
CANADA / JUDGMENT

R. v. MacInnes

2020 BCSC 2232

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2232 R. v. MacInnes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. MacInnes,

2020 BCSC 2232

Date: 20201002

Docket: 51914

Registry: Vernon

Regina

v.

Kyle Sayre MacInnes

Before: The Honourable Justice Crerar

Oral Reasons: Voir Dire

Counsel for Crown:

Domenic Maio

Counsel for Accused:

Michael Patterson

Place and Date of Trial:

Vernon, B.C.

September 30, 2020

October 1-2, 2020

Place and Date of Judgment:

Vernon, B.C.

October 2, 2020

I. INTRODUCTION

- [1] This is my oral ruling on the voir dire in this matter.
- [2] The accused Mr MacInnes is charged with one count of possession for the purpose of trafficking contrary to s 5(2) of the Controlled Drugs and Substances Act, SC 1996, c 19.[1] Specifically, the Crown alleges that on Thursday, September 6, 2018, approximately 14 grams of methamphetamine were found in the seat storage compartment of his motor scooter (the "moped").
- [3] Mr MacInnes seeks the exclusion of this evidence under s 24(2) of the Canadian Charter of Rights and Freedoms, based on alleged breaches of three Charter rights:
- a) Section 8: he alleges that the search of the moped storage compartment constituted an unreasonable search and seizure;
 - b) Section 9: he alleges that his arrest constituted arbitrary detention and imprisonment;
 - c) Subsection 10(b): he alleges that he was denied his right to retain and instruct counsel without delay. Specifically, he alleges that the police failed in their implementational duty to allow him meaningful and immediate access to counsel.
- [4] The relevant sections of the Charter are as follows:
- 8. Everyone has the right to be secure against unreasonable search or seizure;
 - 9. Everyone has the right not to be arbitrarily detained or imprisoned;
 - 10. Everyone has the right on arrest or detention;
 - (b) to retain and instruct counsel without delay and to be informed of that right

II. FACTS

A. The witnesses

- [5] The Court heard the testimony of four officers involved in the investigation and arrest of Mr MacInnes.
- [6] The first three officers were members of the Vernon RCMP detachment drug investigation team who were involved in a multi-day surveillance of an apartment residence at 2-3405 21st Avenue in Vernon that they suspected was being used to sell illegal drugs (the "residence"). On September 6th, Constable Catton was the "eyes" of the operation, parked in a tinted unmarked vehicle on the street outside the residence. Corporal Pollock was in charge of the

drug investigation: on September 6th, he was parked about one block away. The third member of the drug investigation team, Sergeant Evans, was also parked nearby. All members of the drug team were connected on a dedicated and encrypted radio channel via devices akin to walkie-talkies.

- [7] All three officers had extensive investigation experience, and extensive experience specific to drug investigations. Corporal Pollock had 17 years' experience as an RCMP officer, and he had been in charge of the Vernon RCMP drug team for five years, with two years also served on the Williams Lake drug investigation team. Sergeant Evans had 27 years' experience as an officer, half of which were focused on drug investigations; he had conducted, in his words, "countless" drug investigations similar to the present. Constable Catton had 11 years' experience as an officer, much of which was focused on drug offences; he had led and participated in many similar drug investigations.
- [8] The fourth officer, Constable Parish, was not a member of the drug investigation team but was called in to assist Officers Evans and Pollock with the arrest of Mr MacInnes. Constable Parish has been a member of the RCMP since 2007, and a member of the Vernon detachment for the past 10 years. It was Constable Parish who read the accused his Charter rights and transported him back to the RCMP detachment. Constable Parish was the officer in charge of the accused at the RCMP detachment. Under her watch, the accused was booked into custody. Also under her watch, the accused communicated his desire to speak to a lawyer, and arrangements were made to that effect.
- [9] The accused himself took the stand at the end of the voir dire. As set out below, his evidence largely agrees with that provided by the officers, and, most particularly, Constable Parish, except in the one key regard of whether Constable Parish asked him if he wished to call another lawyer other than the one he previously had selected.
- [10] Given the fact that the accused agreed with most of the officers' testimony, this present hearing is not, except on perhaps one point, a battle of credibility. That said, I generally believed the evidence of the officers in its entirety. Their testimony was careful, in the positive sense of the word. They readily admitted weaknesses in their investigation and limitations in their observations, and they did not exaggerate. Constable Catton, for example, admitted that on September 5th, he did not witness sufficient short-stay transactions to recommend an arrest (only 4 short visits in the space of 2 hours), and admitted that he did not specifically observe the accused put any drugs in the under-seat storage compartment of his moped. Sergeant Evans admitted that he did not recall the specifics of how the under-seat storage compartment lid opened and did not claim to have heard Constable Parish read the accused's Charter rights. Corporal Pollock did not claim to recall the specific words of Constable Parish's Charter warning to the accused. Constable Parish admitted that she could not recall the specific words of her conversation with the accused with respect to possibly calling another lawyer, and candidly admitted that her notes could have been more complete.

B. The investigation

- [11] The residence had been the subject of investigation for at least five months, albeit not five solid months. A confidential informant had advised the police that the residence was being used to sell drugs. The two occupants of the residence were known to police with respect to the drug trade. In April 2018, an undercover officer had purchased illegal drugs from one of the target occupants of the residence in the alley behind the residence.
- [12] September 6th was the culmination of seven previous days of active surveillance on the residence, approximating 17 hours, by the Vernon RCMP drug team. During that time there were 38 unique visits by individuals or groups of individuals. Those visitors would go to the front door of the residence; the door would open, and the visitors would be let in. Sometimes the primary targets of the investigation -- the occupants of the residence -- were seen opening the door. Those visits would last a matter of mere minutes: inconsistent with a social visit or a package delivery, and consistent with a brief drug transaction. Constable Catton recognized a few of the visitors from his past drug investigations.
- [13] Mr MacInnes was not the target of the investigation. On September 6th, the police were lucky, and Mr MacInnes unlucky. It was the intention of the police to observe a series of individuals visiting the residence for a short period of time and then leaving, to establish evidence of a pattern of drug trafficking. Once the pattern was re-established for that day, the police intended to arrest one of the alleged purchasers, charge that person with mere possession, and use the discovery of the illegal drugs on that person as the basis for obtaining a search warrant of the residence. By arresting a later visitor, the police would also avoid disrupting the evidentiary pattern of high-volume short-stay visits ongoing during the day.
- [14] Mr MacInnes was the 10th or 11th visitor to the residence that day, of a total of 28 unique visits that day. Constable Catton observed him arrive on his moped. He walked to the front door of the residence, entered, stayed approximately two or three minutes, and left. Photographs show the accused with a phone in his hand, but no visible drugs. At the same time, his clothes were baggy, and any drugs would not necessarily be visible.
- [15] Constable Catton described this transaction to his team. The team decided that the accused would suit their purposes perfectly. As the 10th or 11th visitor, there was a sufficient pattern of short visits consistent with drug transactions that day. The fact that Mr MacInnes was alone, and on a moped rather than in a car was also optimal. It would make drugs easier to find and avoid any ambiguity that the drugs were those of another person in the vehicle.
- [16] Mr MacInnes drove away in the moped. Corporal Pollock and Sergeant Evans followed in their unmarked vehicles. While they followed, they called for backup assistance from Constable Parish. Corporal Pollock turned on his siren and light and stopped Mr MacInnes. Constable Parish arrived soon thereafter, in her marked police car. Sergeant Evans was caught at a red light and arrived a few moments later.

- [17] Corporal Pollock advised Mr MacInnes that he was under arrest for simple possession of drugs. He conducted a pat-down of the accused and handcuffed him. He did not find any drugs on the person of the accused.
- [18] When Constable Parish arrived, she said that she recognized Mr MacInnes from past dealings. Her check on the police car computer indicated that Mr MacInnes had several outstanding warrants. She told Mr MacInnes that he was now also under arrest for these outstanding warrants. At that point, Constable Parish advised him of his Charter rights, reading verbatim off the standard-issue "Charter card".
- [19] As Corporal Pollock found no drugs on the person of the accused, he turned his attention to the storage compartment of the moped under the seat. Before the police searched the storage compartment, however, Sergeant Evans communicated back to Constable Catton, who was still monitoring the residence outside the door. Sergeant Evans asked Constable Catton if he had observed Mr MacInnes open the moped seat storage compartment after leaving the residence. Constable Catton confirmed that he had, although he did not see specifically whether he had put anything inside.
- [20] At that point, the police concluded that they had reasonable grounds to suspect that drugs were stored in the moped seat storage compartment. Sergeant Evans asked Mr MacInnes how to open it. At first, Mr MacInnes claimed not to know. Sergeant Evans then said words to the effect that he would have to try to force it open. At that point, Mr MacInnes indicated that the storage compartment door would open if the keys were turned to the right in the ignition. Sergeant Evans did so, and the storage compartment door popped up.
- [21] In the storage compartment, Sergeant Evans saw a baseball cap and what he called a "murse": a portmanteau or "man's purse". He moved those two items on top and saw a plastic bag containing approximately 14 grams of what appeared to be, and what turned out to be crystal methamphetamine.
- [22] At that point, the officers concluded that the amount of methamphetamine warranted the more serious charge of possession for the purpose of trafficking.
- [23] By this point, the accused was in the back seat of Constable Parish's police car. Constable Parish made a few telephone communications with respect to the owner of the moped and its impoundment.
- [24] She then turned her attention to the accused. Given the change in the jeopardy that he faced, she listed each charge against him, including possession for the purpose of trafficking. She asked him if he understood. Mr MacInnes said that he did understand, but argued that the drugs were for his personal use. She then read from the Charter card again. She asked him if he understood that he had a right to legal counsel and to legal aid. He responded, "Yes". She asked him if he wished to contact a lawyer. His response was, "Yes". She asked if he wanted to contact a specific lawyer. He answered, "Yes: Nick Jacob." Finally, she cautioned Mr MacInnes of his right not to speak to her or the police. He again indicated

that he understood.

- [25] In his testimony, Mr MacInnes confirmed that he had specified Nick Jacob because Mr Jacob had previously assisted him with legal matters. I am satisfied that Mr MacInnes did in fact desire to speak to Mr Jacob specifically as his past lawyer and that he clearly communicated that desire. He was not simply uttering the only lawyer's name he knew: rather, he was indicating that he did not want to speak to just any lawyer.
- [26] Constable Parish then drove Mr MacInnes back to the RCMP Vernon detachment. The RCMP detachment was very close to the arrest location: only about 5 minutes drive. The booking process took some 10 minutes. Constable Parish asked the cell guard to telephone Mr Jacob and tell him of Mr MacInnes's desire to speak to him. She confirmed that it was usual in the Vernon detachment for officers to ask the guard to place the call to counsel while the officers attended to the accused. She also confirmed that this process frequently occurred and that there was generally no problem with this process. Specifically, she confirmed that Mr Jacob was frequently called, often multiple times a day, and would usually call his clients back in due course.
- [27] The guard reported that she had telephoned Mr Jacob's number. He was not in. She heard his voice message and left a message to call the RCMP Vernon detachment.
- [28] Constable Parish testified that while she was walking Mr MacInnes to the cell after processing him, she asked him if he wanted to call another lawyer. Mr MacInnes said words to the effect of, "No, I'll wait for Nick." While she did not have a note of the conversation, and could not recall the specific words, she had a distinct recollection of walking down the hall with the accused when this exchange took place. I will return to this conversation in a moment.
- [29] Constable Parish admitted that she took no proactive steps after that alleged conversation to follow up whether Mr Jacob did, in fact, call back to the detachment, or whether the accused did speak to Mr Jacob or another lawyer. She admitted that she did not tell the next officer on duty about the voicemail to Mr Jacob, or that the accused had not yet spoken to a lawyer.
- [30] That said, as stated, Constable Parish had an expectation based on specific experience that Mr Jacob or a colleague would soon call back to the RCMP detachment and speak to the accused. Constable Parish noted that many persons brought into the Vernon RCMP detachment expressed a desire to speak to Mr Jacob, a well-established local criminal lawyer. Constable Parish confirmed that the RCMP detachment left messages for Mr Jacob on a daily basis, and Mr Jacob called his clients back in a timely manner. She approximated three such calls a day to and from Mr Jacob for his clients.
- [31] Constable Parish told the accused that he would have to appear in court the next morning on his outstanding warrants. The accused spent the evening in the cell at the detachment.

- [32] There is no allegation that the police tried to interrogate Mr MacInnes during this time, or that any evidence was gathered from him that evening.
- [33] It is uncontroversial that Mr MacInnes did not speak to Mr Jacob or any other lawyer that evening or early the next morning. He did not actually speak to Mr Jacob until the next morning. While Mr MacInnes's memory is, by his own admission, foggy, he believes that he spoke with Mr Jacob at the Vernon Courthouse, where Mr Jacob was serving as duty counsel.
- [34] Mr MacInnes largely agrees with the police testimony. He admits that he briefly visited the residence that day and that he purchased the drugs in question, albeit for personal use. He agrees that Constable Parish read him his Charter rights. He said that he "did but he didn't" understand that he was initially charged with simple possession, and then possession for the purpose of trafficking. From this, I infer that he does not dispute that he was advised that he was being charged with the latter, more serious defence. He confirms the narrative of his arrest and conveyance to the RCMP detachment. He confirms that he was told that Mr Jacob was not in, but that the guard had left a message.
- [35] The sole point of material dispute is the alleged conversation in the hallway between Constable Parish and Mr MacInnes. Mr MacInnes does not believe that Constable Parish asked him whether he wished to speak to another lawyer, and he does not believe that he said words to the effect of, "I'll wait to speak to Nick".
- [36] I found Mr MacInnes to be a generally honest witness, who was trying his best to recall the events of over two years ago. This honesty was evidenced by his frank admission that he had very limited recall of the events of September 6, 2018.
- [37] He admitted that he could only remember "pieces" of what happened. He frankly admitted that he was "in an addiction stage" at the time of his arrest, and that, indeed, he was "high" at the time of his arrest. He did not adamantly deny that Constable Parish invited him to speak to other counsel, or that he declined to do so. The strongest he could recall on this point was that he was "pretty sure". Ultimately, he said that he was "not sure", and this is my conclusion as well. On balance, I accept the evidence of Constable Parish that she did suggest or offer the accused the opportunity to speak to another lawyer and that he communicated his desire to wait for Mr Jacob, rather than to speak to another lawyer.

III. DISCUSSION AND DECISION

A. Did the arrest and detention of the accused violate his ss 8 or 9 rights?

- [38] Mr Patterson, counsel for the accused, concedes, responsibly, that if the Court finds that the s 9 right was not violated, the s 8 breach argument will also fail. I will consider these two interrelated alleged breaches together.
- [39] Mr Patterson argues that the police did not have reasonable grounds to detain or arrest the accused. The arresting officer's decision to search the storage compartment was based solely upon Constable Catton's observation that the accused had "fumbled around" the storage

compartment. Constable Catton admitted that he did not see the deposit of drugs into the compartment, or any drugs at all in the possession of the accused. Constable Catton could not recall how the storage compartment opened, or whether the accused had opened the storage compartment by turning the key in the ignition slot. Accordingly, Mr Patterson argues that the officers acted only on intuition and subjective belief, and lacked objectively reasonable grounds to search and arrest the accused.

- [40] In the recent case of *R v Aeichele*, 2020 BCSC 298, GP Weatherill J provides a useful summary of the ss 8 and 9 Charter principles guiding whether the police may conduct a search and detain an individual:
- [61] Section 8 of the Charter does not protect against all encroachments of a person's right to privacy. Its goal is to protect the public from arbitrary state action by balancing the public's interest in being left alone against the state's interest in investigating crime. It is an objective standard. In most cases, the state's interest in detecting and preventing crime begins to prevail over an individual's privacy interests when credibly-based probability replaces suspicion: *R. v. Chehil*, 2013 SCC 49, at para. 22.
- [62] The objective justification based on reasonable suspicion must be assessed cumulatively against the totality of the circumstances, must be fact-based, flexible and grounded in common sense and practical everyday experience. Generalized suspicion is not enough. The reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so: *Chehil*, paras. 29-30 and 32.
- [63] In *R. v. Bracchi*, 2005 BCCA 461, the Court of Appeal held at paras. 20-21, that the proper test was whether the totality of the circumstances upon which the Crown relied as objective justification for arrest when considered cumulatively, amounted to reasonable and probable grounds. The question is whether a reasonable person standing in the officer's shoes and considering the officer's training, knowledge and experience constituted objectively reasonable grounds that an offence was taking place: *R. v. Juan*, 2007 BCCA 351 at para. 27; *R. v. Jir*, 2010 BCCA 497 at para. 24; *R. v. Luong*, 2010 BCCA 158 at para. 18.
- .
- [70] For the arrest to be valid, arresting officers must have believed that the accused were engaged in committing an indictable offence. The standard of proof is that of reasonable probability, that is, the arresting officers must subjectively have reasonable and probable grounds to arrest and those grounds must be justifiable from an objective point of view: *R. v. Storrey*, (1990), 53 C.C.C. (3d) 316 at p. 324 (S.C.C.); *R. v. Tran*, 2007 BCCA 491 at para. 6.
- [76] In *R. v. Chehil*, 2013 SCC 49 at para. 29, the Court offered the following guidance concerning the reasonable suspicion standard:

[29] Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience. A police officer's grounds for reasonable suspicion cannot be assessed in isolation.

[Citations omitted]

[77] Assessing whether the reasonable suspicion standard has been met should be guided by common sense, flexibility and practical, everyday experience applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.

[78] Police have the power to detain for investigative purposes on objectively reasonable and probable grounds: Mann, at para. 70. What is objectively reasonable depends on the totality of the circumstances.

[41] Mr Patterson relies significantly on R v Oyston, 2019 BCSC 264. There, the Court found that the officer lacked reasonable and probable grounds for the arrest, and excluded the evidence. The officer had observed a van travelling slowly. It stopped in the middle of the road and had a brief transaction with an individual on a skateboard. The officer could not see drugs specifically exchanged. Based upon this single transaction, the officer arrested the operator of the van and conducted a warrantless search that revealed drugs. The Court found that the officer had limited experience in hand-to-hand drug transactions and that the circumstances of the transaction were not sufficient to establish reasonable grounds for arrest.

[42] At paras 84 and 91-97, Oyston provides a useful summary of the law applicable to warrantless arrests, which law is accepted by both Crown and defence:

[84] Section 495 (1) (b) of the Criminal Code authorizes a peace officer to arrest without a warrant if that officer has reasonable grounds to believe a person has committed an indictable offence. The burden is on the Crown to establish both the arrest and the search incident were lawful. R. v. Storrey, [1990] 1 S.C.R. 241, established a two-part test to establish reasonable grounds for an arrest without a warrant. Mr. Justice Cor[y] explained that the first step requires the arresting officer to have a subjective, personal belief that there are reasonable grounds for the arrest. The second part requires objective justification for the officer's subjective belief: at para. 17.

[91] There is a two-part test to establish reasonable grounds for an arrest without a warrant. The first requirement is that the arresting officer "have a subjective, personal belief that there are reasonable grounds for the arrest"; the second requirement is "objective justification" for the arrest (R. v. Messina, 2013 BCCA 499 [Messina] at para. 20, citing to Storrey at 250-251).

- [92] The assessment of objective justification engages the query of whether a reasonable person who is "standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest." (Messina at para. 20, citing to Storrey).
- [93] The test requires a reasonable probability or reasonable belief and not proof beyond a reasonable doubt: *R. v. Debot*, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193 at 1166.
- [94] The court assesses whether there were objective grounds by looking at the officer's observations, through the "lens of someone" with the same experience, training, particular knowledge and skills as the officer; and determining if a reasonable person could conclude the same: *R. v. Luong*, 2010 BCCA 158 at para. 24.
- [95] The vantage point of the officer "must be that of a 'prudent, reasonable and cautious police officer, similarly experienced as the arresting officer' rather than from the vantage point of an ordinary citizen": Pope at para. 58, citing to Messina at para. 24. [Emphasis added].
- [96] Accounting for the officer's special knowledge is not the same as deferring the entire objective assessment of the grounds to the officer's intuition. To do so would make the objective assessment meaningless: Pope at para. 59, citing to *R. v. Payette*, 2010 BCCA 392 at para. 25.
- [97] Further, the assessment of a "reasonable person, standing in the shoes of a police officer" does not mean a police officer who holds an overly negative view of human behaviour and observes "everyday actions made through such a jaded lens that otherwise benign activity is precipitously characterized as criminal", (Pope at para. 60; see also *R. v. Lahtinen*, 2011 BCPC 490).
- [43] I apply these principles to the present case, where the facts, however, differ considerably from those in *Oysten*. Here, the arrest was not based upon a single transaction evaluated by an inexperienced officer. The present arrest was based upon extensive and extended surveillance, as assessed by police officers with extensive experience in drug investigations.
- [44] The totality of the evidence known to the officers, viewed objectively, well surpasses the reasonable suspicion standard of possibly under covering criminality: it indeed it showed a probability of criminality. The police had more than adequate reasonable grounds to search the under-seat storage compartment of the moped. Eight days of surveillance observing frequent and regular short visits consistent with drug purchases provided more than adequate evidence that the accused had purchased drugs, at least for personal use, during his brief visit. The fact that the residents of the residence were known to police for their involvement in the drug trade, coupled with a specific undercover purchase, and the advice of a confidential informant, provided even more compelling evidence. Out of an abundance of caution, Corporal Evans specifically confirmed with Constable Catton that the accused had accessed the under-seat storage area immediately after leaving the residence before the police conducted a search of that storage compartment.

- [45] Mr Patterson emphasizes that Mr MacInnes was just a "random" person selected for arrest, for the greater goal of obtaining a search warrant against the residence. He argues that this suggests an arbitrariness that falls afoul of ss 8 and 9. But given the circumstances just recited, the police would have had more than adequate reasonable and probable grounds to expect that a person in Mr MacInnes's shoes making an unusually brief visit to a residence abounding in evidence of illicit drug transactions, would have purchased and be in possession of illegal substances. Mr MacInnes's unluckiness at being selected as the person to be arrested is neither here nor there: the police had reasonable grounds to search and arrest him.
- [46] Finally, Mr Patterson argues that the police failed to rule out innocent reasons for the accused visiting the residence. But the police are not required to do so: the police need only have reasonable grounds to suspect an offence. Such an argument was rejected in *R v MacCannell*, 2014 BCCA 254:
- [45] In my view, this argument cannot succeed. In *R. v. Jir*, 2010 BCCA 497, this Court described the reasonable grounds standard. This standard does not require an officer to satisfy him or herself that there is evidence of proof beyond a reasonable doubt or even a *prima facie* case. All that the officer must have is an objectively reasonable basis for believing the suspect is presently in possession of marihuana, without necessarily ruling out potentially innocent inferences, defences or lawful excuses. At para. 27 of *Jir*, Frankel J.A. described the standard in this way:

As has been stated many times, the "reasonable grounds" standard is not only less than that required for conviction, but is also less than the civil standard of proof. Madam Justice Wilson put it this way in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.

More recently, in *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, the Court stated (at para. 114):

... the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted].

Further, as Mr. Justice Hill noted in *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 367 (Ont. Ct. (G.D.)):

The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.

[46] There is no merit to the appellant's argument that the officer was required to rule out potential innocent explanations before it could be said he had reasonable grounds for the arrest.

[47] The police had reasonable probable grounds to detain the accused, and the police actions did not violate the ss 8 or 9 rights of the accused.

B. Did the police violate the s 10(b) implementational right to counsel?

[48] The leading Supreme Court of Canada decision on s 10(b), *R v Suberu*, 2009 SCC 33, at para 38 sets out that the s10(b) right is two-pronged: the police must both inform the accused of his right to counsel and facilitate its implementation:

[38] Once engaged, s. 10(b) imposes both informational and implementational duties on the police. The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay. The implementational obligation imposed on the police under s. 10(b), requires the police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so.

[49] Mr Patterson rightfully concedes that the police acquitted their informational duty under the first prong: they advised Mr MacInnes twice of his right to counsel. Mr Patterson argues that the police failed in their duty to provide meaningful access to counsel, thereby failing the implementational component of s 10(b).

[50] At para 42 the Suberu Court set out the requirements of s 10(b):

[42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. 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.

[51] In *R v Taylor*, 2014 SCC 50 the Supreme Court of Canada expanded on the scope of the police's s 10(b) duties:

[24] The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention (*Suberu*, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The

arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (*R. v. Luong* (2000), 2000 ABCA 301, 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

- [25] This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights and facilitate access to those rights where requested, both without delay. This includes "allowing [the detainee] upon his request to use the telephone for that purpose if one is available" (*Manninen*, at p. 1242). And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so (see *Brownridge v. The Queen*, [1972] S.C.R. 926, at pp. 952-53).
- [32] The duty of the police is to provide access to counsel at the earliest practical opportunity. To suggest, as the trial judge did, that it is presumptively reasonable to delay the implementation of the right to counsel for the entire duration of an accused's time waiting for and receiving medical treatment in a hospital emergency ward, without any evidence of the particular circumstances, undermines the constitutional requirement of access to counsel "without delay".
- [52] The accused argues that "immediately" literally means immediately: Constable Parish ought to have proactively assisted the accused in phoning counsel at the site of his arrest. With respect, this proposal was neither realistic nor necessary, for several reasons. First the accused himself did not ask to make the call at the site of the arrest; Constable Parish confirmed that if he had made this request, she would have facilitated the request as best as she could. Second, he was handcuffed, and it would neither have been practical nor safe to remove his handcuffs for a telephone call. Third, any such call would have to be in the presence of police officers: hardly an appropriate venue for a privileged call. Fourth, the detachment was only minutes away; there, the accused could speak to his counsel in private.
- [53] In *Aeichele*, the Court rejects a similar argument:
- [83] The accused assert that immediately on their detention and arrest, *Csts. Jackson and Burton* had a duty to facilitate access to counsel immediately. They refer to the Court's comments in *Taylor* at paras. 24-25
- [84] I do not read the law to require "instant" telephone access to counsel regardless of the circumstances, but that access to counsel must be facilitated as soon as reasonably practicable: *Taylor*, paras. 28 and 32.
- [85] Immediately does not mean instantly. Surely, police officers are entitled to effect an arrest, take a reasonable time to secure the scene, arrange for transport of the suspects to the cells and then arrange for telephone access to counsel there: *Taylor*, para. 24. I am supported in this conclusion by the fact that police officers are not obliged to let detained or arrested persons use the police officer's cell phones at the scene: *Taylor*, para. 27.

- [86] Respecting Mr. Knauff, Corporal Van Every facilitated his access to counsel shortly following the booking-in process at the detachment and in a reasonable period of time in the circumstances. In my view, his s. 10(b) Charter right to access to counsel was not breached.
- [54] Here, to use the phrase from Taylor, "the earliest practical opportunity" for the accused to have a private conversation with counsel was at the RCMP detachment nearby. As noted in *R v Nelson*, 2010 ABCA 349 at paras 17-19 and *R v DMR*, 2014 BCSC 63 at para 63, citing *R v Taylor*, 2013 ABCA 342 at para 75 (Slatter JA dissenting), "As a general rule, the "reasonable opportunity" to consult counsel will arise when the detained person has been transported to the police station."
- [55] The accused next argues that the police ought to have done more than simply leave a message for Mr Jacob. The accused argues that the voice message was insufficient, and represented a "perfunctory" efforts that fall far short of the reasonable diligence required under the case law. The accused argues the police's passivity reflected a "cavalier" approach to the s 10(b) rights. He specifically points to the police's failure to follow up with Mr Jacob, their failure to proactively facilitate his consultation with another lawyer, and Constable Parish's failure to brief the next officer in charge of the fact that Mr MacInnes had not yet spoken to a lawyer.
- [56] Were the police expected to do more than leave a message for Mr MacInnes's counsel of choice?
- [57] The accused cited four Ontario cases where evidence was excluded on s 10(b) grounds: *R v Lebada*, 2019 ONCJ 834; *R v Vernon*, 2015 ONSC 3943; *R v Lewis*, 2019 ONSC 5919; and *R v Kumarasamy*, 2002 OJ No 303 (SC).
- [58] The essence of those four cases is the opposite of the police's alleged failure in the present case. In each of those cases, the accused had indicated his desire to speak to a specific lawyer. The police undermined each of the accused persons' stated desire to speak to counsel of their choice. They made perfunctory efforts to contact the lawyer of choice. The police then, to use the term in *Vernon* at para 48, "defaulted to duty counsel", or to use the phrase in *Lebada* at para 19, "steered [the accused] to duty counsel", thus unfairly and prematurely directing the accused away from their counsel of choice to an anonymous counsel from the duty counsel roster: see *Lebada* at paras 18, 28; *Vernon* at paras 2, 9; *Lewis* at para 41; and *Kumarasamy* at para 21.
- [59] The Ontario cases note additional steps that the police could have taken to contact the counsel of choice before they encouraged the accused in each case to resort to duty counsel. Again, those steps are not free-floating abstract requirements in all cases. They represent simple preliminary steps that the police must attempt before resorting to Plan B: prematurely sending the accused to duty counsel, thus stymying the accused's ability to speak to counsel of choice. For example, *Vernon* states:

- [48] It is true that the police do not need to exhaust all reasonable possibilities in fulfilment of the duty to facilitate contact with counsel: see *R. v. Winterfield*, 2010 ONSC 1288, 93 M.V.R. (5th) 34, at para. 62. However, I share the trial judge's view that they must do more than they did in this case. The police did nothing apart from leaving a message on the voice mail of the respondent's counsel of choice. In essence, they "defaulted to duty counsel". That is not enough.
- [60] Lebeda at paras 25-26 reiterates that where the accused states a desire for a specific counsel, the police fall under an increased burden to take all reasonable logistical steps to realize that objective, and not undermine it:
- [25] When an officer accurately conveys to an accused the accused's full right to counsel, the officer is entitled to accept at face value the accused's claim that he/she understood this right. A breach does not result where the accused's unexpressed misunderstandings about the right to counsel are the by-product of his or her thought processes: *R. v. Zoghaib*, [2005] O.J. No. 5947, affirmed 2006 CanLII 8025 (ONCA). Officers are not expected to be mind readers. Thus, an accused who asserts the right to counsel and who claims to understand that right, but nevertheless does not assert a desire to search for and speak to a particular counsel, and who also voices no dissatisfaction with the duty counsel provided, will often be hard pressed to establish a breach of the right to counsel.
- [26] However, when an accused asserts a right to speak to a specific counsel, the ball lands back in the officer's court and the court expects a greater degree of implementational diligence from the police. Consequently, where an accused has asserted his right to consult a specific counsel and that counsel does not call back, the police should ask the accused if he would like to consult another lawyer. Alternatively, the police should ask the accused whether he has another number for that lawyer or should give the accused access to a directory to enable the accused to find an alternate number for that lawyer: see *R. v. Traicheff*, 2010 ONCA 851 at para 2; see also *R. v. Vernon*, 2015 ONSC 3943, leave to appeal refused 2016 ONCA 211; *R. v. Wannamaker*, [2019] O.J. No. 5732 (S.C.J.); *R. v. Lewis*, [2019] O.J. No. 5233 (S.C.J.). The failure to do so may result in the court concluding that (1) the police failed to provide sufficient information for the accused to diligently assert his/her right and (2) the police failed therefore to sufficiently facilitate contact with counsel.
- [61] Applying the essence of those cases to the present facts places an officer in Constable Parish's position in somewhat of a Catch-22 situation. Had she been more proactive in suggesting and encouraging the accused to speak to a counsel other than Mr Jacob, she might have violated his s 10(b) rights to communicate with the counsel of his choice.
- [62] In contrast to the Ontario cases, Constable Parish did nothing to undermine the accused's stated desire to speak to his counsel of choice: Mr Jacob. She gently raised the possibility of speaking other counsel, but did not press it. At no point did the police pressure or strongly suggest to the accused that he abandon his counsel of choice and confer with a lawyer he did not know. Mr Jacob was a known entity, with an established track record of returning calls

placed to him from the Vernon detachment by his clients in custody. Constable Parish had no reason to believe that he would depart from this pattern. It was also reasonable for her to rely on the guard's report that she had achieved this simple task of reaching Mr Jacob's voicemail and left a message: again, the efficacy of this process has been well-established in the Vernon detachment. Nor did the police attempt to question the accused before he had an opportunity to speak to his counsel, thereby further undermining the s 10(b) right.

- [63] The accused also cited the recent Ontario Court of Appeal decision in *R v Noel*, 2019 ONCA 860 as a factual comparator to the present. In that case, the police, pursuant to a search warrant, arrested the accused who was suspected of small-scale cocaine trafficking. At 10:28 PM, the police entered the residence and arrested Mr Noel. They seized cocaine, marijuana, a scale, and cash in Canadian and US dollars.
- [64] Mr Noel was read his Charter rights approximately five minutes after entry into the house. At that point, he specifically asked to speak to a lawyer. The police took no immediate steps to realize the stated desire.
- [65] They arrived at the station at 11:10 PM. There, no one took charge of facilitating Mr Noel's right to counsel. At 12:48 PM, the officer placed two calls to duty counsel, although the trial judge expressed doubt that those calls were in reference to Mr Noel, as opposed to the co-accused, obtaining legal advice.. At 1:25 AM, the co-accused received a call from duty counsel, but Mr Noel did not. At that point, three hours after arrest, and officer left a message at the duty counsel office asking for someone to call Mr Noel. The evidence did not establish whether duty counsel ever called back.
- [66] The Court of Appeal set aside the convictions against Mr Noel, and substituted verdicts of acquittal. In reaching that conclusion, the Court stated:
- [17] However, we conclude that the trial judge committed errors of principle in her s. 24(2) Charter ruling. These errors were material to her findings relating to the seriousness, and impact, of the s. 10(b) implementational breach, which arose from the delay in facilitating Mr. Noel's right to counsel.
- [18] Specifically, the trial judge found the seriousness of the breach to have been "attenuated somewhat in this case, because the police complied with their obligation to hold off questioning the arrestee until after contact with counsel was facilitated." This passage contains two errors.
- [19] First, had the police attempted to use Mr. Noel as a source of self-incriminating evidence before he had a reasonable opportunity to speak to counsel, that would have been yet another s. 10(b) breach. The seriousness of the breach the trial judge did find cannot be attenuated by the fact that the police did not commit an additional breach of Mr. Noel's rights.

[20] Second, there is no evidence that Mr. Noel ever succeeded in speaking to counsel. The evidence was that at 1:25 a.m., approximately three hours after his arrest, Officer Westcott left a message with duty counsel on Mr. Noel's behalf, but there was no evidence that anyone followed up to ensure contact occurred. It is true that the onus is on Mr. Noel to establish the s. 10(b) breach, and that he did not lead affirmative evidence that he never managed to speak to counsel. That does not change the fact, though, that there is no affirmative proof that he did. It was not appropriate for the trial judge to proceed on the assumption that Mr. Noel did ultimately speak to counsel. It was also not appropriate for the trial judge to conclude that the seriousness of the breach was mitigated by that assumed consultation.

[21] In addition, the trial judge erred in evaluating the impact of the breach. She said:

I have heard no evidence about the impact of the breach on the protected interest of the accused. He did not testify on this application about any impact. It is his onus to demonstrate that a breach occurred and that the evidence should be excluded. While the evidence is that his right to confer with counsel was delayed, and there is necessarily an impact on his constitutionally protected interests as a result, there is no evidence that it was denied, or that the delay impacted adversely on his ability to have a meaningful conversation with counsel. On balance, I conclude that this factor is quite neutral in the s. 24(2) analysis. [Emphasis added.]

[22] With respect, this passage reflects a misunderstanding of the relevant Charter protected interest. That interest is the right is to [sic] consult counsel without delay. The loss of this right is in no way neutralized because the right to consult counsel is delayed, as opposed to denied. Nor is the impact of delayed access to counsel neutralized where an accused fails to demonstrate that the delay caused them to be unable to have a late but meaningful conversation with counsel. It would be inconsistent with solicitor-client privilege to expect a detainee to lead evidence about the quality of their solicitor-client conversation. More importantly, this inquiry misses the mark.

[23] The right to consult counsel without delay exists because those who are arrested or detained are apt to require immediate legal advice that they cannot access without help, because of their detention: *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191; *R v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 41; *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3) 135, at para. 34.

[24] For example, an arrest and the search of one's home can raise urgent legal issues about the lawfulness of the arrest and the obligation to submit, as well as the validity of the search warrant and the scope of authority that the search warrant gives to the police. Such information could be useful in preventing an unjustified search, before it happens: *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1144.

[25] Detention also raises questions of immediate importance relating to the detainee's rights during detention, including the right against self-incrimination: *Bartle*, at p. 191; *R. v. T.G.H.*, 2014 ONCA 460, 120 O.R. (3d) 581, at para. 4.

[26] Beyond this, the right to counsel is also important in providing "reassurance" and advice, on such questions as how long the detention is apt to last, and what can or should be done to regain liberty: Debot, at p. 1144; Suberu, at para. 41. As Doherty J.A. said in *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 45:

The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

[27] Mr. Noel was not required to offer direct evidence about why he required access to counsel without delay. He asked to speak to counsel promptly but that right was denied. In assessing the impact of such breaches, it is not appropriate for courts to plumb the content and significance of the conversations a detainee would have had, if his right to consult counsel without delay had been respected, or to treat such breaches as "quite neutral" in the absence of such evidence. The impact of the loss of the right to consult counsel without delay can be evaluated based on the interests it is meant to protect along with the length of the delay.

[28] Given these errors in principle, the trial judge's determination that the admission of the evidence would not bring the administration of justice into disrepute does not require deference, nor do her assessments of the seriousness and impact of the breach. In considering these matters afresh, we come to a different conclusion.

[29] The s. 10(b) violation found by the trial judge was serious. Three hours passed between the time of the arrest and the first confirmed attempt by the police to secure counsel for Mr. Noel. When Mr. Noel arrived at the station at 11:10 p.m., entirely under the control of the police, no one took charge of ensuring that he could speak to counsel as he had requested. Instead, he was placed in a cell and left there.

[30] Rather, it was about an hour and a half later that Officer Capener called duty counsel on behalf of only two of the three detainees, keeping insufficient records to confirm who those detainees were.

[31] It was not until 1:25 a.m., now about two and a half hours after Mr. Noel's arrival at the station, that Officer Wescott left a message with duty counsel, specifically on Mr. Noel's behalf. There is then no confirmation that counsel actually spoke to Mr. Noel.

[32] From the beginning, the police appear to have had a somewhat cavalier attitude about a fundamental, important, and long-settled Charter right to consult counsel without delay. Indeed, the trial judge characterized the police conduct in this regard as demonstrating "carelessness" - a characterization with which the Crown does not take issue.

[33] Moreover, the impact of the breach was significant, not neutral. Mr. Noel remained in custody without the benefit of counsel for at least three hours, unable to receive the direction, reassurance, and advice that counsel could provide.

- [34] We are mindful of the impact of excluding necessary, reliable evidence in this serious prosecution on the reputations of the administration of justice. However, this was a clear violation of a well-established rule. The law around s. 10(b) is clear and long-settled. It is not difficult for the police to understand their obligations and carry them out. Furthermore, it is troubling that the police in this case could not provide any reasonable explanation for the delay, nor could they even say whether Mr. Noel did, in fact, speak to counsel. As noted by Brown J. in *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 44: "exclusion has been found to be warranted for clear violations of well-established rules governing state conduct".
- [35] We conclude that it would damage the long-term interests of the administration of justice to admit the evidence and thus be seen to condone the carelessness and disorganization exhibited by the police with respect to Mr. Noel's right to consult counsel without delay. Given the collection of facts in this case, we conclude that the evidence must be excluded, notwithstanding that doing so undermines the Crown's case against Mr. Noel.
- [36] Given this conclusion, we choose not to resolve Mr. Noel's grounds of appeal relating to s. 8, s. 9, and the informational branch of s. 10(b). In doing so, we should not be taken as expressing agreement with the trial judge's rulings. It is simply unnecessary to grapple with these issues given the significance of the s. 10(b) implementational error.
- [67] The facts and conclusions of Noel are distinguishable from the present in key aspects. First, and critically, there was no evidence that Mr Noel ever spoke with counsel, even after immediately requesting to do so: paras 20, 34. Second, the police in fact did show a cavalier disregard in effectively ignoring Mr Noel's specific request to speak to counsel; at the end of the day they were not even able to confirm that he had spoken to counsel. Third, the decision primarily turns on the Court of Appeal's identification of several significant legal errors made by the trial judge, based on which she exonerated the actions of the police. Critically, the trial judge presumed, incorrectly, that at the end of the day Mr Noel did in fact receive the assistance of counsel. This in turn caused the Court to conclude in error that right to counsel was not denied, but merely delayed, undermining the right to consult counsel without delay: see para 22. It is the combination of legal error by the Court, as well as the police's casual approach to the s 10(b) right, that would lead the administration of justice into disrepute were the evidence in Noel admitted, as per s 24 of the Charter. As reiterated in para 35, Noel turns on its "collection of facts", and not merely the factual similarity with the present case: that a message was left for a counsel.
- [68] The accused also cites the recent decision of *R v Lerch*, 2020 BCSC 441.
- [69] The facts in *Lerch* differ considerably from the present case. There, as in Noel, the accused immediately indicated a desire to speak to his own lawyer. The arresting officer did nothing to facilitate that contact. He handed the accused over to two other officers, who also did nothing to facilitate that contact: see paras 69-70.

- [70] No phone was provided, and no phone message was left for the lawyer until almost a full day after the arrest. This stands in contrast to the present case, where the police themselves affirmatively placed the telephone call in attempting to facilitate contact with the accused's chosen lawyer. Although it would not have been necessary for the police to have done so, the police also asked the accused if he wished to contact another lawyer.
- [71] I found the actions and assumptions of the police in the present case to be reasonable and in good faith. They were not cavalier, to use the oft-quoted phrase from Noel. In contrast to the three hours' delay in Noel, a call was placed to the lawyer of Mr MacInnes's choice about an hour after his arrest, and soon after return to the detachment. As I have found above, Constable Parish specifically asked the accused if he wished to call another lawyer, and he declined. She had a reasonable expectation that Mr Jacob would call back soon and that the accused would be able to speak to his lawyer of choice. And, at the end of the day, the accused was able to speak to the lawyer of his choice, albeit the next morning.
- [72] The Ontario cases canvass various options available to the police to acquit their reasonable diligence in realizing the implementational aspect of the s 10(b) right, in order to facilitate the access of the accused to counsel. In retrospect, it would have been desirable for the Vernon detachment to have been more diligent in following up throughout the afternoon and evening to see whether or not Mr Jacob was indeed available and could reasonably be expected to call back. The Vernon detachment could have also provided a list of other lawyers, while still emphasizing to the accused his right to stick with Mr Jacob. The Vernon RCMP detachment may wish to implement such protocols.
- [73] That said, whether or not the police have exercised reasonable diligence in facilitating the access of the accused to their counsel of choice is a highly fact-specific inquiry. I am satisfied that in this case, in the legal context of Vernon, where Constable Parish knew both the accused and Mr Jacob, where she knew that the accused wished to speak to Mr Jacob, and where she had no reason to doubt that Mr Jacob would call back in a reasonable time, it cannot be said that the police failed in their duty of reasonable diligence. That diligence is to be assessed at the time, and not with the benefit of hindsight.

IV. Conclusion

In summary, the accused's application is dismissed. The Court rules that the evidence seized is admissible at trial.

"Crerar, J"

- [1] On March 9, 2021, the Court found Mr MacInnes not guilty of the charge of possession for the purpose of trafficking, but guilty of the lesser included charge of simple possession of that controlled substance, contrary to s 4(1) of the Controlled Drugs and Substances Act.

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