

CANADA / JUDGMENT

R. v. McKnight

2024 BCSC 1504

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1504 R. v. McKnight

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McKnight,

2024 BCSC 1504

Date: 20240730

Docket: 87713-2

Registry: Nanaimo

Between:

Rex

v.

Stephen Michael McKnight

Before: The Honourable Justice E. McDonald

Oral Ruling on Voir Dire #1

Counsel for the Crown:

C.J. Gibson

Counsel for the Accused:

E. Holzman

Place and Date of Trial/Hearing:

Nanaimo, B.C.

July 23 and 29, 2024

Place and Date of Judgment:

Nanaimo, B.C.

July 30, 2023

Table of Contents

Introduction.. 3

Issues. 3

The Evidence. 4

Did the police violate the accused's s. 8 rights when they searched the vehicle at the scene of the arrest?. 8

Should the evidence be excluded?. 12

Seriousness of Charter Infringing Conduct 15

Impact of the Breach on the Charter-protected rights of Mr. McKnight 16

Society's interest in adjudication of the case on its merits. 16

Balancing the factors. 16

Conclusion.. 17

[1] These reasons were delivered as oral reasons. They have since been edited for distribution and publication.

Introduction

[2] The accused, Mr. McKnight, was arrested on February 5, 2021. He is charged with unlawful possession of controlled substances, namely methamphetamine, cocaine, fentanyl and MDA, for the purpose of trafficking and possession of a prohibited device, namely, a silencer.

[3] In the defence application and in the submissions on the voir dire, Mr. McKnight seeks a declaration that his rights guaranteed by s. 8 and s. 10(b) of the Canadian Charter of Rights and Freedoms [Charter] were infringed or denied when RCMP officers arrested him and failed for some 31 minutes to inform him of right to counsel and when the officers conducted searches and seized items. Mr. McKnight seeks an order pursuant to s. 24(2) of the Charter that the drugs and silencer be excluded from trial.

Issues

[4] The defences raises the following issues:

- a) Did the police violated the accused's s. 10(b) right to counsel at scene of arrest?
 - b) Did the police violate the accused's rights guaranteed by s. 8 rights when they searched the vehicle at the scene of arrest?
 - c) Did the police violate the accused's rights guaranteed by s. 8 when they searched the vehicle the day after the arrest?
 - d) Should the evidence be excluded pursuant to s. 24(2) of the Charter?
- [5] It is not disputed that the police violated Mr. McKnight's s. 10(b) right to counsel at the scene of the arrest. The Crown concedes that it took police 31 minutes from Mr. McKnight's initial arrest at the scene to inform him of his s. 10(b) right to retain and instruct counsel and that this delay has not been adequately explained.
- [6] It is also not disputed that the police violated Mr. McKnight's s. 8 rights when the police searched the vehicle the day after Mr. McKnight's arrest, when the warrant to search the vehicle had already expired.
- [7] The Crown does dispute that Mr. McKnight's s. 8 rights were breached when the police searched the vehicle at the scene of the arrest. The Crown submits that despite conceding two of the three Charter breaches alleged, the drugs and silencer ought not to be excluded by s. 24(2).

The Evidence

- [8] On the voir dire, the Crown called three RCMP officers to testify: Constable Kendall Oliver, Constable Ali Dakhallallah and Corporal Trevor Shields. I will summarize the relevant portions of their evidence.
- [9] On February 5, 2021, a member of the public called the police to report a male and female who were arguing in a grocery store parking lot in a vehicle described as a blue Honda Civic (the "Civic"). The person also reported that the female appeared to be in distress. A number of police officers were involved in the investigation that followed and three of those officers provided testimony on this voir dire.
- [10] Constable Oliver testified that on February 5, 2021, he was working and he heard an alert over the police radio regarding a potential "domestic" in progress at a grocery store parking lot. This included a report that a male and female were sitting in a vehicle with license plate "LA381F" and the female appeared to be in distress. Constable Oliver then drove his vehicle toward the reported location.
- [11] Constable Oliver said the license plate sounded familiar to him because he had been involved in a previous investigation of a vehicle with a license plate LH381F. In that prior investigation, Constable Oliver recalled that there was an interaction with individuals, Stephen McKnight and Dakota Rayner, and a blue Mitsubishi Lancer that was registered to Myra Lewis. In the course of that earlier investigation, Mr. McKnight had fled while driving

the Mitsubishi and Constable Oliver knew that Mr. McKnight was arrestable for flight from the police, dangerous driving and breach of an undertaking.

- [12] Constable Oliver noted that the license plate did not come back as linked to any vehicle, so he told dispatch that he thought the vehicle involved might have the license plate LH381F and that the individuals involved might include Mr McKnight who was arrestable. Based on the descriptions, he thought the people might be Mr. McKnight and Ms. Rayner, both of whom he had encountered during the previous investigation involving the Mitsubishi.
- [13] Constable Oliver did not enter his vehicle into the underground parking lot of the grocery store. Instead, he parked and walked down the ramp of the lot to look for the Civic, which he located at approximately 13:46.
- [14] The Civic was unoccupied, locked and sitting in a parking stall. The license plates on the vehicle were "LF381F". Constable Oliver recognized the vehicle from his previous dealings with Ms. Rayner, who was the registered owner. He also recognized the vehicle from a previous incident where Mr. McKnight had been reported to be passed out in the vehicle while holding a weapon, although the report of a weapon turned out to be incorrect.
- [15] Constable Oliver looked through the front windshield for the vehicle identification number which he then provided to dispatch. He also saw a drill and heat gun in the back seat and some drug paraphernalia on the passenger side door, although he could not recall the specific items that he saw.
- [16] Dispatch then confirmed to Constable Oliver that plate number "LF381F" was associated with a Mitsubishi Lancer. Dispatch also confirmed that the VIN showed that the Civic was owned by Ms. Rayner and there was no insurance on it. In other words, Constable Oliver confirmed the number plates on the Civic were not the correct number plates for that vehicle and the Civic was uninsured.
- [17] Constable Oliver reported where the Civic was parked. He also removed the plates from the Civic.
- [18] Meanwhile, Corporal Shields, who was a plain clothes officer, had been observing Mr. McKnight and Ms. Rayner inside the grocery store. He let the officers who had assembled in the parkade, including Constable Oliver, know that Mr. McKnight and Ms. Rayner were leaving the grocery store and heading towards the elevator to the parkade.
- [19] Constable Oliver positioned himself close to the door from the elevator into the parkade. Directly next to him was Constable Dakhllallah, who had arrived shortly before to join the other officers in the parkade. In total, there were five police officers waiting in the parkade when Mr. McKnight and Ms. Rayner opened the door to the parkade.

- [20] As soon as Constable Oliver saw Mr. McKnight open the door, Constable Oliver told him he was under arrest. Mr. McKnight began to run away but he did not get far before he stumbled and fell face down on the ground. Constable Oliver and Constable Dakhallallah held onto him while Mr. McKnight was handcuffed.
- [21] At 13:55, Constable Oliver said that he told Mr. McKnight that he was under arrest for flight from police, dangerous driving and breach of an undertaking. He said that he did this from memory, but he could not recall whether he provided Mr. McKnight with a police caution or his right to counsel. Constable Oliver said that his practice was to tell the person what they are under arrest for, to warn them and to tell them that they have a right to call a lawyer.
- [22] Constable Oliver did a pat down on Mr. McKnight and he found a key in his pocket with an "H" on it. He asked Mr. McKnight if this was the key to the Civic and Mr. McKnight said that it was.
- [23] Constable Oliver said he asked Constable Dakhallallah to provide Mr. McKnight with his s. 10(a) and (b) Charter rights while he and another officer went over to the Civic. During his evidence, Constable Dakhallallah said he did not recall Constable Oliver asking him to do this while they were together in the parkade.
- [24] Constable Oliver called a tow truck to take the Civic away. Concerned about the safety of the tow truck driver, for reasons that I will expand upon later, Constable Oliver and another officer opened the Civic with the key and checked inside from the driver's side.
- [25] Meanwhile, Constable Dakhallallah was tasked with transporting Mr. McKnight back to the detachment. He left the scene to get his vehicle. When he returned, he placed Mr. McKnight into the back of his vehicle and transported him to the detachment, which was about 12 minutes away. The drive started at 2:03 p.m., and during the drive, Mr. McKnight told Constable Dakhallallah about his family, but they did not discuss anything about the investigation.
- [26] They arrived at the detachment at 2:16 p.m. at which point Constable Dakhallallah started the booking procedure, filing out paperwork and conducting a secondary search of Mr. McKnight by patting him down and checking his pockets. In this secondary search, Constable Dakhallallah found a plastic bag containing a purple rock in Mr. McKnight's front hoodie pocket. He set that item aside.
- [27] At 2:25 p.m., Constable Oliver communicated via radio that he had only arrested Mr. McKnight verbally and that Mr. McKnight needed to be "Chartered and warned". So one minute later, Constable Dakhallallah read the entire contents of his Charter card to Mr. McKnight and he arrested him for dangerous driving, fleeing and breach of an undertaking. He also recorded all of Mr. McKnight's answers in his notebook. Mr. McKnight answered the question about the right to counsel by saying he wanted to talk to his lawyer and he provided the counsel's name.

- [28] At 2:31 p.m., Constable Dakhlallah placed Mr. McKnight in a private room while Constable Dakhlallah called the lawyer's office. There was no answer, so he left a message. After twenty minutes, Constable Dakhlallah informed Mr. McKnight that his lawyer had not called back. Constable Dakhlallah asked if Mr. McKnight wished to call Legal Aid but he declined, saying he wished to wait for his lawyer to call him back.
- [29] While Mr. McKnight was in the room waiting to talk with his counsel, Constable Dakhlallah tested the purple rock taken from Mr. McKnight's pocket. The test came back indicating that it contained heroin. Constable Dakhlallah placed the purple rock in an exhibit bag, before weighing, seizing and putting it in the exhibits.
- [30] The following day on February 6, 2021, Constable Dakhlallah started his shift at 7:00 a.m. and he learned that a search warrant had been obtained for the Civic and that a constable had conducted a search. That same morning, Constable Dakhlallah watched another officer perform testing on a heart-shaped candy that had been found on Ms. Rayner the day before. The test came back indicating the heart-shaped candy contained amphetamine.
- [31] Constable Oliver said he had seen heart-shaped candies in the Civic, so Constable Dakhlallah and another officer went to the Civic and they collected heart-shaped candies from the passenger-side floor and seat of the vehicle. They did not search anywhere else in the vehicle. Constable Dakhlallah never saw the search warrant and he did not know that it had authorized a search between the hours of 1900 and 2100 hours on February 5, 2021. Constable Dakhlallah recently learned that the candies collected from the Civic were indeed candy and not drugs.

Did the police violate the accused's s. 8 rights when they searched the vehicle at the scene of the arrest?

- [32] As mentioned, the only alleged Charter violation at issue on this voir dire, concerns the police search of the Civic at the scene of the arrest. The Crown does not challenge Mr. McKnight's standing to raise this ground even though it was Ms. Rayner who owned the vehicle.
- [33] The defence submits that the search of the Civic at the scene of the arrest violated Mr. McKnight's s. 8 rights because their actions amounted to a warrantless search and seizure due to:
- a) Constable Oliver having no authority to tow the vehicle for lack of insurance;
 - b) Constable Oliver not alleging that the search of the vehicle at the scene was a search incident to arrest that was motivated by the charges against Mr. McKnight; and
 - c) There being no safety issues that required the police to search the vehicle at the scene of the arrest since Constable Oliver had already looked at the vehicle interior through the windows and he saw nothing of concern, he had not seen Mr. McKnight in the vehicle and he had Mr. McKnight in handcuffs at the time.

- [34] I will begin with Constable Oliver's evidence about believing he had the discretion to tow the Civic.
- [35] Constable Oliver said it was his usual practice to arrange to tow uninsured vehicles. Constable Oliver intended to have the Civic towed to the place specified by Ms. Rayner, such as her residence. However, he confirmed that he never asked Ms. Rayner where she wanted the vehicle towed.
- [36] He was concerned about the fact that the Civic was uninsured. Specifically, he believed that if he just left it there and something happened to it, he would be questioned about his decision to not have it towed. Constable Oliver said it was standard practice as a member of the traffic division to tow an uninsured vehicle because it could be involved in an accident, so he generally arranged to tow the vehicle to a safe place specified by the owner who would also pay for the tow. In every case where he arranges for a tow, Constable Oliver does a safety check in the vehicle to ensure there are no hazards for the tow truck driver.
- [37] Constable Oliver was not sure of the specific sections, but he thought the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [Act] gave him authority to tow the Civic because it was uninsured. In cross-examination, he agreed it was not the sections dealing with impounding a vehicle such as s. 251 or s. 215(6). In Constable Oliver's mind, the vehicle was being towed, not impounded.
- [38] There is authority for the proposition that when a vehicle is being impounded, the police may, in certain circumstances, perform "inventory searches" of a vehicle to ensure the safety of the vehicle and its contents: *R. v. Strilec*, 2010 BCCA 198 and *R. v. Donovan*, 2024 BCCA 213. However, as counsel for the defence points out, Constable Oliver insisted he was not impounding the Civic, rather he was just having it towed and he was doing a safety check for the benefit of the tow truck driver. Counsel for the defence submits that the evidence about the wrong number plates being on the Civic does not connect the search to the reason for arresting Mr. McKnight and it provides no authority to tow the vehicle for lack of insurance.
- [39] Crown submits that while Constable Oliver could not recall which provision of the Motor Vehicle Act he relied on to tow the Civic, there is authority in s. 188(2)(c) of the Act, where there is an unattended vehicle without proper or valid number plates, to take it into the officer's custody and cause it to be taken to and stored in a safe and otherwise suitable place.
- [40] Counsel for defence points out that Constable Oliver's main concern was the lack of insurance, not that the Civic had number plates belonging to another vehicle. However, in my view, number plates are related to the insurance issue and therefore, it was not unreasonable, where there was both a lack of insurance and improper number plates displayed on the Civic, for Constable Oliver to conclude he had the power to tow it to a safe place and that he ought to do so.

- [41] Because on February 5, 2021, he had called a tow truck driver, Constable Oliver used the key to open the driver's side door. He checked the area around the driver's seat looking for weapons or needles. He also opened the glove box to look for ownership papers that the tow driver might need, but there was no paperwork in there. He then opened the center console between the passenger and driver's seats to check for paperwork and weapons or sharps and he saw three government-issued IDs not issued to Mr. McKnight and Ms. Rayner. Constable Oliver did not open the passenger door or the trunk because he said the tow truck driver would not need to enter those areas.
- [42] Upon finding the ID cards, Constable Oliver immediately stopped his search. He closed the driver's door and locked it. He telephoned Corporal Shields, telling him about the ID cards. Corporal Shields instructed him to have the Civic towed to the detachment so that he could apply for a search warrant. Later in the day on February 5, 2021, Corporal Shields prepared an information to obtain a search warrant which relied on the police report that Constable Oliver had prepared. A warrant to search the Civic was issued later on February 5, 2021.
- [43] I accept Constable Oliver's evidence about his concern for the safety of the tow truck driver because of his belief, which was reasonable in all of the circumstances, that the driver might be required to enter the passenger side of the Civic to unlock the transmission and check for ownership papers. Constable Oliver restricted his search of the Civic to the specific areas that he believed the tow truck driver might need to access and not areas such as the trunk, back seat, or passenger side. I find this consistent with his evidence about the safety purpose of the search of the Civic at the scene.
- [44] If, when a vehicle is being impounded, an inventory search to ensure safety is permissible, I fail to see why, when a vehicle is being taken into custody and towed, the police would be precluded from searching the vehicle to ensure the reasonable safety of the tow truck driver who may need to enter the vehicle to facilitate the towing process. While the defence suggests that the tow truck driver would not need to enter the vehicle, I cannot rule out that accessing the interior of the vehicle may be necessary for towing and the safety risks that may accompany doing so.
- [45] I found Constable Oliver to be a credible witness on this issue. He clearly explained his reasons for searching the Civic and he did not change his evidence when confronted with the grounds for impounding the vehicle under the Act. The search that Constable Oliver conducted when he entered the Civic was restricted to areas he believed the tow truck driver might need to access. He restricted his search to the areas where he thought ownership papers might be stored and the area around the driver's seat, looking for weapons and sharp objects. When he saw the IDs, he immediately stopped the search.
- [46] Based on an overall assessment of the evidence, I find the search was authorized by law and it was reasonable in all of the circumstances. I do not find that the search of the Civic at the scene of the arrest was a violation of Mr. McKnight's s. 8 rights.

Should the evidence be excluded?

- [47] As the Crown concedes there were breaches of Mr. McKnight's s. 10(b) and s. 8 Charter rights, I must consider whether the drugs and silencer should be excluded under s. 24(2) of the Charter.
- [48] Counsel for the defence submits that the specific Charter violations, coupled with the cumulative effect of multiple breaches, heightens the seriousness and warrants exclusion of the evidence under s. 24(2). Counsel submits that the court must consider, and I agree, what the police did during the 31-minute period of delay in providing Mr. McKnight with his s. 10(b) rights. The police located the key in Mr. McKnight's pocket and they opened the Civic to conduct a limited search of it, which search I have already found was authorized by law.
- [49] As mentioned, the police transported Mr. McKnight to the detachment and, among other things, conducted a secondary pat down of him during which they located the purple rock in his hoodie pocket. The defence counsel stated during submissions that the defence does not allege it was a violation of Mr. McKnight's Charter rights to do an initial pat down, or a secondary pat down, when he was taken to the detachment. However, the defence submits that it is important to note that the police continued doing things, such as searching the Civic and finding the purple rock, during the period of delay when Mr. McKnight had not received information about his s. 10(b) rights.
- [50] Regarding the breach of Mr. McKnight s. 10(b) rights, counsel for the defence points out, and it is not disputed, that there was non-compliance with all elements of this important Charter right. While he characterized Constable Dakhallallah as having denied that he was told by Constable Oliver to provide Mr. McKnight with his s. 10(b) rights information, his evidence was that he did not remember being asked to do so. I found Constable Dakhallallah to be a credible witness and I accept that he has no recollection of being asked to do this at the scene of the arrest. I do not accept Constable Oliver's evidence that he told Constable Dakhallallah to provide Mr. McKnight with his s. 10(b) rights while they were arresting him in the parking lot because of the evidence that Constable Oliver later sent a radio transmission asking that Mr. McKnight be provided with his s. 10(b) rights.
- [51] When Constable Dakhallallah received that request, he promptly provided Mr. McKnight with information on his s. 10(b) rights by reading the entire contents of the officer's Charter card to him. He also made arrangements without delay to act on Mr. McKnight's request for counsel by telephoning the counsel's office and cell phone numbers. When there was no response, he asked if Mr. McKnight wished to speak to Legal Aid counsel.

- [52] I agree with counsel for the defence that the police have been unable to explain why Mr. McKnight was not immediately provided with his s. 10(b) right to counsel when he was initially arrested and why it took 31 minutes to do so. I agree with Crown counsel that no evidence suggests the breach was deliberate or strategic and the only statement the police elicited from Mr. McKnight during the delay was his answer confirming the key belonged to the Civic.
- [53] The Crown states it will only rely on the fact that the key was found on Mr. McKnight and not that he said anything about it. I find that the failure to immediately provide s. 10(b) rights to Mr. McKnight was due to a mistake on the part of the police. There is no question this amounts to a violation of Mr. McKnight's Charter rights under s. 10(b) and the Crown properly concedes this breach.
- [54] Counsel for the defence points out that delays of, for example, 22 minutes, in providing a detainee with information about their s. 10(b) right to counsel has been determined to weigh in favour of excluding evidence: *R. v. Mian*, 2014 SCC 54 at para. 87.
- [55] Counsel for the defence referred me to the decision of Justice Iyer (as she then was) in *R. v. Dill*, 2018 BCSC 2232, where the court found a breach of s. 10(b) in light of a delay of just over 30 minutes and a further 19 minutes, respectively, in informing the detainee of his s. 10(b) rights and providing him an opportunity to speak with counsel and because the court found it troubling the officer always delayed giving the detainee their s. 10(b) rights until after the booking procedure had been completed.
- [56] Regarding the breach of Mr. McKnight's s. 8 rights related to the search of the vehicle on February 6, 2021 and the seizure of the heart-shaped candies from the passenger side, it is properly conceded this was a breach because when the search and seizure took place, the warrant had expired. The Crown submits that this breach is not particularly serious given that the search was limited to two to three minutes involved in gathering the candies from one area of the Civic.
- [57] The Crown will not be attempting to introduce the candies into the evidence at trial. The defence submits that this incident is just another example of how the police were violating Mr. McKnight's Charter rights after his initial arrest on February 5th.
- [58] In *Dill*, Justice Iyer discussed the test for excluding evidence and the three inquiries a court must make as provided by *R v. Grant*, 2009 SCC 32. I adopt Justice Iyer's summary of the analysis that the court must conduct to decide whether the evidence should be excluded as set out at paras. 49-53 of *Dill*.
- [59] I will now turn to consideration of the factors set out in *Grant*.

Seriousness of Charter Infringing Conduct

- [60] The Crown submits that the search of the vehicle was lawful and for the reasons that I have explained I agree. Regarding the breach of s. 8 caused by the police searching the Civic to gather the candies after the warrant had expired, I find that this breach was at the low end of the range as the search lasted only two to three minutes and it was limited to accessing the passenger side to pick up the candies that were scattered on the seat and floor. The search was conducted because the police believed the candies might contain amphetamine and their reason for believing this is backed up by the evidence that a similar candy found on Ms. Rayner had tested positive for amphetamine.
- [61] No officer testified that they had concerns about releasing the Civic when it possibly contained a controlled substance in the form of the scattered candies. Indeed, Constable Dakhallallah thought the search was permitted by the warrant and he failed to confirm that by checking the warrant.
- [62] In considering the evidence, I find that the breach of Mr. McKnight's s. 8 rights due to the February 6th search was on the low end of the spectrum of seriousness.
- [63] Regarding the failure to immediately provide Mr. McKnight with his s. 10(b) rights, the Crown submits that this breach cannot be characterized as having been made in good faith; however, the Crown points to the lack of evidence that the breach was deliberate or strategic. The Crown submits that since the only statement elicited from Mr. McKnight concerned the key found in his pocket, which statement the Crown will not seek to rely on, it ameliorates the seriousness of this Charter breach. The defence submits that the breach of Mr. McKnight's s. 10(b) right to counsel is very serious and egregious given the discrepancy in the evidence of the officers.
- [64] I find that the seriousness of the breach of Mr. McKnight's s. 10(b) rights resulting from the 31-minute delay is serious because there is no justification for it.
- [65] Overall, I find the Charter breaches fall between a minimal level for the s. 8 breach, to serious for the s. 10(b) breach. Given that there were breaches of two Charter-protected rights, I find that this increases the seriousness of the conduct and this factor supports excluding the evidence.

Impact of the Breach on the Charter-protected rights of Mr. McKnight

- [66] In Dill, Justice Iyer reiterates that the impact on the accused requires consideration of the extent to which the breach violated the interests engaged by the infringed right while also noting the purpose of the right: at paras. 58-59.
- [67] When I consider the evidence about what the police did, I do not conclude that the breaches of Mr. McKnight's s. 8 and 10(b) rights seriously violated the interests engaged by those rights. In my view, this factor tends to support the admission of the evidence.

Society's interest in adjudication of the case on its merits

- [68] The defence acknowledges the evidence in this case, namely, the drugs and the silencer are real evidence that is reliable and that without it, the Crown's case may fail. The defence also submits that since the other prongs of the Grant test pull towards exclusion, the societal interest in adjudication on its merits will rarely justify admitting the evidence.
- [69] I find that the evidence sought to be excluded is reliable and without it, the Crown's case will fail. In my view, this factor favours admission of the evidence.

Balancing the factors

- [70] After considering all of the circumstances, including all of the evidence, I find that the long-term reputation of the justice system, together with the confidence of society in the justice system, will be best served by admitting the evidence which is reliable and key to the Crown's case. While Mr. McKnight's s. 8 and 10(b) rights were violated, I have found the police had the authority to search the vehicle for safety purposes at the scene of the arrest in the parking lot.
- [71] The subsequent wrongful search of the vehicle was limited in scope and it did not turn up the evidence that is sought to be excluded and even if he had been accorded his s. 10(b) rights immediately, the defence does challenge the initial or subsequent pat-down of Mr. McKnight which turned up the Civic key and the purple rock. Except for the confirmation about the key, no further evidence was elicited from Mr. McKnight before the serious breach of his s. 10(b) right was remedied and he was provided with access to a lawyer.

Conclusion

- [72] Therefore, notwithstanding defence counsel's able submissions, Mr. McKnight's application pursuant to s. 24(2) of the Charter for exclusion of the evidence is dismissed.
- [73] This concludes the first Voir Dire.

"E. McDonald J."

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