable person, informed of the entirety of the circumstances, would conclude that excluding the admissions made by Mr. Dupray, rather than admitting them, would best serve the long-term interests of the administration of justice.

Conclusion

[80] In the result, the defence application pursuant to s. 24(2) of the Charter to have the evidence of the handgun excluded is dismissed; the application to have the incriminating admissions made by Mr. Dupray is allowed. The application is allowed in part. As I stated when I gave the result in this case: the statements are out, the handgun is in.

"Ker J."

- [1] The largest package contained 548.45 grams of cocaine in a hard rock form that analyzed as 90% pure cocaine. The other two packages had between 111.38 and 101.23 grams of powdered cocaine. A sample from one container analyzed as being a 65% pure and the other tested as 27% pure cocaine.
- [2] In some respects, a reverse dial-a-dope where the customer attended upon the dealer rather than the other way around.

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