

CANADA / JUDGMENT

R. v. Hayer

2023 BCSC 15

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Supreme Court of British Columbia

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2023 BCSC 15 R. v. Hayer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hayer,

2023 BCSC 15

Date: 20230104

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Registry: New Westminster

Rex

v.

Munroop Singh Hayer

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Before: The Honourable Madam Justice Devlin

Reasons for Judgment re: Arrest/Detention/Access to Counsel

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Place and Dates of Trial:

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August 15-19; 22-24, 2022

September 26-29, 2022

October 17-19, 2022

November 14-16, 2022

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January 4, 2023

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Introduction

- [1] The accused, Munroop Hayer, is charged, together with Jagpal Hothi and Jordan Bottomley, with the first-degree murder of Andrew Baldwin. A fourth accused, Jasman Basran, is charged with being an accessory after the fact. On November 11, 2019, Mr. Baldwin was stabbed to death inside the residence of his friend A.B. in Surrey, BC.
- [2] On this application, Mr. Hayer alleges breaches of his rights under ss. 7, 8, 9, and 10(b) of the Canadian Charter of Rights and Freedoms [Charter].
- [3] First, Mr. Hayer alleges that he was arbitrarily detained in breach of his s. 9 Charter rights. He says the police lacked reasonable and probable grounds to arrest him. Mr. Hayer submits that, in determining whether the police had proper grounds to arrest him, this Court should excise information that, since his arrest, has been found to have been obtained by an invalid order. In addition, Mr. Hayer submits that the police arrested him for purely investigative purposes, and in particular with the purpose of facilitating an undercover operation targeting him and Mr. Bottomley. Mr. Hayer says that, as a consequence of his unlawful arrest, the police search incidental to his arrest was also unlawful and in breach of his s. 8 Charter rights.

- [4] Second, Mr. Hayer alleges that he was denied access to counsel immediately upon his arrest, in breach of his s. 10(b) Charter rights. He submits that the police deliberately delayed his access to counsel in order to facilitate the undercover scenario mentioned above, and intentionally tried to conceal that fact from the Court.
- [5] Third, Mr. Hayer alleges that his unlawful arrest, and the particular design and purpose of the undercover operation in this case, infringed his right to silence under s. 7 of the Charter. He similarly submits that, when viewed as a whole, the conduct of the police officers during his arrest, detention, and the voir dire held for this application undermines the integrity of the judicial process and constitutes an abuse of process in breach of s. 7 of the Charter.
- [6] The Crown submits that both the arrest and the incidental search of Mr. Hayer were lawful and did not infringe either ss. 8 or 9 of the Charter. They also say there is no support for Mr. Hayer's allegation that his s. 7 Charter right to silence was breached.
- [7] The Crown concedes a breach of Mr. Hayer's s. 10(b) rights. However, it submits the delay in providing Mr. Hayer access to counsel was brief and constituted a discrete period of time. It says the nature of the breach thus serves to attenuate its seriousness.
- [8] Finally, the Crown submits there is no basis to engage in a consideration of an abuse of process. Instead, they say the circumstances resulting in the s. 10(b) breach should be considered as part of an analysis under s. 24(2) of the Charter.
- [9] I will begin these reasons with a brief overview of the evidence heard on the voir dire. I do so to provide context for my analysis of the issues raised on this application. I will then consider the alleged Charter violations and the positions of the parties. At that stage, I will canvass the relevant evidence in greater detail.

Background Facts

- [10] On November 11, 2019, members of the Surrey RCMP attended a residence after receiving a 911 call advising that there had been a stabbing. When police attended at the scene, they spoke to the resident of the home, A.B. Upon entering A.B.'s residence, they located the body of Andrew Baldwin. Mr. Baldwin had been fatally stabbed. The RCMP Integrated Homicide Investigative Team ("IHIT") assumed conduct of the investigation, with Staff-Sergeant Jeffery as the team commander.
- [11] IHIT is a specialized section dedicated to investigating homicides. As team commander, S/Sgt. Jeffery was ultimately responsible for all aspects of the investigation, including allocation of resources, assignment of roles, and monitoring the overall progress of the investigation. On this voir dire, S/Sgt. Jeffery provided a comprehensive review of the investigation, including witness statements, surveillance footage, DNA evidence, and phone records and data.

- [12] Among other things, S/Sgt. Jeffery coordinated the plan for Mr. Hayer's arrest with members of the Emergency Response Team ("ERT"), who actually executed the arrest. Mr. Hayer's arrest ultimately occurred on January 24, 2020, in the parking lot of a shopping centre in Surrey, BC.
- [13] Prior to Mr. Hayer's arrest, the police had obtained charge approval for Mr. Bottomley and Mr. Hothi, but not for Mr. Basran. S/Sgt. Jeffery did not seek charge approval for Mr. Hayer at the time. However, as I will discuss, S/Sgt. Jeffery formed the belief, on the entirety of the evidence gathered in the investigation until that time, that he had reasonable grounds to arrest Mr. Hayer pursuant to s. 495 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [14] The operational plan for Mr. Hayer's arrest included a multi-faceted undercover operation targeting both Mr. Hayer and Mr. Bottomley. S/Sgt. Jeffery testified that the focus of the undercover operation was Mr. Bottomley, who police expected would provide further information regarding Mr. Hayer's role in the murder. In other words, the police intended to continue their investigation following what they considered to be the lawful arrest of Mr. Hayer and others.
- [15] The original plan was to arrest both Mr. Hayer and Mr. Hothi in the Kelowna area. However, in the days preceding the arrest, police surveillance revealed that Mr. Hayer and Mr. Hothi had returned to British Columbia's Lower Mainland. S/Sgt. Jeffery was contacted by the surveillance team leader, who expressed public safety concerns due to observations of Mr. Hayer while in the Lower Mainland. S/Sgt. Jeffery communicated these concerns to senior members of the ERT, who then made the decision to assume responsibility for the arrest of Mr. Hayer.
- [16] Several ERT elements, which consist of smaller teams of ERT members, were engaged in the plan to arrest Mr. Hayer. To that end, a number of ERT members testified on the voir dire. For instance, Sergeant Thomson participated in discussions with S/Sgt. Jeffery about whether the circumstances warranted the assistance of ERT. Another member, Constable Peterson, acted as the ground team leader and was generally responsible for preparing for the arrest of Mr. Hayer. Finally, Corporal Penny, Constable Irwin, and Constable Scarpelli were the team or 'element' that actually executed the arrest of Mr. Hayer in the parking lot on January 24, 2020.
- [17] Described briefly, Mr. Hayer's arrest unfolded as follows. Cst. Irwin approached Mr. Hayer as he walked towards his car in the parking lot and advised him he was under arrest. Two cell phones were located on Mr. Hayer, which were then retrieved by an IHIT investigator and subsequently searched. Mr. Hayer was compliant with Cst. Irwin's commands and asked that his hood be pulled up so that he had some privacy, given that it was a busy parking lot in the middle of the afternoon. Immediately upon his arrest, Mr. Hayer requested to speak to a lawyer. Cst. Irwin explained that he would be transferred over to another police officer who would assist. This officer was Staff-Sergeant Lloyd; as part of the arrest plan, S/Sgt. Jeffery had assigned S/Sgt. Lloyd the role of providing Mr. Hayer with access to counsel, and

generally of ensuring that police respected and fulfilled Mr. Hayer's Charter rights.

- [18] S/Sgt. Lloyd was accompanied by Surrey RCMP member Constable MacDonnell. Prior to the arrest, the two officers shadowed the surveillance team, who were monitoring Mr. Hayer's movements. S/Sgt. Lloyd was located in the vicinity of the shopping centre while Mr. Hayer was attending a bank.
- [19] Approximately two minutes passed between the initial arrest and transfer of Mr. Hayer from Cst. Irwin to S/Sgt. Lloyd. Specifically, S/Sgt. Lloyd assumed custody of Mr. Hayer at 2:57 p.m. at the arrest scene. At 2:58 p.m., S/Sgt. Lloyd escorted Mr. Hayer to the back of a marked RCMP car, and at 2:59 p.m. read Mr. Hayer an arrest script, informing him of his rights. Mr. Hayer immediately reiterated his request to speak to a lawyer. As I will discuss in detail later in these reasons, Mr. Hayer did not speak to a lawyer until 4:06 pm.
- [20] All interactions between S/Sgt. Lloyd and Mr. Hayer were audio recorded, except for a period of time while they were inside the Surrey RCMP detachment. Copies of the audio and corresponding transcript were filed as exhibits on the voir dire.
- [21] S/Sgt. Lloyd testified on the voir dire in August 2022 and again in September 2022. The unique circumstances surrounding S/Sgt. Lloyd's testimony will be discussed in considerable detail below, as they relate to both the s. 10(b) and s. 7 abuse of process allegations raised by Mr. Hayer.

Analysis

Issue 1: Were There Reasonable and Probable Grounds for the Arrest of Mr. Hayer?

The Governing Legal Principles

- [22] I begin with a consideration of the legal principles that govern a warrantless arrest. Section 495 of the Code entitles police to make arrests without a warrant. Specifically, s. 495(1)(a) of the Code provides, among other things, that a peace officer may arrest without a warrant a person "who, on reasonable grounds, he believes has committed or is about to commit an indictable offence".
- [23] The leading case on the principles relevant to warrantless arrests remains *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CanLII 125 [Storrey]. Storrey established a two-part test for grounds to justify a warrantless arrest under s. 495 of the Code. Writing for the Court, Justice Cory stated, at 250-251, that:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie*

case for conviction before making the arrest.

[24] More recently, in *R. v. Beaver*, 2022 SCC 54 [Beaver], the Supreme Court of Canada confirmed that the essential legal principles governing warrantless arrests are settled. At para. 72, the Court summarized those principles as follows:

1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint (*R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51; *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 26; *R. v. Tim*, 2022 SCC 12, at para. 24).
2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 17). Subjective grounds for arrest are often established through the police officer's testimony (see, for example, *Storrey*, at p. 251; *Latimer*, at para. 27; *Tim*, at para. 38). This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal (*R. v. G.F.*, 2021 SCC 20, at para. 81; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 4).
3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer (*Storrey*, at pp. 250-51; *Latimer*, at para. 26; *Tim*, at para. 24).
4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism" (*R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at paras. 64-65). Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45 and 47; *MacKenzie*, at para. 63). The arresting officer's grounds for arrest must be more than a "hunc[h] or intuition" (*Chehil*, at para. 47).
5. In evaluating the objective grounds to arrest, courts must recognize that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete" (*R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 750, per Doherty J.A.). Courts must also remember that "[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'" (*R. v. Canary*, 2018 ONCA 304, 361 C.C.C. (3d) 63, at para. 22, per Fairburn J.A. (as she then was), citing *MacKenzie*, at para. 73).

6. "Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime (Chehil, at para. 27; R. v. Debot, [1989] 2 S.C.R. 1140, at p. 1166). At the same time, police do not require a prima facie case for conviction before making an arrest (Storrey, at p. 251; Shepherd, at para. 23; Tim, at para. 24). Nor do the police need to establish that the offence was committed on a balance of probabilities (Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114; see also R. v. Henareh, 2017 BCCA 7, at para. 39 (CanLII); R. v. Loewen, 2010 ABCA 255, 490 A.R. 72, at para. 18). Instead, the reasonable and probable grounds standard requires "a reasonable belief that an individual is connected to the offence" (MacKenzie, at para. 74 (emphasis deleted); Debot, at p. 1166). A reasonable belief exists when "there is an objective basis for the belief which is based on compelling and credible information" (Mugesera, at para. 114; see also R. v. Al Askari, 2021 ABCA 204, 28 Alta. L.R. (7th) 129, at para. 25; R. v. Omeasoo, 2019 MBCA 43, [2019] 6 W.W.R. 280, at para. 30; R. v. Summers, 2019 NLCA 11, 4 C.A.N.L.R. 156, at para. 21). The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest (Chehil, at para. 34; Shepherd, at para. 23; R. v. Ha, 2018 ABCA 233, 71 Alta. L.R. (6th) 46, at para. 34; R. v. MacCannell, 2014 BCCA 254, 359 B.C.A.C. 1, at paras. 44-45; R. v. Rezansoff, 2014 SKCA 80, 442 Sask. R. 1, at para. 28; E. G. Ewaschuk, Criminal Pleadings & Practice in Canada (3rd ed. (loose-leaf)), at § 5:40).
7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest (R. v. Biron, [1976] 2 S.C.R. 56, at p. 72; R. v. Brayton, 2021 ABCA 316, 33 Alta. L.R. (7th) 241, at para. 43; Ha, at paras. 20-23; R. v. Montgomery, 2009 BCCA 41, 265 B.C.A.C. 284, at para. 27; Ewaschuk, at § 5:40).
8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds (Debot, at pp. 1166-67).

[Italic emphasis in the original; underline emphasis added.]

- [25] One principle that emerges from these cases is that the lawfulness of an arrest must be determined with reference to the totality of the circumstances. Accordingly, I will set out at some length the factual circumstances which the Crown says provided the police reasonable and probable grounds to arrest Mr. Hayer. However, before doing so, I will address the preliminary issue raised by counsel for Mr. Hayer with respect to the doctrine of automatic excision.

Does the Rule of Automatic Excision Apply in Assessing Grounds for Arrest?

- [26] In a previous decision, indexed as *R. v. Hayer*, 2022 BCSC 769, Mr. Hayer and his co-accused Mr. Hothi successfully challenged a production order requiring the Fraser Regional Correctional Centre to produce audio recordings and records of phone calls made by an inmate to a phone number ending in the digits 0521. The Crown and police suggest that these phone calls evidence an association between Mr. Hayer and Mr. Hothi. I found the production order was not properly issued.
- [27] The Crown nonetheless cites these calls as a component of the factual matrix that provided police reasonable grounds to arrest Mr. Hayer. By contrast, Mr. Hayer submits that, in analysing the sufficiency of the grounds for his arrest, these calls should not be considered as they were obtained through an invalid production order in breach of his s. 8 Charter rights. In other words, Mr. Hayer asks this Court to import the doctrine of automatic excision to the context of warrantless arrests.
- [28] Automatic excision refers to the removal of improperly obtained information from an Information to Obtain ("ITO") or affidavit. The Court came to articulate the contemporary automatic excision rule in a series of cases in the early-to-mid 1990s: see *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CanLII 52; *R. v. Kokesch*, [1990] 3 S.C.R. 3, 1990 CanLII 55; *R. v. Grant*, [1993] 3 S.C.R. 223, 1993 CanLII 68 [Grant]; *R. v. Wiley*, [1993] 3 S.C.R. 263, 1993 CanLII 69; and *R. v. Plant*, [1993] 3 S.C.R. 281, 1993 CanLII 70.
- [29] In most cases, the doctrine applies to information obtained in breach of the Charter: *R. v. Love*, 2022 ABCA 269 at para. 47, application for leave to appeal to SCC filed, 40427 (3 November 2022) [Love]. Plainly stated, the rule requires "any unconstitutionally obtained evidence [to] be excised from the grounds in support of the authorization or warrant", and "applies uniformly, irrespective of the nature of the breach and whether it is serious or more technical in nature": *R. v. Wawrykiewicz*, 2018 ONCJ 199 at para. 65, aff'd 2020 ONCA 269. The reviewing court must then determine whether the warrant or authorization would have been issued had the improperly obtained facts been excised from the ITO: Grant at 251.
- [30] Some courts have suggested that the automatic excision rule should apply to the grounds of arrest analysis. For instance, in *R. v. Pelucco*, 2013 BCSC 588 [Pelucco], aff'd 2015 BCCA 370, the court reasoned as follows:
- [104] If evidence which is obtained in violation of an accused's constitutional rights cannot be used to contribute to reasonable and probable grounds to support the issuance of a search warrant, I can see no logical reason why such evidence should be allowed to contribute to reasonable and probable grounds for arresting an accused person without warrant and (as an incident to the arrest) searching the accused and his or her immediate surroundings. In both instances, the illegally-obtained evidence is offered as part of the grounds relied on to justify a search.

- [31] However, Pelucco provides little justification for this proposition; its value for the determination of this case is also undermined by developments in the caselaw since it was decided.
- [32] Indeed, as pointed out in *R. v. Latimer*, 2020 BCSC 685 [Latimer], the decision in Pelucco to adopt the search warrant excision doctrine in the context of warrantless arrests "contains no analysis of how the two distinct frameworks are comparable", and does not refer to caselaw in support of its conclusion: Latimer at para. 157. The court in Latimer also emphasized that while Pelucco was affirmed on appeal, the appellate decision "contains no analysis of the application of the automatic excision rule to grounds for arrest and nothing should be read into it as having implicitly done so": Latimer at para. 160. In other words, our Court of Appeal, while generally affirming the decision in Pelucco, has not bound trial courts to the conclusion in Pelucco that automatic excision applies to the grounds for arrest analysis.
- [33] Additionally, the reasoning in Pelucco was persuasively rejected in *R. v. Flintroy*, 2019 BCSC 35 [Flintroy], a decision that the court later echoed in Latimer. In both cases, the court referred to the Ontario Court of Appeal's decision in *R. v. Golub* (1997), 117 C.C.C. (3d) 193, 1997 CanLII 6316 (Ont. C.A.) [Golub] for the proposition that the grounds for arrest and search warrant analyses should be kept separate: Flintroy at para. 14 and Latimer at para. 132. As stated in Golub (at para. 18):

The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

- [34] Accordingly, per Flintroy, automatic excision should not generally apply in the context of grounds for arrest. In the court's words, "there are benefits to having a framework whereby the validity of an arrest is not a matter of post-facto determination such that an arresting officer can reasonably know at the time of the arrest, with some degree of certainty, whether their arrest is valid or not": at para. 45. The court found that the Storrey framework effectively balances the rights of arrestees "with the need of law enforcement authorities to have a workable, practical method for making warrantless arrests in exigent circumstances" or otherwise where obtaining a warrant is not feasible: Flintroy at para. 46.
- [35] I remain mindful that in Flintroy, the court seems to have acknowledged that there may be circumstances in which conduct the police believed or should have reasonably believed to be unlawful at the time of the arrest can be excised from the reasonable grounds analysis: Flintroy at para. 47. However, even if such an exception exists, I do not find that it should apply in the present case. Namely, Mr. Hayer has not argued or adduced evidence to suggest that at the time of his arrest the police knew or should have reasonably known of the

particular legal frailties in the production order that I identified in my previous ruling.

- [36] Finally, the holdings in *Flintroy* and *Latimer* find support in jurisprudence outside of British Columbia. A leading example is the Alberta Court of Appeal's recent decision in *Love*. In that case, the court first noted that the automatic excision doctrine has received criticism for its potentially disproportionate effect, especially where it serves to invalidate early investigative steps: *Love* at para. 57. The court also canvassed arguments that automatic excision may deny the accused a meaningful remedy in certain circumstances, that it may be particularly problematic where there are co-accused, and generally that it can be unclear and counterintuitive: see *Love* at paras. 58-63.
- [37] With these criticisms in mind, the court declined to extend the rule to warrantless arrests for three reasons:
- [89] First, as discussed above, the doctrinal basis for automatic excision is uncertain enough to make extension unwise.
- [90] Second, automatic excision in the warrantless context would be impractical.
- [91] Like other tests for the exercise of warrantless police powers, the *Storrey* test is rooted in the need to balance individual rights and public safety. Unlike the process of drafting an ITO, warrantless powers will often need to be exercised in dynamic situations. This contextual difference affects how the reasonableness standard is applied.
- [92] In warrantless contexts, officers are not obligated to undertake further investigation into the reliability of information in their possession [T]his is because such an obligation would be too onerous and time-consuming, potentially preventing officers from taking action when action is required. [I]t would be unreasonable to expect officers to inquire into the constitutionality of prior investigative steps before acting on the information they yielded.
- [93] Our third reason for rejecting the extension of automatic excision is that doing so would conflict with the *Storrey* test, by which we are bound just as we are bound by the *Grant* test in the ITO context.
- [94] Automatic excision, operating after-the-fact, would nullify the subjective focus of the *Storrey* test by artificially altering the information on which the arresting officer relied at the time. It would distort the objective aspect of the test by shifting the focus away from the factual basis for the officer's action. It would conflict with the Supreme Court's direction that an officer exercising a warrantless power "is entitled to disregard only information which he has good reason to believe is unreliable"
- [38] Given the recent observation by the Supreme Court in *Beaver* that the essential legal principles governing a warrantless arrest are settled, and considering the weight of the recent authorities within and beyond British Columbia, I conclude it would be improper to excise from the grounds for arrest the information obtained by police through the invalid production order in this case.

[39] I will now review in detail the factual circumstances which the Crown says provided police reasonable and probable grounds to arrest Mr. Hayer.

The Evidence Concerning Reasonable and Probable Grounds

[40] S/Sgt. Jeffery, an experienced homicide investigator, was the investigator responsible for the decision to arrest Mr. Hayer pursuant to s. 495 of the Code. S/Sgt. Jeffery provided a detailed account of the numerous steps taken during what was a rapidly developing investigation. The investigation resulted in a substantial body of evidence which, when assessed cumulatively, caused S/Sgt. Jeffery to believe he had reasonable grounds to arrest Mr. Hayer for the murder of Mr. Baldwin. In doing so, S/Sgt. Jeffery was aware he did not have approval from the Crown to charge Mr. Hayer; he was of the view that the absence of charge approval did not impact the reasonableness of his grounds for authorizing the arrest.

[41] Specifically, S/Sgt. Jeffery considered the following information, obtained primarily from witness statements and video footage, in deciding to authorize Mr. Hayer's arrest:

- Crime scene information - A.B., the eyewitness to the incident, provided several statements to the police. He described the incident and stated that he attempted to stop the attack on Mr. Baldwin by hitting the assailant with a machete. Police received a 911 call from A.B. at 4:52 p.m. Prior to the attack, A.B. stated he was told by Mr. Baldwin that he had received a phone call telling him "you're next", which A.B. understood to be a reference to the death of Mr. Baldwin's brother, Keith. As discussed below, the investigation also revealed that Mr. Baldwin owed a drug debt, and that both he and his mother had received threatening messages. A.B. also stated that he believed the assailant was "Sheldon", later identified as Mr. Bottomley. A cellphone belonging to Mr. Bottomley was seized from the crime scene. In addition, police determined that Mr. Bottomley was residing in a residence not far from the crime scene, on Old Yale Road in Surrey.
- Surveillance video in the vicinity of the crime scene and other locations - police obtained surveillance video footage from businesses in the vicinity as well as Surrey traffic cameras. A review of the video footage revealed the progress of a Ford F150 truck from the Scott Town Plaza in Surrey at around 4:30 p.m. to the area of Old Yale Road. There, a person was observed getting picked up in the area of Mr. Bottomley's residence, after which the vehicle proceeded towards the vicinity of the crime scene. The video also revealed a male walking away from where the Ford F150 was parked towards the crime scene, and a few minutes later departing the area and walking with an apparent limp. Another male was also seen in the area. From a review of the Scott Town Plaza video, the police were able to identify a male (Manjot Dhindsa) who provided a statement in which he identified himself and Mr. Hothi in the video. Mr. Dhindsa stated that he only drove Mr. Hothi to the plaza. Further surveillance video confirmed that Mr. Hothi met up with the driver of a Ford F150 at approximately 4:30 p.m. Collectively, this evidence established that Mr. Hothi was picked up by the driver of the Ford F150 and proceeded to the vicinity of Mr. Bottomley's residence on Old Yale Road, before proceeding to the area of the crime scene. Further investigation determined that the Ford F150 was registered to Mr. Basran's father, who confirmed that his son is the usual driver of the truck.

- Search of the Ford F150 - the vehicle was subsequently seized by police and a search revealed DNA belonging to Mr. Baldwin located inside, thus connecting the vehicle and its occupants to the murder. Further results of a production order for Mr. Basran's bank account revealed that he attended Apna Car Care in Surrey on November 12, 2019, to have the car cleaned. Video footage from Apna Car Care confirmed that Mr. Basran attended personally on November 12, 2019.
- General warrant for Mr. Bottomley and search of his residence - on November 19, 2019, police executed a general warrant on Mr. Bottomley which revealed he had significant injuries consistent with the encounter described by A.B. The search of his residence on Old Yale Road located bloody clothing consistent with the type of clothing observed on the video footage from the crime scene vicinity. DNA testing revealed that Mr. Baldwin's and Mr. Bottomley's DNA was located on the clothing. This provided further evidence that Mr. Bottomley was Mr. Baldwin's assailant.
- Statement from Julie McDonald - Ms. McDonald was Mr. Baldwin's mother. The statements she provided, together with a review of her text messages and call records, revealed that in the summer and fall of 2019 she had received death threats from a person using a phone number ending in 0521. Ms. McDonald identified the user of the phone as "Manny" or "Roop". The 0521 number was subsequently determined to be associated with Mr. Hayer. Ms. McDonald also identified "Sheldon" as the person she knew as Jordan, who was a former roommate of Mr. Baldwin's. "Sheldon" and "Jordan" were later identified as names for Mr. Bottomley.
- Statement of Nicole Wagner - Ms. Wagner was Mr. Baldwin's former girlfriend. She stated she also received threats from Mr. Hayer related to Mr. Baldwin's drug debt. She confirmed that Mr. Baldwin was involved in the drug trade and owed some debts, and that at the time before his murder had been in hiding. She also confirmed that Mr. Baldwin had lived with "Yogi" and "Sheldon".
- Statement of Magdalana Bulak - Ms. Bulak was Mr. Bottomley's former girlfriend. She provided two phone numbers for Mr. Bottomley, which were then linked to texts and calls with both Mr. Hayer and Mr. Hothi in the days prior to and on the day of the attack on Mr. Baldwin. She also confirmed that Mr. Bottomley lived in a house on Old Yale Road, was a drug user, and was involved in the drug trade.
- Statement of John Foran - Mr. Foran stated that Mr. Baldwin owed a debt for legal fees paid for him. He stated that "Manny" was Mr. Baldwin's boss in the drug trade, and described the area where "Manny" lived with his parents. This description matched the location of the Hayer family home in Surrey, providing a further basis for believing that "Manny" was Mr. Hayer.
- Statements of Mr. Nair and Mr. Jukes - both of these individuals provided further information regarding Mr. Baldwin's relationship with Mr. Bottomley and their involvement in the drug trade. Mr. Jukes stated that the killer was probably Mr. Baldwin's roommate who lived on Old Yale Road, which was confirmed as Mr. Bottomley's residence.

- [42] In sum, prior to Mr. Hayer's arrest, the investigation had already uncovered an association among Mr. Hayer, Mr. Hothi, Mr. Bottomley, Mr. Basran, and the deceased. The police had evidence available to them suggesting that all were engaged in the drug trade, and that Mr. Baldwin had accrued a drug debt owing to Mr. Hayer. In the weeks and months preceding the murder, Mr. Baldwin's mother and former girlfriend had also received explicit, extortive threats on his life from a person the police had evidence to believe was Mr. Hayer.
- [43] Apart from the above-reviewed evidence, S/Sgt. Jeffery considered an ample body of evidence obtained from various search warrants and production orders for cellphone data and call records. This evidence concerned a phone number ending in 0521 associated with Mr. Hayer, as well as two other phone numbers ending in 2549 and 2456. These latter phone numbers were registered to Mr. Hayer's then-girlfriend, Dasheena Gill. Mr. Hothi was linked to a phone number ending in 6670. A witness had also provided two numbers used by Mr. Bottomley.
- [44] Based on the investigation, S/Sgt. Jeffery believed the above-noted phone numbers could credibly be associated with Mr. Hayer, Mr. Hothi, and Mr. Bottomley, respectively. In my summary of the evidence below, for ease of reference I may refer to the phone numbers as belonging to Mr. Hayer, Mr. Hothi, and Mr. Bottomley, but in doing so mean that the police associated the accused with the devices.
- [45] Described briefly, and when reviewed in chronological order, this evidence provided additional evidence that Mr. Hayer, Mr. Hothi, Mr. Bottomley, and Mr. Baldwin were all engaged in the drug trade. It also provided particular evidence that the accused were in direct communication with each other in the lead up and following the attack on Mr. Baldwin.
- [46] Specifically, the cellphone evidence provided S/Sgt. Jeffery with the following information prior to the day of the attack on Mr. Baldwin:
- October 13, 2019 - Mr. Bottomley exchanged text messages with Mr. Hayer regarding drugs and referenced "Baldy", a known nickname for Mr. Baldwin. This established a link between Mr. Hayer, Mr. Bottomley, and Mr. Baldwin.
 - October 24, 2019 - Mr. Hayer sent Mr. Bottomley a text message about Mr. Bottomley's own debt. The message also described how Mr. Hayer had been trying to assist Mr. Baldwin. This further established a relationship between the two.
 - November 6, 2019 - an intercepted jail call was obtained between an inmate and Mr. Hayer, using the 0521 number. During the call, the 6670 number, associated to Mr. Hothi, was linked into the call. Mr. Hothi was scolded by the others for not obtaining his drivers licence. Again, this established a relationship between Mr. Hayer and Mr. Hothi. On another intercepted jail call with the 0521 number, Mr. Hayer can be heard giving directions to his residence. This information aligned with other information regarding the Hayer family residence in Surrey, providing further evidence that Mr. Hayer used the 0521 number.

- November 8, 2019 - an intercepted jail call to the 0521 number included a woman who can be heard identifying herself. This woman is believed to be Mr. Hayer's girlfriend, Ms. Gill, providing further evidence of the link between Mr. Hayer and the 0521 number. As well, this provides a link between Mr. Hayer and the other phone numbers registered to Ms. Gill.
- November 9, 2019 - at 4:09 p.m., Mr. Baldwin received a voicemail and then a text message from the 0521 number. S/Sgt. Jeffery considered this significant as it aligned with A.B.'s statement about Mr. Baldwin receiving a threatening call days before the incident. This was important because police had information about Mr. Baldwin owing a drug debt to Mr. Hayer. Mr. Bottomley also sent text messages to Mr. Hayer at the 0521 number, in which he indicated he was looking to obtain drugs to sell. These communications provide further evidence that Mr. Bottomley and Mr. Hayer were involved in the drug trade. There was also contact between Mr. Bottomley's and Mr. Hothi's known phone numbers. S/Sgt. Jeffery believed these series of communications established that all of these individuals were engaged in the drug trade, and that Mr. Hayer's role was superior to that of Mr. Hothi, Mr. Bottomley, and Mr. Baldwin.

[47] The cellphone evidence from the day of the attack was as follows:

- Between 2:41 p.m. and 2:45 p.m., several calls were exchanged between the 2549 number, associated with Mr. Hayer through Ms. Gill, and the 6670 number, associated with Mr. Hothi. Call records also revealed that the other number registered to Ms. Gill and associated with Mr. Hayer, ending in 2456, was in frequent contact with Mr. Hothi's 6670 number.
- At 3:47 p.m., a number associated to Mr. Bottomley sent a text message to Mr. Hothi at the 6670 number advising that he would have "4 bills on Wed". At 3:48 p.m., he also sent the same message to Mr. Hayer at the 0521 number. S/Sgt. Jeffery believed these messages referred to a drug debt of Mr. Bottomley.
- Between 4:05 and 4:16 p.m., there were a series of brief phone call communications between the aforementioned phone numbers associated with Mr. Bottomley, Mr. Hothi, and Mr. Hayer, including: a one-minute call between Mr. Bottomley and Hayer; a 30-second call between Mr. Hothi and Mr. Hayer; a 30-second call between Mr. Bottomley and Mr. Hayer; and a 16-second call between Mr. Hayer and Mr. Hothi.
- At 4:19 p.m., there was a message sent on the encrypted messaging application Wickr from a user named Yella01 to a user named Rinaldi187 saying "Don't be on no camera". The recipient replied, "No, I know, I'm cover up to". S/Sgt. Jeffery believed that Mr. Hayer was Yella01 and Mr. Bottomley was Rinaldi187.
- At 4:25 p.m., Mr. Hayer, using the 0521 number, had a 15-second phone call with Mr. Hothi's 6670 number. Video footage from Scott Town Plaza established that Mr. Hothi was in the area of the Surrey Wireless Store at the time and made an 18-second call to Mr. Basran's phone. Cell phone tower data revealed that both Mr. Hothi's and Mr. Basran's phones were in the area of Scott Town Plaza at this time. At 4:33 p.m., the Ford F150 is observed entering the parking lot, and at 4:37 p.m. there was a two-minute call between Mr. Hayer's 0521 number and Mr. Hothi's 6670

number. At 4:40 p.m., Mr. Hothi called Mr. Bottomley, and at 4:42 p.m. the video footage revealed a person from the area of the Bottomley residence on Old Yale Road getting into the Ford F150. S/Sgt. Jeffery believed this sequence established that Mr. Basran, driving the Ford F150, picked up Mr. Hothi from the plaza and together they drove to pick up Mr. Bottomley at his residence. They are then observed proceeding towards the vicinity of A.B.'s residence. During these events, Mr. Hayer remained in cellular communication with Mr. Hothi, establishing his involvement in the unfolding plan.

- At 4:51 p.m., Mr. Hayer, using the 0521 number, had a one minute and 33 second phone call with Mr. Hothi's 6670 number. At 4:54 p.m. Mr. Hothi called Mr. Hayer using the same numbers, but the call went to voicemail. The phone records establish that after the 4:51 p.m. call, all calls to Mr. Hayer's 0521 went to voicemail, and that no outgoing calls or texts were placed. Given this was moments after the attack on Mr. Baldwin, S/Sgt. Jeffery considered this sequence to be further evidence of Mr. Hayer's involvement in the murder.

- Although the 0521 number became inactive after 4:51 p.m., S/Sgt. Jeffery believed there continued to be contact between Mr. Hothi's 6670 number and Mr. Hayer on the numbers registered to Ms. Gill. For example, between 5:21 p.m. and 9:52 p.m., there were nine calls from the 6670 number to the 2456 number, and 4 returning calls. There were also several calls between the 6670 number and Ms. Gill's other number, ending in 2549.

- Throughout the evening of November 11, 2019, there were a series of communications between a TextNow phone number activated by Mr. Bottomley at 5:28 p.m. (originally provided by Mr. Bottomley's girlfriend, Ms. Bulak) and Mr. Hothi's 6670 number. These communications resulted in Mr. Hothi arranging to meet Mr. Bottomley to provide him with some drugs. Mr. Bottomley also attempted to contact Mr. Hayer at the 0521 number without response.

[48] I will now determine whether in the totality of the circumstances described above, S/Sgt. Jeffery had reasonable and probable grounds to authorize the arrest of Mr. Hayer.

Discussion

[49] I found S/Sgt. Jeffery to be a credible witness who presented the details of the Andrew Baldwin murder investigation in a careful and forthright manner. Among other things, he candidly acknowledged weaknesses in the evidence.

[50] I reiterate that Storrey, and more recently Beaver, make clear that the reasonable and probable grounds threshold does not require a prima facie case for conviction before making an arrest: Beaver at para. 72, point 6. When evaluating the objective grounds to arrest, the court must apply "common sense, flexibility, and practical everyday experience": Beaver at para. 72, point 5.

- [51] Upon reviewing the totality of circumstances, I conclude that S/Sgt. Jeffery's subjective grounds for arrest were objectively reasonable. In other words, I am satisfied that S/Sgt. Jeffery had reasonable and probable grounds to believe that Mr. Hayer was responsible, along with others, for Mr. Baldwin's murder.
- [52] In particular, I find that the above-reviewed evidence provided a substantial and objective basis for police to reach several conclusions relevant to Mr. Baldwin's murder. First, they had reason to believe Mr. Baldwin, Mr. Bottomley, and Mr. Hothi were all engaged in the drug trade with Mr. Hayer, and that Mr. Baldwin owed Mr. Hayer a drug debt. They also had reason to believe that differences over that debt had escalated to the point that Mr. Hayer was sending threatening messages to Mr. Baldwin's mother and former girlfriend about Mr. Baldwin, and that at the time of his death, Mr. Baldwin was trying to avoid Mr. Hayer by staying with a friend, A.B. The police had reason to believe that Mr. Bottomley was similarly indebted to Mr. Hayer and Mr. Hothi. Finally, the police could reasonably conclude that Mr. Hayer had maintained extensive communication--as evidenced by the sequence of text messages and phone calls made on November 11, 2019--with Mr. Hothi and Mr. Bottomley prior to and immediately following Mr. Baldwin's murder. That sequence further aligns with surveillance video footage of the parties and the crime scene on that day.
- [53] To that end, I find there is no merit to the suggestion made by counsel for Mr. Hayer that S/Sgt. Jeffery had nothing more than a "hunch" that Mr. Hayer was involved. For instance, I do not accept the submission by defence counsel that the threatening messages sent to Ms. MacDonald and Ms. Wagner in September and October of 2019 were dated and therefore of no relevance to Mr. Baldwin's murder. S/Sgt. Jeffery identified Mr. Baldwin's drug debt to Mr. Hayer as a compelling possible motive for the murder. That conclusion found support in the text messages sent to Mr. Baldwin's mother and ex-girlfriend, together with information from A.B., which collectively established ongoing threats to Mr. Baldwin's life.
- [54] As well, while the police did not know the content of the telephone calls exchanged on the day of the murder by the various accused, in light of the sequence of events reviewed above, it was reasonable for S/Sgt. Jeffery to consider these phone calls in assessing his grounds for arresting Mr. Hayer. Evidence of coordination on the day of the murder among Mr. Hayer, Mr. Hothi, Mr. Basran, and Mr. Bottomley established the opportunity to commit the murder, and the sequence of calls before and immediately after the murder between Mr. Hothi and Mr. Hayer supported a belief that Mr. Hayer was involved in Mr. Baldwin's killing.
- [55] In sum, there was a significant body of evidence upon which S/Sgt. Jeffery could reasonably base his decision to arrest Mr. Hayer for his involvement in the murder of Mr. Baldwin. S/Sgt. Jeffery's grounds went well beyond a hunch or intuition and objectively justified his reasonable belief that Mr. Hayer was involved in Mr. Baldwin's killing. Thus, I am satisfied that S/Sgt. Jeffery's grounds for arrest are justifiable from an objective viewpoint based on compelling and credible information.

- [56] Having determined that the warrantless arrest of Mr. Hayer was lawful, I conclude that Mr. Hayer's detention was not arbitrary. I therefore dismiss Mr. Hayer's allegation of a breach of his rights under s. 9 of the Charter.

Was the Arrest Made for an Improper Purpose?

- [57] Having found that Mr. Hayer's arrest was lawful, I can also dispense with other arguments made by counsel for Mr. Hayer regarding the alleged misuse by police of their arrest powers.
- [58] Mr. Hayer argues that the only reason the police arrested him was to facilitate an undercover operation targeting both him and Mr. Bottomley. They say the fact that the police had not sought charge approval for Mr. Hayer demonstrates that they knew they did not have sufficient grounds to arrest him. Mr. Hayer submits the police viewed the success of the undercover operation targeting him and Mr. Bottomley as imperative to uncovering evidence of Mr. Hayer's role in the murder. Thus, Mr. Hayer argues his arrest was executed solely for an investigative purpose, and thus constituted a misuse of the police powers of arrest under s. 495 of the Code.
- [59] The defence refers to several cases that it says provide examples of police misusing their arrest powers to further their investigation instead of compelling the accused to face charges: *R. v. Duguay* (1985), 50 O.R. (2d) 375, 1985 CanLII 112 (C.A.) [Duguay], aff'd [1989] 1 S.C.R. 93, 1989 CanLII 110; *R. v. Huntley*, 2021 BCSC 149 [Huntley]; and *R. v. Ladouceur*, 2002 SKCA 73 [Ladouceur].
- [60] The general thrust of the defence's submission is obviously true--i.e., the police are not entitled to arrest someone solely for the purpose of investigating them. However, the reliance by the defence on the charge approval standard, and the contention that the police can only arrest someone with the intention that they be charged with a crime, are misguided.
- [61] First, as confirmed in *Storrey*, the police may legitimately investigate an arrestee post-arrest. Doing so benefits society and not infrequently the accused. An otherwise lawful arrest does not become unlawful simply because the police intended to continue their investigation after the arrest. See *Storrey* at 254.
- [62] Second, the police do not need a *prima facie* case for conviction to satisfy the reasonable grounds standard: *Storrey* at 251. While a hunch or mere intuition is insufficient, it is also inappropriate to rely on the Crown's charge approval standard in the grounds for arrest inquiry.

- [63] Indeed, the reasonable grounds and charge approval standards, at least in British Columbia, are clearly distinct. It would be inconsistent with the Storrey framework to suggest that the police did not have reasonable grounds to make an arrest simply because they knew they had not obtained sufficiently cogent evidence of wrongdoing to satisfy the Crown's higher charge approval threshold. This point was concisely made in *M.P.W. v. City of Victoria*, 2020 BCSC 858:
- [239] I agree with the defendants' submission that the Crown's decision not to approve charges does not suggest that the standard of reasonable and probable grounds was not objectively met. The standard for charge approval in British Columbia requires there to be a substantial likelihood of conviction on the basis of proof beyond a reasonable doubt. This standard is significantly higher than that of reasonable and probable grounds, which is lower than the civil "balance of probabilities" standard and does not require the police to demonstrate even a *prima facie* case. Police investigation would be rendered practically impossible if the standard for arrest were as high as the plaintiff suggests.
- [Emphasis added.]
- [64] Similarly, the fact that an arrestee was not charged post-arrest does not, in itself, vitiate the lawfulness of the arrest: e.g., *R. v. McKinnon*, 2013 BCSC 2295 at paras. 100-102. For instance, the Crown is right to point out in its written submissions that the preventative arrest power under s. 495(1)(a) of the Code is a type of warrantless arrest whose lawful purpose is not necessarily to bring about the pressing of criminal charges or to compel the appearance of the accused before the court. Instead, in the case of a preventative arrest, the police are required to release the arrestee--presumably with or without charge--once they are satisfied the continued detention of the person is no longer necessary to prevent the commission of the offence: s. 503(4) of the Code.
- [65] Finally, the cases the defence relies on in support of its position are distinguishable from the circumstances at bar. In *Duguay*, the police testified directly as to their state of mind prior to the arrest. Both detectives agreed that the purpose of the arrest was to investigate the accused by obtaining inculpatory statements and fingerprints. In one officer's words, they arrested the accused to determine "whether they actually did it or not": at para. 16. The court concluded that this purpose was unlawful and did not satisfy the reasonable grounds standard.
- [66] By contrast, in the present case, while the police unquestionably intended to further their investigation of Mr. Hayer after his arrest, it cannot be said that the sole purpose of the arrest was investigative. Given the substantial body of evidence obtained during their investigation, it is readily apparent that the police did not arrest Mr. Hayer only for the purpose of determining "whether he actually did it", as occurred in *Duguay*.
- [67] In the same vein, the cases of *Huntley* and *Ladouceur* are both distinguishable from the case at bar. In each case, the police essentially relied on a 'ruse' by which they intended to investigate the arrestee. In *Ladouceur*, the police unlawfully stopped vehicles along a stretch

of highway on the guise of conducting vehicle safety checks, but with the 'adjunct' intention of searching for evidence of possible unknown crimes, and in particular drug trafficking. Likewise, in Huntley the police unlawfully detained the accused for jaywalking as a ruse to further their investigation for drug-related offences. They had observed the accused engaging in a single hand-to-hand transaction, with no items seen, and decided to follow the accused to "see what happens": at para. 12.

[68] Neither circumstance resembles this case. The detention of Mr. Hayer was not effected on the guise of a minor infraction, as in Huntley, and was not a proverbial 'shot-in-the-dark', as in Ladouceur. Here, the police had already formed the particular view, on the basis of several pieces of information obtained during their investigation prior to the arrest, that Mr. Hayer was a suspect in Mr. Baldwin's murder.

[69] In sum, while the police are not entitled to arrest someone for the sole purpose of furthering their investigation, they are also not required to effect an arrest only when they believe they have sufficient evidence for criminal charges to be pressed against the arrestee. As Beaver reminds us, the police are required to satisfy the well-defined and long-settled standard for reasonable grounds--no more and no less.

Issue 2: Was the Search Incidental to Arrest a Breach of s. 8 of the Charter?

[70] Given my finding that the arrest of Mr. Hayer was lawful, it follows that the search incidental to his arrest was also lawful and did not infringe his rights under s. 8 of the Charter. The validity of the subsequent seizure of the data from electronic devices seized upon Mr. Hayer's arrest are subject to a separate application.

Issue 3: Did the Police Violate the s. 10(b) Implementational Right to Counsel?

[71] Counsel for Mr. Hayer submit that the police deliberately delayed facilitating Mr. Hayer's access to counsel in order to ensure an undercover credibility scenario could unfold as planned. Specifically, before Mr. Hayer received access to counsel, police executed an undercover operation by which Mr. Hayer observed an undercover officer ("UC"), referred to as UC Mike on the voir dire, get 'booked in' at the Surrey RCMP detachment. The intention of the operation was to enhance the credibility of UC Mike once Mr. Hayer would be placed with the officer in the detachment's cells.

[72] Counsel for Mr. Hayer say the execution of the credibility scenario at the expense of Mr. Hayer's s. 10(b) Charter rights formed one part of an overall plan to orchestrate an unlawful arrest, detain Mr. Hayer, and employ an undercover operation to gather evidence to support charges against him. The most troubling submission by Mr. Hayer is that S/Sgt. Lloyd lied to the court when he testified in August 2022 with respect to the post-arrest police conduct, and that he did so in a deliberate attempt to conceal the unlawful actions by himself and other investigators.

- [73] The Crown concedes a breach of s. 10(b) of the Charter arising from the discrete portion of time in which Mr. Hayer waited to be transported to the book-in counter at the detachment post-arrest. They submit the seriousness of this delay is attenuated by a number of factors at play at the time.
- [74] The Crown further submits there is no basis to find S/Sgt. Lloyd deliberately lied to the court. They say issues in his testimony resulted from a lack of memory, along with a reliance on inaccurate notes and other evidence. They submit he made a conscientious effort to correct his testimony, and when confronted with a contrary version of events that he admitted he had inaccurately testified in error.

The Governing Legal Principles

- [75] Section 10(b) of the Charter provides that "[e]veryone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right".
- [76] Section 10(b) imposes both informational and implementational duties on the police. First, it obliges the police to advise a detained person of the right to retain and instruct counsel without delay (the informational duty). If the detained person requests to exercise their right to counsel, the police must then provide the detainee with a reasonable opportunity to speak with counsel (the implementational duty). The police must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to speak with a lawyer, or has unequivocally waived the right to do so. See *R. v. Bartle*, [1994] 3 S.C.R. 173 at 191-192, 1994 CanLII 64 [Bartle].
- [77] As well, the s. 10(b) Charter right is closely linked to (but not coterminous with) the s. 7 right to silence. By facilitating legal advice, s. 10(b), among other things, ensures that persons in police custody can make informed choices about whether to cooperate with the police. As explained in *R. v. Hebert*, [1990] 2 S.C.R. 151 at 176-177, 1990 CanLII 118 [Hebert] (see also *R. v. Sinclair*, 2010 SCC 35 at para. 25):

The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.

The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.

[78] Per s. 10(b)'s text, police must comply with both the informational and implementation duties "without delay". In *Bartle*, the Supreme Court of Canada discussed the general purpose of the right to counsel, and why it is necessary for it to be facilitated "without delay" (at 191):

[W]hen an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination ...

[79] The Court in *R. v. Suberu*, 2009 SCC 33 [Suberu], held that "without delay" means "immediately", and reasoned as follows:

[40] any interpretation of the phrase "without delay" must be consistent with a purposive understanding of the Charter provision in which it occurs. [T]he purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.

[41] A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

[42] The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

- [80] Whether delay in implementing the right to counsel violates s. 10(b) is a factual inquiry; the burden rests on the Crown to show the delay was reasonable in the circumstances: *R. v. Taylor*, 2014 SCC 50 at para. 24 [Taylor], referring to *R. v. Luong*, 2000 ABCA 301 at para. 12.
- [81] To that end, in *R. v. Fan*, 2017 BCCA 99 [Fan], our Court of Appeal examined the practical meaning of the term 'immediately' as used in *Suberu*. The court held that:
- [53] "immediate" is not necessarily synonymous with "instantaneous". Sometimes practical considerations play a role in what is immediate for purposes of s. 10(b), particularly with respect to the implementational duty.
- [54] A police officer's duty is to facilitate access to counsel upon a detainee's request at the first reasonably available opportunity. If a telephone is available and the detainee asks to speak with counsel, the duty to facilitate access may be engaged.
- [55] Where a telephone is available and a detainee asks to speak with counsel, police must grant the request if it would be reasonable to do so. A lack of privacy for the call will not necessarily justify refusal of such a request: *R. v. Luu*, 2006 BCCA 73 at para. 30. On the contrary, failure to give a detainee the option of contacting counsel without privacy may amount to an infringement of s. 10(b), as occurred in *R. v. Bui*, 2005 BCCA 482. The touchstone is reasonableness, given all of the circumstances of the case.

[Emphasis in the original.]

- [82] I will return to a consideration of these legal principles later in my analysis.

The Evidence on the Voir Dire

- [83] As stated earlier, S/Sgt. Lloyd was tasked with the responsibility of ensuring that Mr. Hayer obtained access to counsel in accordance with s. 10(b) of the Charter. On this voir dire, S/Sgt. Lloyd's evidence unfolded in an unusual fashion. He testified over two days in August 2022 regarding his interactions with Mr. Hayer on the day of arrest. Shortly after he completed his testimony, he contacted the Crown advising that he wished to clarify some of his earlier testimony. As a result, S/Sgt. Lloyd returned to testify again in September 2022.
- [84] S/Sgt. Lloyd's evidence was extraordinary, revealing two dramatically different versions of events. Simply put, S/Sgt. Lloyd's first version of events was a false narrative. Most troublingly, but for the admirable diligence of Mr. Hayer's counsel, this false narrative would have likely prevailed.

The August 2022 Version of Events

[85] S/Sgt. Lloyd attended a briefing led by S/Sgt. Jeffery on the morning of January 24, 2020. As discussed previously, the investigative team had developed an elaborate arrest plan for Mr. Hayer and other targets. The plan was to have Mr. Hayer arrested by members of the ERT and then transported to the Surrey RCMP detachment, where an undercover operation targeting Mr. Hayer would take place.

[86] S/Sgt. Lloyd was tasked with the role of arresting Mr. Hayer for the murder of Mr. Baldwin and ensuring that he was provided access to counsel. Accordingly, an arrest script was prepared which explained the reason for the arrest and related rights. The arrest script also contained a "Transportation Warning", which stated as follows:

You will be transported to the Surrey RCMP Detachment where you will be provided an opportunity to call your lawyer to receive legal advice. If you prefer, you have the option of being transported to the nearest RCMP Detachment or police department where you may call your lawyer in private to receive legal advice prior to being transported to the Surrey RCMP Detachment.

[87] S/Sgt. Lloyd was aware of the obligation to ensure Mr. Hayer obtained access to counsel without delay. In order to reduce the potential for delay, the plan was to have S/Sgt. Lloyd ride along with Surrey RCMP Cst. MacDonnell in a marked police car on the day of the arrest. That way, once Mr. Hayer was arrested, he could be transported immediately to the detachment.

[88] The briefing concluded at 7:55 a.m. Subsequent evidence established that at 8:46 a.m., S/Sgt. Lloyd sent a text message to a member of the undercover unit, UC Hunter. I will have more to say about the undercover operation later in these reasons.

[89] At 9:20 a.m., S/Sgt. Lloyd and Cst. MacDonnell began shadowing the surveillance team monitoring Mr. Hayer, so that they would be in the vicinity of where ERT effected the arrest and positioned to assume custody of Mr. Hayer immediately upon his arrest.

[90] At 2:54 p.m., S/Sgt. Lloyd was advised that Mr. Hayer had been arrested by a member of the ERT team outside of the Envision Financial bank, located in strip-mall near the intersection of Highway 10 and 176th Street in Surrey, BC. S/Sgt. Lloyd arrived at the arrest scene minutes later, at 2:57 p.m. S/Sgt. Lloyd then took custody of Mr. Hayer, placed him in the back of the police car, and read the arrest script. Mr. Hayer immediately advised that he wished to contact his lawyer. I pause to point out that counsel for Mr. Hayer concedes that the delay period from Mr. Hayer's arrest until S/Sgt. Lloyd took custody of him and read him his rights was reasonable.

- [91] Upon taking custody of him, S/Sgt. Lloyd used a handheld audio recorder to capture his interactions with Mr. Hayer. S/Sgt. Lloyd also made some notes, although these were sparse in detail and, in many respects, inaccurate. As a result, in order to refresh his memory on this void dire, S/Sgt. Lloyd relied on the transcript of the audio recording created during his dealings with Mr. Hayer. As I will discuss, the reliance on the transcript of the audio contributed to the false narrative that was presented to the court in August 2022.
- [92] When S/Sgt. Lloyd read the arrest script and transportation option, Mr. Hayer indicated he wished to speak to his lawyer right away. It was at this point that S/Sgt. Lloyd first inquired with Cst. MacDonnell whether the nearby community police office ("CPO") could accommodate a private call. S/Sgt. Lloyd and Cst. MacDonnell did not make any such inquiry with the CPO at any point throughout the day prior to Mr. Hayer's arrest. Rather, a brief exchange can be heard on the audio recording in which Cst. MacDonnell tells S/Sgt. Lloyd that "there's not a private room". No further inquiries were made by S/Sgt. Lloyd.
- [93] As such, S/Sgt. Lloyd told Mr. Hayer that he can have a private call with his lawyer at the Surrey RCMP detachment. S/Sgt. Lloyd told Mr. Hayer the detachment "is about 3 minutes away" from the arrest scene. Mr. Hayer responded that he wanted to go "anywhere I can speak to my lawyer right away, in private, with all my legal rights".
- [94] S/Sgt. Lloyd and Mr. Hayer then discussed the possibility of calling counsel from the police car. Mr. Hayer asked how a call in such circumstances would be private. S/Sgt. Lloyd said he could not ensure a private call from the police car because there were people watching "and stuff like that", but added that "we can get you there, as soon as we get there we can get you on the phone with your lawyer". Mr. Hayer repeated that he wanted to speak to his lawyer "right away". As I will discuss below, S/Sgt. Lloyd knew that Mr. Hayer would not be permitted to speak to a lawyer until after the credibility scenario had occurred.
- [95] During his initial testimony, S/Sgt. Lloyd said he did not consider a call from the police car to be a viable option because he and Mr. Hayer were situated in a public area on a busy Friday afternoon. He also added that the police windows were not tinted and that the police car is not soundproof. Accordingly, he reasoned that he could not ensure Mr. Hayer's conversation would be private. Further, S/Sgt. Lloyd said there were risks with letting Mr. Hayer use his work phone to call counsel, and that he would have no control over who Mr. Hayer might call. However, during cross-examination S/Sgt. Lloyd acknowledged that the configuration of the police car--with a barrier between the front and back seats--does provide some privacy, as the barrier makes it difficult to hear what a passenger is saying.
- [96] S/Sgt. Lloyd explained that after he had discussed various options with Mr. Hayer, Mr. Hayer agreed that the best option was to go directly to the Surrey RCMP detachment. On cross-examination, S/Sgt. Lloyd acknowledged that during these discussions he never advised Mr. Hayer that he would not get access to counsel until after the booking-in process. In other words, he never informed Mr. Hayer that his access to counsel at the detachment would not be immediate.

[97] S/Sgt. Lloyd departed the arrest location at 3:10 p.m. and proceeded directly to the Surrey RCMP detachment, arriving there at 3:19 p.m. During the drive to the detachment, the audio recording captured S/Sgt. Lloyd speaking on his cell phone several times. As I will discuss, the evidence ultimately revealed that S/Sgt. Lloyd was speaking with UC Hunter, who was coordinating the undercover operation targeting Mr. Hayer.

[98] S/Sgt. Lloyd said he called the Surrey RCMP detachment cells in advance so they were aware he was bringing someone in custody. S/Sgt. Lloyd can be heard saying "we're good with whatever you want" and then telling Mr. Hayer and Cst. MacDonnell "sounds like it's busy here try to get him in as soon as we can". In another phone call, S/Sgt. Lloyd can be heard saying:

Okay. Um, well it sounds like it's pretty busy. I mean obviously we gotta, we'll wait as long as we can. Gotta get him in touch with his uh, counsel here pretty quick. Um, but we can, we can, if it's busy, yeah, yeah, we don't wanna slow that down.

[99] S/Sgt. Lloyd told Mr. Hayer they would have to wait because "they got a pile of people and they're just, booking people in". When Mr. Hayer asked how the process will work, S/Sgt. Lloyd told him:

as soon as we get a chance, like it's busy we're gonna get you a phone call to your lawyer as soon as we can. And, obviously it's important you get legal advice from him, not me.

[100] S/Sgt. Lloyd described the scene at the detachment when they arrived as busy because police were processing "multiple people into cells". After waiting in the underground parking lot at the detachment for a few minutes, S/Sgt. Lloyd said he went into the cells area to speak with the staff there to determine how long they would have to wait "in the queue" before he could move Mr. Hayer to the booking-in area. S/Sgt. Lloyd did not make a note as to who he spoke with or what was said, and he left his audio recorder in the police car. S/Sgt. Lloyd testified that he spoke to cells staff and said that he "learned that it was busy". Thus, he testified that he "was left with the impression they had booked a couple of people in at the time and that Mr. Hayer was next to come in".

[101] When he returned to the police car, S/Sgt. Lloyd can be heard on the audio recording reporting on what he had seen inside the book-in area as follows:

Shouldn't be too much longer. They're just booking a couple people in right now. So they got counter space I think, for a couple people, so. Yeah, I think we're good to go.

[102] At 3:30 p.m., Mr. Hayer was removed from the police car and brought into the book-in area at the Surrey RCMP detachment's cells. There is no recording of what took place because S/Sgt. Lloyd inadvertently turned off the audio recorder. When Mr. Hayer was brought into the cells area, he was directed to sit on a bench and wait to be processed because the detachment was a "busy place".

- [103] S/Sgt. Lloyd testified that before Mr. Hayer could be provided access to counsel, he had to be booked in. He understood this to be standard policy, especially at a busy detachment like Surrey, to ensure the health and safety of the person who is in police custody. During this process it was determined that Mr. Hayer had a recent leg injury and required medication. S/Sgt. Lloyd explained that fingerprinting and photographing was part of the process, but he decided to deal with that after Mr. Hayer received access to counsel. In addition, S/Sgt. Lloyd was not certain he had authority to take prints or photos because Mr. Hayer was not being charged with an offence.
- [104] At 3:46 p.m., after he was processed at the book-in counter, Mr. Hayer was placed in the private phone room and, after some effort to contact his counsel, Mr. Hayer spoke to counsel at 4:06 p.m. At 4:19 p.m., Mr. Hayer had another short call with counsel. S/Sgt. Lloyd then placed Mr. Hayer in a cell.
- [105] On cross-examination, S/Sgt. Lloyd repeated that there were "multiple people in custody" and they were delayed getting into the cells area because "other people were getting booked in". When pressed as to why he did not ask cells staff to allow Mr. Hayer to use the phone room before booking him in, S/Sgt. Lloyd stated that:
- I walked him in and was working with the cells staff with multiple clients they were dealing with and trying to go through the process that they were - the system that they have in place in Surrey
- [106] When asked about the undercover operation, S/Sgt. Lloyd said that he was aware the plan was to do an undercover operation but said he could not speak to "the purpose and their planning".
- [107] Although S/Sgt. Lloyd was shadowing the surveillance of Mr. Hayer on the day of the arrest, he was unable to provide any details as to when they arrived in the arrest scene, how long Mr. Hayer was inside the bank, and for how long S/Sgt. Lloyd was waiting in the vicinity of the arrest scene, because he made no notes of any of those details.
- [108] During his testimony, S/Sgt. Lloyd agreed that he never told Mr. Hayer at any point that when they arrived at the Surrey RCMP detachment he would have to be booked in before he would be granted access to counsel. Despite the fact S/Sgt. Lloyd knew the Surrey RCMP detachment could be a busy place, he said he never told Mr. Hayer there might be a delay because "at that point I was not aware how busy the cells were, how many people were being booked in".
- [109] S/Sgt. Lloyd was cross-examined about the various phones calls he had with staff at the detachment's cells. He was unable to provide any detail as to who he was speaking with, but maintained that "it's a very busy place" that had to balance the need to process "multiple people". In addition, he explained he did not go into the cells and ask to "jump the queue" in order to facilitate Mr. Hayer's access to counsel. When pressed as to whether there was actually a queue, S/Sgt. Lloyd stated:

Well, I can say there was a queue because when we got to cells, the cell bay area, we had to wait to go in 'cause I was told they were booking people in and going through the entire process.

[110] S/Sgt. Lloyd was aware that there was an undercover operation planned to have a police officer placed in the cell with Mr. Hayer. At the end of his initial cross-examination, S/Sgt. Lloyd stated that he recalled there was one other person being booked in at the counter but could not recall what that person looked like because "I wasn't paying attention necessarily to all the other clients". Further, he could not recall who was in the cell when he eventually placed Mr. Hayer into police cells, but did not think it was the same person who he had seen being booked in before Mr. Hayer. He said he did not recognize the undercover operator.

[111] When asked directly if Mr. Hayer's s. 10(b) rights were delayed in order to facilitate the booking-in of an undercover officer, S/Sgt. Lloyd stated "No, I don't believe so".

The September 2022 Version of Events

[112] As a result of developments that occurred after he testified in August 2022, counsel agreed that S/Sgt. Lloyd should be re-called and subject to cross-examination. As a result of the admirable efforts by counsel for Mr. Hayer, the cross-examination of S/Sgt. Lloyd exposed a version of events that was dramatically different from that provided by S/Sgt. Lloyd in his earlier testimony.

[113] S/Sgt. Lloyd testified in September 2022 that on the evening of August 24, 2022, he emailed the Crown requesting a de-brief regarding his testimony. This had nothing to do with the accuracy of his testimony. He merely sought feedback on how he testified.

[114] On August 26, 2022, S/Sgt. Lloyd received an email from Crown counsel advising him that he might be required to testify again. After receiving the email, S/Sgt. Lloyd became concerned about the accuracy of his testimony. Specifically, he began worrying that he had inaccurately stated at the end of his cross-examination that he did not recognize the person being booked in ahead of Mr. Hayer at the Surrey RCMP detachment.

[115] Accordingly, S/Sgt. Lloyd decided to review the Andrew Baldwin investigative file, and in particular the notes of UC Niall, UC Hunter, and UC Mike. He also reviewed portions of the video footage of the cells area. From that review, S/Sgt. Lloyd determined that he was incorrect when he testified that he did not recognize the person who was booked in while Mr. Hayer sat waiting on the bench in the cells area. In fact, he recognized the person as UC Mike. He prepared a will-say to revise that specific portion of his evidence, but nothing else.

[116] During his second cross-examination, S/Sgt. Lloyd agreed that it is important for police to make thorough, accurate, and fair notes. He also acknowledged that inaccurate notes may cause police officers to provide the court inaccurate evidence.

[117] S/Sgt. Lloyd agreed that in his notes from the morning of January 24, 2020, he had noted the phone number for UC Hunter so that they could communicate as things progressed with Mr. Hayer's arrest. S/Sgt. Lloyd said he did not recall speaking to UC Hunter, but said it was

possible he had done so on the day of the arrest. He also agreed that it was possible the person he was heard speaking to on the phone while driving back to the Surrey RCMP detachment post-arrest was UC Hunter. However, he made no notes about any of the calls. S/Sgt. Lloyd testified that one of the reasons he decided not to make any notes was because he knew what he was saying was being audio recorded.

- [118] When the audio recording of his dealings with Mr. Hayer and the surveillance video footage from the Surrey RCMP detachment were played together, it became apparent that S/Sgt. Lloyd's prior testimony about the situation at Surrey cells was inaccurate. Namely, the surveillance video revealed that the only people in the cells area when S/Sgt. Lloyd arrived with Mr. Hayer were UC Hunter and a few cells staff. In other words, there was no "queue" and no "piles of people"--in fact, there was no reason to delay bringing Mr. Hayer into the book-in area.
- [119] S/Sgt. Lloyd maintained that he could not recall who he spoke with in Surrey cells. However, the video footage and audio recording together revealed that as S/Sgt. Lloyd received a phone call, UC Hunter made a call on his phone while standing inside the empty cells area. This evidence demonstrated that the person S/Sgt. Lloyd spoke with in the cells regarding how "busy" things were was UC Hunter. Further, the video clearly shows that when S/Sgt. Lloyd left the parking garage and went into the cells area to make inquiries, the person he spoke with was UC Hunter. Despite S/Sgt. Lloyd advising Mr. Hayer there was a queue, the video revealed there was no one waiting to be booked in, and that at least two booking-in stations were available. S/Sgt. Lloyd thus acknowledged that he lied to Mr. Hayer when he returned to the police car and told him that the cells were busy.
- [120] S/Sgt. Lloyd had no notes of any discussion with UC Hunter. Although he knew all of his interactions with Mr. Hayer were audio recorded, S/Sgt. Lloyd made no note anywhere in his notebook indicating that what he was telling Mr. Hayer was not accurate, or otherwise noting that in fact the book-in area was not busy. S/Sgt. Lloyd said that it never occurred to him to make a note clarifying that he was coordinating the undercover credibility scenario with UC Hunter.
- [121] As I will discuss later in these reasons, I find S/Sgt. Lloyd's attitude regarding his obligation to make notes astonishing and patently inconsistent with his duties as a police officer--let alone an officer solely tasked with ensuring that police respect Mr. Hayer's Charter rights during and following his arrest.
- [122] Additionally, at the request of Crown counsel, prior to his second cross-examination S/Sgt. Lloyd produced a copy of the text messages between himself and UC Hunter made on January 24, 2020. S/Sgt. Lloyd made no mention of these text messages when he testified in August 2022. He agreed that the text messages revealed he was coordinating with UC Hunter beginning at the scene of the arrest. Soon after reading Mr. Hayer his rights, S/Sgt. Lloyd sent a text message to UC Hunter with an expected arrival time at the detachment. At 3:28 p.m., UC Hunter sent S/Sgt. Lloyd a text message saying "good to go". This was after

they had had several phone calls while Mr. Hayer waited inside the police car in the Surrey RCMP detachment's garage for 12 minutes. On the audio recording, S/Sgt. Lloyd can be heard advising Mr. Hayer "we're good to go". S/Sgt. Lloyd then proceeded to move Mr. Hayer from the police car into the book-in area. S/Sgt. Lloyd agreed that the "good to go" text from UC Hunter gave him permission to move Mr. Hayer into the book-in area as the credibility scenario with the undercover operator was ready to commence.

- [123] S/Sgt. Lloyd said that if UC Mike had not been occupying the booking-in spot, Mr. Hayer could have been processed right away. In fact, the video revealed that at least two booking-in spots were available. He agreed that the fake booking-in of UC Mike was a part of a credibility scenario that needed to occur before Mr. Hayer was placed in the cell with UC Mike. Even though S/Sgt. Lloyd agreed that it would be unfair to delay access to counsel for the benefit of a police investigative technique, he admitted that "we waited on facilitating access to counsel for the undercover". I pause to note that this directly contradicts S/Sgt. Lloyd's testimony in August 2022 with respect to the undercover operation.
- [124] During his second cross-examination, S/Sgt. Lloyd identified UC Hunter and UC Mike on the video in the book-in area. After entering the area with Mr. Hayer, the video shows S/Sgt. Lloyd speaking both to UC Hunter and to Mr. Hayer, who was sitting on the bench waiting to be booked in. However, S/Sgt. Lloyd testified that he had no recollection of what he discussed with either person.
- [125] Counsel for Mr. Hayer pressed S/Sgt. Lloyd as to how it was possible that he did not remember there was an undercover operation connected to the arrest of Mr. Hayer. S/Sgt. Lloyd testified that it was "surprising" to him that he did not remember it, and acknowledged that notes would have assisted his recall. He also admitted that his prior testimony was inaccurate with respect to the busyness of Surrey RCMP detachment's cells on the day of Mr. Hayer's arrest, the general reasons for the delay in processing Mr. Hayer, and what S/Sgt. Lloyd personally observed in the cells area.
- [126] However, S/Sgt. Lloyd disagreed with the suggestion that he deliberately did not make notes of his dealings with UC Hunter because he knew it was inconsistent with his assigned role to facilitate Mr. Hayer's access to counsel. He also disagreed with the suggestion that he only became concerned about his evidence after he learned from Crown counsel that he might be recalled to testify again.
- [127] In re-examination, S/Sgt. Lloyd explained that the reason he made no notes of the undercover operation was because he understood that the 'cover' person would be responsible for noting their planning, their decisions, and how the scenarios unfolded. A cover officer refers to the officer responsible for the overall safety of an undercover operator. As a result, when he testified about how busy it was in the cells, S/Sgt. Lloyd only had his audio recording available to refresh his memory.

- [128] As discussed above, S/Sgt. Lloyd now acknowledges that he lied to Mr. Hayer on the audio with respect to the busyness of the Surrey RCMP detachment and the ability to facilitate Mr. Hayer's access to counsel. However, I note that in his subsequent review of notes made by the undercover team, S/Sgt. Lloyd did not identify any other aspects of his testimony that required clarification.
- [129] In any event, S/Sgt. Lloyd also acknowledged that the evidence established that when he was speaking to UC Hunter on the phone, they were working together to enhance the undercover scenario by making it seem busy in the cells. Indeed, he admitted that he was part of the overall undercover plan and was assisting that plan by creating the false impression to Mr. Hayer that the book-in area was busy. It was readily apparent from the audio and video evidence that he was coordinating with UC Hunter all along to facilitate the credibility scenario with UC Mike.

Evidence of the Undercover Operators

- [130] UC Niall, UC Hunter and UC Mike all testified on the voir dire. Their evidence did little to assist in clarifying what transpired on January 24, 2020, because they also took few notes, if any at all.
- [131] UC Hunter was a member of the RCMP undercover unit and assigned as the cover person for UC Mike. UC Hunter was also responsible for coordinating the credibility scenario using UC Mike and targeting Mr. Hayer. UC Hunter attended a briefing on the morning of January 24, 2020, with other undercover operators, including UC Niall. He had a brief notation of the meeting.
- [132] UC Hunter's evidence was somewhat challenging because, other than a few brief entries, he did not make notes of events that unfolded on the day of Mr. Hayer's arrest. Instead, he testified about what his "common practice" would have been in the circumstances. For example, given the lack of notes to assist his memory, he was unable to say when he arrived at the Surrey RCMP detachment, where UC Mike was within the detachment, or why the undercover operation did not commence as soon as Mr. Hayer arrived at the detachment. Rather, he stated his "common practice" was to arrive two hours in advance of the anticipated scenario.
- [133] The video of the Surrey cells area was played to UC Hunter. In the video, UC Hunter can be seen alone in the empty cells area periodically using one of his two cell phones to either make a call or send a text message. Because UC Hunter had no notes about the unfolding of events, he could not say whether he was using his work phone or personal phone, who he was speaking with, or what they were speaking about. Similarly, when we see UC Hunter speaking to S/Sgt. Lloyd in the video, UC Hunter was unable to provide any details as to what they discussed, again because he made no notes. When it was suggested to UC Hunter that the video and audio played together show that he was using his phone at the same time S/Sgt. Lloyd received a call, he was reluctant to agree. However, after hearing a portion of

the audio where the voice of the speaker on the phone with S/Sgt. Lloyd can be faintly heard, UC Hunter acknowledged it was his voice. Because he had no notes of these events, he was unable to provide any details about what he was telling S/Sgt. Lloyd, nor could he recall if he had any other conversations with S/Sgt. Lloyd.

- [134] UC Hunter also had no recollection of receiving text messages from S/Sgt. Lloyd. He did agree that the print out of text messages provided by S/Sgt. Lloyd was of messages between himself and S/Sgt. Lloyd regarding the undercover scenario. He agreed that it was important for the success of the operation that he be made aware of when Mr. Hayer would be arriving at the detachment, so he could ensure UC Mike was ready. When he wrote in his text "good to go", I find that was to convey that the credibility scenario was ready to proceed.
- [135] UC Hunter could not recall if he spoke to S/Sgt. Lloyd about delaying Mr. Hayer's arrival into the book-in area. He could merely say that it was not his "common practice" to delay any of the actions of the investigative team that he is supporting. When pressed as to why he did not make any notes, UC Hunter explained:

In this instance, and my common practice, I will not make notes of things if - or notes of communications if they don't affect my decision making or alter my decision making to go off course of what my briefing was with my operators at the time. I will not write notes down if it doesn't affect the course of my decisions or my actions or if it doesn't relate specifically to what I'm doing at that time.

[Emphasis added.]

- [136] UC Hunter acknowledged that police officers are responsible, among other things, for making notes of their actions. He understood this to mean that officers must "document details that will affect their actions and decision making". He agreed that if a third party reviewed his notes from January 24, 2020, they would not know what had transpired between himself and S/Sgt. Lloyd.
- [137] UC Niall was responsible for coordinating the undercover scenarios on January 24, 2020, including the scenario targeting Mr. Hayer. He was the cover person for the undercover operation targeting Mr. Bottomley and assigned UC Hunter to act as the cover person for UC Mike. UC Niall had few notes regarding what unfolded on January 24, 2020. For instance, he had sparse notes with respect to his meeting with other undercover officers and his dealings with the undercover operators targeting Mr. Bottomley. UC Niall explained that he does not make notes of de-briefings that occur with undercover operators because "it was the operator's evidence to give as to what transpired during the course of the scenario". By contrast, he understood his purpose as the cover person was to relay information to the investigative team.

[138] Finally, UC Mike was assigned the role of the undercover operator to be placed in the cell with Mr. Hayer. His notes on January 24, 2020, consisted of a brief reference to attending a meeting with other undercover operators from 9:04 a.m. to 9:20 a.m., and then another note made at 3:38 p.m. stating that he was staged in the cells. He acknowledged that, other than the entries in his notebook, he had no memory of what occurred on January 24, 2020.

Other Evidence

[139] RCMP Cst. Long testified that he was working with the mobile street enforcement team on January 24, 2020. At 2:15 p.m., he arrested a male and transported him to Surrey cells at 2:48 p.m., arriving at 3:11 p.m. The male was processed at the book-in counter and lodged into cells by 3:29 p.m. Cst. Long testified that the entire process was faster than usual, as the male did not wish to speak to counsel and there was no requirement for photographs or fingerprints. In sum, there was no delay in processing the male into cells. As I will discuss, the presence of Cst. Long at the Surrey cells does not account for the delay in processing Mr. Hayer.

Discussion

[140] I find that S/Sgt. Lloyd prioritized the undercover operation over Mr. Hayer's s. 10(b) Charter rights. I find that he did so despite testifying that he was aware Mr. Hayer was entitled to access counsel immediately upon his arrest. There are several reasons why I reach this conclusion.

Events Immediately Following Mr. Hayer's Arrest

[141] I find it problematic that S/Sgt. Lloyd made no inquiries regarding the viability of taking Mr. Hayer to the CPO near the arrest scene. He did not do so while he was waiting inside the police vehicle as Mr. Hayer was inside the bank. Although I accept that S/Sgt. Lloyd did not know with certainty that Mr. Hayer would be arrested in the vicinity, it certainly would have been prudent for him to make some inquiries so as to avoid any delay. S/Sgt. Lloyd also did not make meaningful inquiries about the CPO when Mr. Hayer initially expressed he wanted to speak to counsel immediately after his arrest. Instead, S/Sgt. Lloyd and Cst. MacDonnell had a short discussion in which they decided the CPO was not viable, but came to this conclusion without any effort to actually confirm that view with someone at the CPO. As such, the "option" first proposed by S/Sgt. Lloyd post-arrest was then summarily dismissed by him. In my view, it was therefore not actually a meaningful option at all.

[142] I similarly find it unacceptable that S/Sgt. Lloyd dismissed the option of facilitating a call from the police car without careful consideration of the circumstances. I had the benefit of listening to the audio recording of the exchange between Mr. Hayer and S/Sgt. Lloyd. Mr. Hayer repeatedly stated that he wished to speak to a lawyer and at the same time expressed concern about ensuring that call was private. S/Sgt. Lloyd had ample time prior to the arrest to ensure that he brought a secure cellphone by which Mr. Hayer could access counsel in

the police car, and could have determined whether the barrier in the car provided for sufficient privacy. S/Sgt. Lloyd could have also exited the vehicle while Mr. Hayer called counsel rather than remaining in the car, although I accept that doing so may have given rise to legitimate safety concerns. However, rather than considering whether arrangements like these could be made to have Mr. Hayer speak to counsel while in the police car, the option was quickly raised and dismissed by S/Sgt. Lloyd.

- [143] Thus, in my view both of the proposed options for facilitating Mr. Hayer's access to counsel--i.e., at the CPO or in the police car--were illusory. I find that S/Sgt. Lloyd's plan all along was to transport Mr. Hayer directly to the Surrey RCMP detachment in order to facilitate the credibility scenario, and find as a fact that he was not prepared to consider any option that might deviate from that plan.
- [144] To that end, the defence refers to the case of *R. v. Hamdan*, 2017 BCSC 467 [Hamdan], which I find instructive on this issue. In *Hamdan*, the accused was arrested for several terrorism-related offences, including counts for counselling murder. The accused repeatedly stated after being informed of s. 10(b) that he wanted to speak with counsel "right now": *Hamdan* at para. 7. Instead, the accused was first driven to the detachment and underwent a booking-in process, before the police contacted Legal Aid on his behalf approximately 37 minutes post-arrest.
- [145] The court held that the police did not fulfil their implementation duties under s. 10(b) of the Charter for reasons that are analogous to this case. First, the court rejected the Crown's argument that the officers were entitled not to offer their phones for the accused's use at the arrest scene on the basis of privacy and safety. The court noted that the arrest, as in this case, was carefully planned, and the police could and should have brought a secure phone for the purpose of implementation at the scene: *Hamdan* at para. 41. Furthermore, again like in the case at bar, the police did not adequately turn their mind to the possibility of ensuring privacy at the arrest scene for a phone call (e.g., at the back of the transport vehicle): *Hamdan* at paras. 43-44.
- [146] Although these issues alone provide a strong basis for finding a breach of s. 10(b) of the Charter, the police's failures in implementing the right to counsel only worsened when Mr. Hayer arrived at the Surrey RCMP detachment.

Mr. Hayer Arrives at the Detachment

- [147] The Crown concedes the period between 3:19 p.m., when Mr. Hayer arrived at the Surrey RCMP detachment, until 3:31 p.m., when he was processed in the book-in area, constitutes a breach of s. 10(b). I agree but find this period of delay formed part of a continuing course of conduct by S/Sgt. Lloyd that deliberately denied Mr. Hayer access to counsel.

- [148] For one, the delay was exacerbated inasmuch as S/Sgt. Lloyd never considered providing Mr. Hayer access to counsel from the secure area of the garage, even though Mr. Hayer continued to ask for clarification about why he was arrested. The audio recording revealed that Mr. Hayer had been calm, compliant, and polite throughout his detention. There were no identifiable security concerns inside the police garage. Yet, S/Sgt. Lloyd did nothing to address Mr. Hayer's repeated requests to speak to a lawyer.
- [149] I am mindful of the comments by Justice Lamer in *R. v. Rothman*, [1981] 1 S.C.R. 640, 1981 CanLII 23 [Rothman], that sometimes police must resort to "tricks or other forms of deceit" when conducting investigations: at 697. Indeed, it is clear that the "investigation of crime and the detection of criminals is not a game to be governed by the *Marques of Queensbury* rules": Rothman at 697. I thus take no issue generally with the propriety of police resorting to undercover techniques in their investigation of Mr. Hayer.
- [150] However, the issue before me is not whether the police were entitled to provide Mr. Hayer with false information with the purpose of enhancing the viability of their undercover scenario. Rather, the issue at bar is the propriety of S/Sgt. Lloyd prioritizing the undercover operation over his obligation to facilitate Mr. Hayer's access to counsel at the first reasonably available opportunity. I find S/Sgt. Lloyd deliberately failed to do so. To reiterate, I take no issue with the use of trickery or deceit in this case as it relates to the undercover operation, but find it patently unjustified for police to prioritize the success of an undercover operations at the direct expense of an arrestee's constitutional rights.

Mr. Hayer is Moved into the Book-in Area

- [151] The failure by S/Sgt. Lloyd to comply with his constitutional obligations continued once Mr. Hayer was brought out of the Surrey RCMP detachment's garage and into the book-in area. The surveillance video revealed that the only person being booked-in when Mr. Hayer was brought in was UC Mike. Mr. Hayer waited a further 4 minutes while UC Mike was "booked in". In their submissions, the Crown maintained that the video footage only showed a "portion of the booking-in counter". Even if other people may have been at the cells area outside of view of the surveillance cameras, the fact remains that there was no one else using several available booking-in spaces. As mentioned above, the Crown's reliance on the brief attendance of Cst. Logan in the book-in area to account for some of the delay is also without merit. In my view, the video footage clearly shows the Surrey RCMP detachment's book-in area is a spacious location which, at the time of Mr. Hayer's processing, could have easily accommodate more than one arrestee.

Mr. Hayer is Booked In

- [152] Between 3:35 p.m. and 3:45 p.m., Mr. Hayer was booked-in. The Crown submits it was reasonable for S/Sgt. Lloyd to wait until Mr. Hayer had been booked in before providing him access to counsel. I disagree. In my view, S/Sgt. Lloyd's decision to book in Mr. Hayer before facilitating access to counsel was unjustified in the circumstances and contributed to a further delay. I find the following comments by Ker J. in *R. v. Smith*, 2011 BCSC 1695 [Smith], to be applicable to the present case:
- [198] The need to record and mark Mr. Smith's entry into the system and properly document all his possessions as they were removed could have occurred after he had contact with counsel. As I understood the evidence, the interview room used for the purposes of contacting counsel was in the booking-in area. Mr. Smith was locked in that room when he contacted counsel, and Corporal Keen watched him through the plexiglass window. He certainly was not going to be able to go anywhere else in the detachment and was under a measure of control, both in observation and recorded timing. There is nothing in the evidence to support the notion that the administrative act of booking Mr. Smith into cells had to take priority to facilitating access to counsel, apart from convenience to the officers and following usual procedure.
- [199] In the circumstances then, I am satisfied that the further delay in facilitating Mr. Smith's access to counsel, by electing to first conduct the booking-in procedure, is an extension of the initial delay and part of the violation of Mr. Smith's s. 10(b) Charter rights.
- [Emphasis added.]
- [153] The comparison to Smith is apt for several reasons. First, as in Smith, Mr. Hayer immediately requested to speak to his lawyer. As well, Mr. Hayer was likewise not afforded the option to call his lawyer in the police car despite the lack of exigent circumstances justifying delay of his right to counsel. In both cases, the accused's opportunity to speak to counsel was also delayed by the staging of an undercover operation and by a relatively lengthy booking-in process once at the police detachment. Finally, in the present case as in Smith, it can be said generally that the police orchestrated a carefully-planned arrest but, remarkably, seemed to overlook in that planning how the accused's right to counsel would be implemented immediately.
- [154] The Crown further submits that in these particular circumstances the delay can be attenuated. I disagree. The constitutional right to access counsel without delay cannot be displaced by assumptions of impracticality; barriers to access must be proven, not assumed, and proactive steps are required to turn the right to counsel into access to counsel: Taylor at para. 33. S/Sgt. Lloyd may have believed it was standard practice for police to process and book in an accused person immediately upon arrival at the police station. However, delay of the immediate duty to implement s. 10(b) cannot be justified by standard policy, and in the absence of safety concerns or other exigent circumstances, s. 10(b) must be prioritized over the booking-in process: see *R. v. Dill*, 2018 BCSC 2232 at para.

46, citing Smith at paras. 192-199 and R. v. Hayes, 2014 BCPC 109 at para. 29; see also R. v. Tremblay, 2022 BCPC 209 at paras. 50-54. As well, any safety concerns or other exigencies justifying the delay must be 'legitimate': R. v. Suberu, 2007 ONCA 60 at para. 47, aff'd 2009 SCC 33.

[155] I find that S/Sgt. Lloyd chose to prioritize the undercover operation over Mr. Hayer's constitutional right to access counsel. I find the Crown has failed to establish that the delay in implementing Mr. Hayer's right to counsel was reasonable in the circumstances. Accordingly, I find there has been a breach of Mr. Hayer's s. 10(b) Charter right. I will discuss the impact of S/Sgt. Lloyd's inaccurate testimony when I consider Mr. Hayer's allegation of an abuse of process.

Issue 4: Was There a Breach of Mr. Hayer's Right to Silence?

[156] The right to silence is a basic tenet of our legal system and falls within the ambit of s. 7 of the Charter: Hebert at 161; see also R. v. D.M.R., 2014 BCSC 63 at para 31.

[157] Mr. Hayer alleges that his unlawful arrest and the use of an undercover officer in his cell were both an abuse of process and undermined his right to silence under s. 7 of the Charter. As I understand their position, counsel for Mr. Hayer are not alleging that the undercover operator actively elicited information from Mr. Hayer. Rather, they say the breach arises because the undercover operation was designed to undermine Mr. Hayer's right to silence in an effort to obtain evidence to establish grounds to arrest and charge him.

[158] Having found that the arrest of Mr. Hayer was reasonable, I see no merit in the allegation that his s. 7 right to silence was breached by placing an undercover operator in his cell. As mentioned above, Canadian courts have long held that police, in dealing with "sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit": R. v. Oickle, 2000 SCC 38 at para. 66, citing Rothman at 697. I agree with the Crown that there was nothing improper about placing an undercover operator inside a cell with Mr. Hayer.

[159] Accordingly, Mr. Hayer's allegation that his s. 7 right to silence was breached is dismissed.

Issue 5: Does the State Action Constitute an Abuse of Process?

[160] Mr. Hayer argues the state conduct in this case amounted to an abuse of process. Specifically, he says the conduct constitutes a residual abuse of process--i.e., the category of the doctrine which focuses on the impact of the state conduct on the integrity of the judicial process, separate and apart from trial fairness issues. He argues that the police engaged in an elaborate scheme involving an undercover operation geared towards obtaining evidence to support a murder charge against him. As part of this alleged scheme, Mr. Hayer submits the police unlawfully arrested him and deliberately denied him access to counsel. Further, Mr. Hayer submits that in order to conceal this scheme and the role he played in it, S/Sgt. Lloyd created a false narrative on the audio recording, crafted misleading notes, and lied on

the witness stand. He says that the fact that S/Sgt. Lloyd only clarified one aspect of his testimony demonstrates that he was content to have his false version of events prevail. In sum, Mr. Hayer submits that this deliberate set of lies, combined with the other problematic aspects of the investigation, impact directly on the integrity of the judicial process, constituting an abuse of process.

- [161] Earlier in this ruling I determined that Mr. Hayer's allegations of a breach of s. 7 (right to silence), s. 8 (search incidental to arrest), and s. 9 (unlawful arrest) have not been established. However, I have found a breach of s. 10(b) of the Charter for the reasons set out above. A central feature of the breach, and a foundational aspect of Mr. Hayer's abuse of process argument, is the circumstances surrounding the false narrative provided by S/Sgt. Lloyd during his testimony.
- [162] To that end, the Crown submits that any allegation of a breach of Mr. Hayer's Charter rights should be considered under the specifically enumerated right rather than as an abuse of process. In support of their position, they refer to the comments by the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, 1992 CanLII 117 [Généreux]. There, the Court showed a preference for dealing with an allegation of a Charter breach with reference to a specific "legal right" guaranteed by the Charter (i.e., as set out in ss. 8-14) in cases where both a specific legal right and s. 7 are pleaded: *Généreux* at 310.
- [163] The Crown concedes that S/Sgt. Lloyd's evidence was inaccurate with respect to how busy the Surrey RCMP detachment's book-in area was on the day of Mr. Hayer's arrest. However, the Crown says that this inaccuracy can be explained due to his mistaken reliance on the audio recording and lack of notes. When confronted with evidence to the contrary, they submit S/Sgt. Lloyd acknowledged his error. The Crown thus submits such an error does not amount to an intention to mislead the court or conceal improper conduct on behalf of the police.
- [164] I will briefly canvass the legal principles that govern my analysis.

General Legal Principles

- [165] Stated generally, an abuse of process may arise from state conduct that either: (a) compromises trial fairness (i.e., the 'main' category); or (b) does not threaten trial fairness but risks undermining the integrity of the judicial process (i.e., the 'residual' category): *R. v. Babos*, 2014 SCC 16 at para. 31 [Babos], citing *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 at para. 73; see also *Denis v. Côté*, 2019 SCC 44 at para. 7. Put differently, in the context of a s. 7 abuse of process, the doctrine can be invoked for conduct that either affects the fairness of the trial or that is so vexatious or unfair that it "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process": *R. v. Nixon*, 2011 SCC 34 [Nixon] at para. 36, describing *O'Connor* at para. 73. The general governing test is whether compelling the accused to stand trial "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or

whether the proceedings are "oppressive or vexatious": Nixon at para. 40, citing R. v. Keyowski, [1988] 1 S.C.R. 657 at 658-659, 1988 CanLII 74, and R. v. Jewitt, [1985] 2 S.C.R. 128 at 136-137, 1985 CanLII 47.

[166] As explained by the Supreme Court of Canada in R. v. Hart, 2014 SCC 52, the purpose of the residual category of abuse of process is as follows (at para. 113):

In my view, this is where the doctrine of abuse of process must serve its purpose. After all, the doctrine is intended to guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system (R. v. Babos, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 35). Moreover, the doctrine provides trial judges with a wide discretion to issue a remedy -- including the exclusion of evidence or a stay of proceedings -- where doing so is necessary to preserve the integrity of the justice system or the fairness of the trial (ibid., at para. 32). The onus lies on the accused to establish that an abuse of process has occurred.

[167] I remain mindful that in cases where a stay of proceedings is sought as a remedy for an alleged abuse of process, the court must determine, among other things, whether some remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward: Babos at para. 39. However, at this stage I am only determining whether the state conduct at issue put the integrity of the justice system at risk. If I make such a finding, then a consideration of the appropriate remedy will occur.

Discussion

[168] I agree with counsel for Mr. Hayer that S/Sgt. Lloyd's testimony, together with an absence of accurate notes, hindered the ability of this Court to conduct the necessary fact-finding process for the resolution of this voir dire. I also agree that the absence of truthful testimony generally imperils the justice system. However, I am not prepared to find that S/Sgt. Lloyd intentionally deceived the court. I also do not agree that S/Sgt. Lloyd orchestrated the false narrative in an effort to conceal the fact that he failed to comply with his obligation to ensure Mr. Hayer was provided access to counsel in compliance with s. 10(b) of the Charter.

[169] I struggle to comprehend how an experienced investigator like S/Sgt. Lloyd would not have any memory of efforts he made to fulfill his only task of ensuring Mr. Hayer was granted access to counsel. However, I appreciate that the passage of time may affect one's memory; providing testimony in court is also not meant to be a memory test. In my view, that is precisely why police officers must make notes--i.e., so that they may rely on them to refresh their memory as they testify.

The Police Notetaking Duty

[170] I find that the failure to make accurate notes explains how it was that S/Sgt. Lloyd provided inaccurate testimony. The failure of UC Hunter, UC Niall, and UC Mike to make accurate notes contributed to the problem. I find it troubling that S/Sgt. Lloyd never considered

making notes to record what actually unfolded on the day of Mr. Hayer's arrest, so that he could later properly recount for the court what transpired. It is especially troubling that he chose to essentially rely on the content of an audio recording in which he later agreed he was deliberately telling false information to Mr. Hayer. It is also concerning that he thought the responsibility for making notes about matters related to the undercover operation would be done by others. Overall, I find it most concerning that someone in S/Sgt. Lloyd's position would not comprehend the importance of making accurate notes.

- [171] However, S/Sgt. Lloyd was not the only police officer who fundamentally misunderstood the importance of making notes. Indeed, UC Hunter had such sparse notes that he constantly resorted to relying on his "common practice" when testifying. The reliance on his "common practice" was unhelpful, if not arguably entirely meaningless. When police are called to testify about their conduct with respect to criminal investigations (and especially high-profile homicide investigations like the one at bar), the court requires specific evidence pertaining to the particular actions of police. References to their "common practice", without more, will simply not suffice.
- [172] I also find that both S/Sgt. Lloyd and UC Hunter displayed a cavalier attitude towards their responsibility to make accurate notes. Each officer expressed a view that it was not their role to take notes of aspects of the investigation they did not consider important. In particular, UC Hunter said he only takes notes of things that impact on his decision making. A similar view was expressed by UC Niall, who explained that he only takes notes about things he may give in evidence. As this case demonstrates, it was their cavalier view of the duty to accurately record investigative steps that fatally undermined their ability to provide evidence necessary for the adjudication of the issues on this voir dire.
- [173] Illustrative of this problem is S/Sgt. Lloyd's efforts to clarify his testimony. When S/Sgt. Lloyd returned to the stand, the only aspect of his testimony that he clarified was the identification of UC Mike at the book-in counter. He explained that he came to the realization that he knew the individual at the counter after reviewing the notes of the undercover operators and some of the detachment's surveillance video. Given that neither UC Hunter, UC Mike nor UC Niall had any notes to inform S/Sgt. Lloyd about the events that unfolded with respect to the coordination of the undercover scenario, it is understandable that S/Sgt. Lloyd did not identify the other problematic aspects of his testimony. Indeed, he seemed to be genuinely oblivious to the true version of events. Only when he was shown the audio and video produced by the defence was his error exposed.
- [174] The officers involved in this case must understand that the duty of police officers to produce accurate, comprehensive, and contemporaneous notes is essential to the proper administration of justice. The Supreme Court of Canada had occasion to emphasize this point twice in the year 2013 alone. In *R. v. Vu*, 2013 SCC 60, the Court stated as follows with respect to police notetaking [emphasis added]:

[70] Sgt. Wilde admitted in his testimony that he intentionally did not take notes during the search so he would not have to testify about the details. This is clearly improper and cannot be condoned. Although I do not decide here that they are a constitutional prerequisite, notes of how a search is conducted should, in my view, be kept, absent unusual or exigent circumstances. Notes are particularly desirable when searches of computers are involved because police may not be able to recall the details of how they proceeded with the search. ...

[Emphasis added.]

[175] Meanwhile, in *Wood v. Schaeffer*, 2013 SCC 71 [Wood], the Court reviewed the police duty to make notes. Per the Court:

[63] Although it is common ground among the parties that the duties of a police officer include a duty to make notes on the events that transpire during the officer's tour of duty, I recognize that neither side points to a definitive statement of this Court holding as much

[64] However, reports by experienced jurists have concluded that such a duty exists. For example, in their 1993 report to the Attorney General of Ontario a committee made up of experienced counsel and police officers and led by the Honourable G. A. Martin, observed that:

... the duty to make careful notes pertaining to an investigation is an important part of the investigator's broader duty to ensure that those who commit crimes are held accountable for them.

...

... inadequate note-taking, while it can hamper the conduct of the defence, also risks hampering an investigation and/or a prosecution. In short, inadequate note-taking does a disservice to both an accused and the community, [which] is entitled to expect that innocent people will be acquitted and guilty people properly convicted.

[65] In another instance, the Honourable R. E. Salhany considered the significance of police notes in the course of a public inquiry into a death caused by an off-duty officer. He explained the importance of notes in this way:

[Note-making] is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. It is as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses. The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator.

[66] These conclusions, in my view, stand on firm ground. The importance of police notes to the criminal justice system is obvious. As Mr. Martin observed of properly-made notes:

The notes of an investigator are often the most immediate source of the evidence relevant to the commission of a crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate.

[Emphasis in the original.]

[176] The Court concluded with "little difficulty that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation": Wood at para. 67. The Court clarified that this duty, even when not explicitly expressed in statute, is "at a minimum, implicit in an officer's duty to assist in the laying of charges and in prosecutions": Wood at para. 67.

[177] The Court in Wood emphasized that none of its conclusions should come as news to police officers, whose own policies and codes of conduct typically include references to note-making duties: at para. 68. For its part, the RCMP's Code of Conduct, which governs the conduct of the officers in this case, requires officers to "provide complete, accurate and timely accounts pertaining to the carrying out of their responsibilities, the performance of their duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force": Royal Canadian Mounted Police Regulations, 2014, S.O.R./2014-281, Schedule, s. 8.1.

[178] More recently, in *Beaver* the Supreme Court had another occasion to address the issue of the importance of police notes, albeit in the context of a scenario much different than what was before me. The general proposition stated in *Beaver* that "police notes are crucial to the court's ability to meaningfully review the exercise of police power without prior judicial authorization" clearly applies to the present case: *Beaver* at para. 172.

[179] Finally, Mr. Hayer refers to *R. v. Spagnoli*, 2011 ONSC 4843 [Spagnoli], which I find provides a clear example of the dangers posed by inaccurate and incomplete police notes. In that case, the two accused were charged with offences related to an alleged marijuana growing operation. The police began their investigation after receiving a tip from a police officer in another jurisdiction. The tipster said he preferred that his name be kept out of the investigation, but did not make his tip conditional on remaining anonymous. He merely said he had relatives in the area and believed organized crime was involved.

[180] A key investigating officer inaccurately recorded in his notes that the source of the tip was anonymous, although he knew the source's identity. The same officer also repeatedly and inaccurately stated in an affidavit related to the investigation that the source of the information was anonymous. He was found to have lied under oath with respect to the tipster's identity, and stated he would do so again to protect the identity. Meanwhile, another officer deliberately provided the Crown redacted notes that hid the tipster's identity, thereby preventing the Crown (and, by operation of disclosure principles, the defence) from learning the identity.

- [181] The court held as follows with respect to the police notetaking in the case, and ultimately granted a judicial stay of proceedings [emphasis added]:
- [39] Leigh recorded the true source in his notebook but he provided to the crown his redacted notes which eliminated the identity of the true source. Malloy made the false recording in his notes that the source was anonymous. Clearly this constitutes misconduct on the part of Leigh and Malloy
- [48] Malloy and Leigh have not acknowledged their duty to record all relevant information received by them in an investigation in their notes. If the court does not refuse to hear the case, this will be an invitation to the police to continue to record in their notes what they choose and to disclose to the crown, and hence to the defence, what they choose. It is the crown and not the police that is required by the law to decide what is to be disclosed to the defence. In my view a reasonable member of the public fully informed of the facts and of the law would be of the view that the case should be stayed.

[Emphasis added.]

- [182] Unfortunately, the case at bar provides a similar example of inadequate and inaccurate police notetaking, although as I have said I am not convinced in the circumstances before me that S/Sgt. Lloyd deliberately lied to this Court. Of particular relevance, in this case S/Sgt. Lloyd failed to provide a note clarifying that the information he conveyed to Mr. Hayer while in the detachment's garage, as captured on the audio recording, was false. He failed to note that the detachment was in fact empty, and repeated inaccurately during his initial testimony that the detachment was busy. This inaccuracy is especially troubling because the detachment's busyness, and the extent to which the police were or were not able to book-in Mr. Hayer upon his arrival, clearly plays an important role in adjudicating the right to counsel issue engaged on this voir dire. Therefore--absent the defence compilation of the audio and video footage and S/Sgt. Lloyd's admission of his error--the court would have been left with an inaccurate impression of a significant issue in this matter.

Does the State Conduct Amount to an Abuse of Process?

- [183] I agree with counsel for Mr. Hayer that S/Sgt. Lloyd's testimony about how busy it was in cells, anchored in inaccurate notes and a false narrative, posed a grave danger to the proper adjudication of this voir dire.
- [184] However, as stated, I do not accede to the submission by counsel for Mr. Hayer that S/Sgt. Lloyd set out to deliberately mislead this Court. I had the opportunity to observe S/Sgt. Lloyd as the underpinnings of his 'pantomime', as characterized by defence counsel, collapsed before him in the courtroom. I found S/Sgt. Lloyd to be genuinely surprised that he had forgotten such an important component of his actions on the day of Mr. Hayer's arrest. I also accept that he had no independent memory of what took place and relied on the false narrative he had created in the audio recording. When confronted with his error, S/Sgt. Lloyd was contrite and acknowledged that it is difficult to imagine how he could not

recall such important facts. Not only did S/Sgt. Lloyd not have an independent memory of his actions that day; he also had no way in which he could refresh his memory because neither he nor the other officers made "accurate, detailed and comprehensive notes": Wood at para. 65. In sum, while I find the unfolding of events in this case with respect to Mr. Hayer's s. 10(b) Charter right to be immensely troubling, I do not doubt S/Sgt. Lloyd's sincerity or credibility.

[185] As such, I agree with the Crown that the action of S/Sgt. Lloyd should not result in a finding that he intentionally misled the court. To that end, the Crown appropriately contrasts S/Sgt. Lloyd's conduct with that of investigators in *R. v. McKee*, 2020 ONCJ 341 [McKee] and *R. v. Davis*, 2017 ONSC 4775 [Davis].

[186] In *McKee*, the Court found the investigator was evasive and provided internally contradictory evidence regarding an impaired driving investigation. Finding that the investigator's testimony during the trial constituted an abuse of process, the Court made the following observation (at para. 117):

If, as in *Morelli*, unintentionally misleading statements by police constables made in the course of an application for a search warrant has the effect of eroding the public's confidence in the repute of the judicial system, it follows that intentionally misleading statements made in the course of a constable's testimony could only have a similar, if not a greater, impact on the integrity of the system. The result is an abuse of process in the "residual category".

[187] In *Davis*, the Court found false attribution of an exhibit to an accused and misleading testimony by a police officer constituted "precisely the type of state misconduct that undermines the integrity of the judicial process": at para. 52. The court then made the following observation, which applies equally to the matter before me (at para. 57):

The role played by police officers in law enforcement is critical to the maintenance of a society that respects the rule of law. It is difficult to imagine how public confidence can be maintained in the rule of law when police officers present false evidence against accused persons. Our justice system cannot function unless courts can rely on the willingness of witnesses to honour their oath or affirmation, and tell the truth.

[188] I agree with the Crown that the circumstances before me can be distinguished from those in *Davis* and *McKee*. To reiterate: I do not find that S/Sgt. Lloyd lied under oath when he testified before this court, and accept that he had no memory of what specifically occurred. I also understand that his testimony was hampered by a paucity of accurate notes--either those made by himself or the undercover operators engaged in this case.

[189] In addition, I do not agree with the defence submission that the reason S/Sgt. Lloyd decided to review the police file was because he was alerted by other investigators that the Crown had requested video footage of the cells area from the day of the arrest. I find no basis in the evidence to conclude that there was a conspiracy of silence amongst those involved in this case. Rather, I accept S/Sgt. Lloyd's explanation that he decided to check the police file

because, if he was wrong about the person at the book-in counter, he knew it was important to correct the error. In my view, this is consistent with his testimony in August 2022, when he appeared uncertain as to whether he did recognize the person at the counter.

- [190] However, such a finding should in no way be viewed as an endorsement by this Court of S/Sgt. Lloyd's conduct, or that of the various UCs in this case. I remain deeply troubled by what unfolded before me. I consider the police conduct in this case unacceptable; the police simply cannot be left with the impression that their conduct was in any way helpful or sufficient for the adjudication of this matter. In short, I strongly condemn the manner in which the evidence unfolded in this case. In particular, I consider wholly undesirable and inconsistent with fundamental police duties the cavalier attitude displayed by senior investigators like S/Sgt. Lloyd, UC Hunter, and UC Niall with respect to the importance of accurate notetaking practices.
- [191] Yet, I wish to be clear that although I have found S/Sgt. Lloyd intentionally delayed facilitating access to counsel for Mr. Hayer in order to prioritize the undercover scenario, I do not accept the defence submission that S/Sgt. Lloyd lied to the court in a deliberate effort to conceal his actions.
- [192] Given that S/Sgt. Lloyd's actions are directly connected to my findings of a s. 10(b) breach, I find it would be appropriate to consider the consequences of his actions when determining the remedy for the breach pursuant to s. 24(2) of the Charter. It is at that time that this Court will consider the impact of S/Sgt. Lloyd's action on the integrity of the judicial system. I therefore dismiss Mr. Hayer's allegation of an abuse of process.

Summary of Conclusions

- [193] First, I have found Mr. Hayer's arrest to be lawful. In doing so, I declined to apply the automatic excision doctrine to the grounds for arrest as relied on by S/Sgt. Jeffery. Accordingly, I dismiss Mr. Hayer's allegation of a s. 9 Charter breach.
- [194] Second, I have found the search of Mr. Hayer incidental to his arrest was also lawful. Therefore, I dismiss Mr. Hayer's allegation of a s. 8 Charter breach.
- [195] Third, I have found Mr. Hayer's right to silence was not infringed during the undercover operation. I thus dismiss Mr. Hayer's allegation of s. 7 Charter breach.
- [196] Fourth, I have found that Mr. Hayer's s. 10(b) Charter rights were infringed, but have dismissed Mr. Hayer's allegation of an abuse of process pursuant to s. 7 of the Charter.
- [197] The remedy for the breach of s. 10(b) of the Charter will be determined after hearing the submissions of counsel on that issue.

"Devlin J."

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