
CANADA / JUDGMENT

R. v. Robertson

2017 BCSC 965

COURT

Supreme Court of British Columbia

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2017 BCSC 965 R. v. Robertson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Robertson,

2017 BCSC 965

Date: 20170608

Docket: 97803-3C

Registry: Kamloops

Regina

v.

Jason Robertson and Sarah Robertson

Before: The Honourable Madam Justice Watchuk

Voir Dire Ruling - Section 24(2)

Counsel for the Crown:

Evan C. Goulet

Iain A. Currie

Counsel for Jason Robertson:

Jeremy Jensen

Counsel for Sarah Robertson:

Julian van der Walle

Place and Date of Hearing:

Kamloops, B.C.

November 14-18, 2016

Place and Date of Decision:

January 13, 2017

Place and Date of Reasons:

Kamloops, BC

June 8, 2017

I. INTRODUCTION

- [1] Jason and Sarah Robertson ("the applicants") are charged on Indictment 97803-3 with 10 counts relating to weapons and property offences. The charges arose on May 8, 2014 after the police executed a search warrant at their residence on Arrowstone Drive in Kamloops, B.C.
- [2] In a Ruling regarding the search, I found that the police breached the applicants' Charter rights in the course of the search in some of the manners alleged. The applicants alleged that the following breaches of s. 8 of the Charter occurred during the search:
1. The police conducted the search in an unreasonable manner contrary to s. 8 by failing to adhere to the requirements of the knock and announce rule;
 2. The police failed to ensure that the search was adequately supervised and thereby conducted the search in an unreasonable manner contrary to s. 8;
 3. The search was unreasonable and contravened s. 8 because police seized many pieces of personal property that were not authorized to be seized by the warrant nor any other law. The items included:
 - (a) the non-restricted firearms lawfully stored in the home in the gun safes;
 - (b) the applicants' passports; and
 - (c) numerous other miscellaneous items that had no evidentiary value.
 4. The police violated Sarah Robertson's s. 10(b) right to counsel during the execution of the search warrant by failing to hold off asking her questions after she said she wanted to speak to a lawyer.
- [3] In Reasons indexed at 2016 BCSC 2474 (the "Search Ruling"), I found that the following breaches had occurred:

1. The police conducted the search in an unreasonable manner contrary to s. 8 by failing to adhere to the requirements of the knock and announce rule;
 2. The search was unreasonable and contravened s. 8 because police seized some pieces of personal property that were not authorized to be seized by the warrant nor any other law; and
 3. The police violated Sarah Robertson's s. 10(b) right to counsel during the execution of the search warrant by failing to hold off asking her questions after she said she wanted to speak to a lawyer and by delaying her access to a telephone to call counsel.
- [4] The Charter breaches that I found differ for each of the applicants. For Mr. Robertson, the police breached his rights by failing to adhere to the knock and announce rule and by seizing some unauthorized items. The police breached Ms. Robertson's rights in those regards as well as her s. 10(b) right to counsel.
- [5] The applicants asked the court to exclude the evidence located in the search of their residence under s. 24(2) of the Charter. By a Memorandum dated January 13, 2017, I informed counsel of my decision to grant Ms. Robertson's application and to dismiss Mr. Robertson's application. These are the Reasons for those decisions.

II. BACKGROUND

- [6] In February 2014, the Kamloops RCMP began an investigation called "E-plosion", primarily targeting Jason Robertson. The RCMP believed that he was the head of a drug trafficking organization in Kamloops. Mr. Robertson lived with his wife, Sarah Robertson, and two young children on Arrowstone Drive in Kamloops, BC ("the residence").
- [7] During the investigation, the RCMP relied heavily upon surveillance, tracking targets, and intercepting transactions. Part of the aim was to identify drug stash locations. On March 10, 2014, the RCMP seized a scale with cocaine residue and drug ledgers known as score sheets from the garbage outside the residence.
- [8] On May 7, 2014, the RCMP saw associates of Mr. Robertson load a quad onto a truck at the residence and drive to another of Mr. Robertson's residences on Westsyde Road in Kamloops. The RCMP followed the truck and when they stopped the driver later that day, they found a large amount of cocaine in the truck and a large amount of marihuana in the quad and in the truck.
- [9] After that seizure, the RCMP obtained three search warrants and executed them on May 8, 2014. They searched the Westsyde Road residence, then the Arrowstone Drive residence, and then a third residence on Badger Drive of one of Mr. Robertson's associates. That the search warrants were valid is not in dispute.
- [10] In searching the Westsyde Road residence, the RCMP found half a pound of marihuana and drug trafficking paraphernalia.

- [11] At the Arrowstone Drive residence, the RCMP expected to find more drugs as well as firearms and stolen property. Upon entering, however, the police found much more than they had expected. Among other things, the RCMP found many firearms (some believed to be reported stolen, some improperly stored, and some in two gun safes), many electronics (some reported stolen), drugs, drug packaging material, score sheets, a large bundle of cash, brass knuckles, a conductive energy weapon, and an Indian Status certificate with Mr. Robertson's picture and another person's name.
- [12] In order to put the evidence into context, it is necessary to describe the scene of the search of the residence. The residence is a bungalow with an attached garage on the front of the home. The garage vehicle door faces the street. On the driveway side of the garage there is a regular entrance door. The mailbox is also on this side of the garage. There is another regular door on the opposite side of the house. Downstairs there is a door that opens onto the back yard.
- [13] Importantly, the residence had a sophisticated multi-camera security system which recorded audio in addition to video. While the police knew at the time of entry that there was a surveillance system at the residence, it is not clear if they were also aware of the system's audio recording capacity.
- [14] After careful consideration the entire video was appropriately introduced by the defence part-way through the voir dire. There are two aspects of the video to be noted in this introduction: not all of the witnesses viewed the video; and the video provides visual and auditory evidence of the events that occurred during the search.

III. THE S. 24(2) INQUIRY - THE LAW

- [15] In order to have evidence excluded under s. 24(2) of the Charter, an applicant must show both that the evidence was "obtained in a manner" that infringed or denied his or her rights, and that the admission of the evidence would bring the administration of justice into disrepute.
- [16] Section 24(2) of the Charter states:
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[Underlining added.]

A. Threshold Requirement: Evidence Obtained "in a manner "

[17] Before the court can embark on the substantive s. 24(2) analysis, the applicant must meet the threshold requirement of establishing a sufficient temporal or contextual nexus between the obtaining of the impugned evidence and the Charter violation or violations that triggered the s. 24 analysis (*R. v. Lauriente*, 2010 BCCA 72 at paras. 35ff). A causal connection between the breach and the obtaining of the evidence may be present but is not required (*R. v. Mian*, 2014 SCC 54 at para. 83; and *R. v. Wittwer*, 2008 SCC 33 at para. 21).

[18] Evidence collected following a Charter breach or breaches meets the "obtained in a manner" requirement provided the seizure and the breach or breaches form part of the same transaction and the discovery of the evidence is not too remote from the Charter breach or breaches (*R. v. Strachan*, [1988] 2 S.C.R. 980 at 1005-06). There are no hard and fast rules for measuring remoteness. Instead, such situations should be dealt with on a case by case basis (*Strachan* at 1006).

[19] Where the police have collected evidence before any Charter breach occurs, the court will consider whether the breach occurred while the transaction was ongoing. In *R. v. Arthur*, 2013 BCSC 2471, Madam Justice Maisonville discussed the case law on whether evidence obtained prior to a Charter violation was "obtained in a manner" that infringed the Charter, as follows:

33 In [*R. v. Pettit & Pranic*, 2003 BCCA 522], the Court of Appeal found that the requisite connection was not established because the evidence was discovered prior to the breach. In *Lauriente*, the Court of Appeal distinguished *Pettit*, stating that the 10(b) violation was more analogous to the breach in [*R. v. Bohn*, 2000 BCCA 239], where the accused's 10(b) right was breached while the police were conducting a search of the appellant's home (see *Bohn* at para. 41, quoted in *Lauriente* at para. 51).

34 In [*R. v. Spence*, 2011 BCCA 280] the Court of Appeal looked at both *Lauriente* and *Bohn* and distinguished them on the basis that in *Spence* the Charter breaches took place after the discovery of the appellant's cocaine rather than at the same time as the search.

35 Of course, in *Spence*, there was only a single violation of the appellant's Charter rights as distinguished from the pattern of breaches found in both *Lauriente* and *Bohn*. The Crown in *Spence* also did not seek to introduce into evidence any comments of the appellant which were made after his right to counsel had been violated (see paras. 55-57). Because of these distinguishing factors, the court in *Spence* found that the evidence was admissible.

[20] In *Arthur*, *Maisonville J.* concluded that the police had not obtained the evidence at issue, a bag containing a large quantity of cash, in a manner that infringed Mr. Arthur's s. 10(b) Charter right to counsel for the purposes of s. 24(2), as the s. 10(b) violation had occurred after the police lawfully discovered the bag. Justice *Maisonville* noted that there was no pattern of breaches of Mr. Arthur's Charter rights in the course of the transaction (para. 36). Rather, the s. 10(b) breach was the sole breach (para. 38).

[21] In the recent decision of *R. v. Pino*, 2016 ONCA 389, Laskin J.A., writing for the Ontario Court of Appeal, summarized at para. 72 the principles emerging from the thoroughly reviewed jurisprudence on the "obtained in a manner" threshold requirement, as follows:

- The approach should be generous, consistent with the purpose of s. 24(2)
- The court should consider the entire "chain of events" between the accused and the police
- The requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct
- The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections.
- But the connection cannot be either too tenuous or too remote.

B. The Grant Analysis

[22] In *R. v. Grant*, 2009 SCC 32, the Supreme Court of Canada articulated three lines of inquiry for determining whether evidence obtained in a Charter-infringing manner should be excluded under s. 24(2) of the Charter. The factors to consider and weigh are (at para. 71):

- (1) The seriousness of the Charter-infringing state conduct (admission may send the message that the justice system condones serious state misconduct);
- (2) The impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and
- (3) Society's interest in the adjudication of the case on its merits.

[23] These factors do not operate as a three-part test. There are no particular findings under the three lines of inquiry that mandate particular results, and it "is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case" (*R. v. Harrison*, 2009 SCC 34 at para. 36). The balancing mandated by s. 24(2) is "qualitative in nature and therefore not capable of mathematical precision" (*Grant* at para. 140). Rather, the court must weigh its considerations under all three factors to determine whether, on balance and having regard to all the circumstances, admitting the impugned evidence would bring the administration of justice into disrepute in the long-term, from the perspective of a reasonable person (*Grant* at paras. 68 and 85-86; *R. v. Côté*, 2011 SCC 46 at para. 48). I will describe each factor in further detail below.

[24] The Grant factors look to the public's overall, long-term faith in the justice system (*Grant* at para. 68; *Harrison* at para. 36). Section 24(2) starts from the proposition that damage has already been done to the public's confidence in the administration of justice by the Charter violation or violations that gave rise to the s. 24 analysis. The Grant analysis concerns itself with whether further damage will be done by admitting the impugned evidence (*Grant* at para. 69).

- [25] The phrase "if it is established that " in s. 24(2) places the burden upon the applicant seeking exclusion of the evidence to persuade the court on the balance of probabilities that admission of the evidence would bring disrepute to the justice system (*R. v. Collins*, [1987] 1 S.C.R. 265 at 280).
1. Seriousness of the Charter-infringing state conduct
- [26] This first factor requires the court to consider the gravity of the state's offending conduct and whether the court should dissociate itself from that conduct by excluding the evidence (*Grant* at paras. 72-73).
- [27] Under this factor, the court must examine both the qualitative seriousness of the state conduct as well as the level of knowledge on the part of the offending state actors. At one end of the spectrum are those breaches that are "technical or trivial" (*Harrison* at para. 3), "inadvertent or minor" (*Grant* at para. 74) or result from "an understandable mistake" (*Harrison* at para. 22). At the other end of the spectrum are those that can be characterized as "brazen" or "flagrant" (*Harrison* at para. 23), "abusive", "deliberate" or "egregious" (*Grant* at para. 133). Although wilful violations are undoubtedly more serious than unintentional ones, reckless or careless violations that demonstrate insufficient regard for Charter rights also inevitably undermine the public's confidence in the rule of law (*Harrison* at para. 24; *Grant* at paras. 74-75).
- [28] Good faith on the part of the police reduces the court's need to dissociate itself from the police conduct by excluding the evidence (*Grant* at para. 75; see also *R. v. Blake*, 2010 ONCA 1 at paras. 24-27). This is especially true where the law governing the police's conduct was unclear or evolving at the time of the violation (*R. v. Aucoin*, 2012 SCC 66 at para. 50; *R. v. Cole*, 2012 SCC 53 at para. 86). Good faith is made out where there is evidence that the offending officer (or officers) attempted to act in accordance with their Charter obligations and mistakenly believed they had succeeded in doing so (see *Aucoin* at paras. 46 and 49 and *R. v. Smith*, 2005 BCCA 334 at paras. 56-61 for further discussion of what constitutes "good faith" and "bad faith" police conduct).
- [29] Another factor that may attenuate the seriousness of Charter-infringing police conduct is the urgent need to prevent the disappearance of evidence (*Grant* at para. 75 and *R. v. Wong*, 2010 BCCA 160 at paras. 37 and 39).
- [30] In accordance with s. 24(2)'s purpose of targeting systemic flaws with the administration of justice (*Grant* at para. 70), evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion of the evidence (*Grant* at para. 75). In *Lauriente*, the Court of Appeal clarified that, in deciding whether to exclude evidence relating to an individual Charter breach in the context of a larger investigation, a court is entitled to consider the cumulative effect of multiple Charter breaches in that same investigation, regardless of whether the same applicant was also the subject of those other Charter violations (see paras. 7, 27, and 30). The Court of Appeal, per Prowse J.A., stated:

[30] This case involved one investigation in which the police overstepped the law in several instances evidencing a pattern of disregard of Charter rights which the trial judge found to be serious. She specifically found that each of the individual Charter breaches were serious, albeit not at the extreme end of the range, or reflecting bad faith on the part of the police. If she had considered the breaches individually, as if they had occurred in a vacuum, or in circumstances which were otherwise unremarkable, she may have concluded that the serious remedy of the exclusion of evidence was not warranted; that is, that the admission of the evidence obtained thereby could not have brought the administration of justice into disrepute. But these breaches did not occur in a vacuum, they occurred in the context of a relatively brief investigation where each step in the investigation followed and built on the prior step, ultimately culminating in the obtaining and execution of the search warrant which led to the respondents' (and Ms. Lauriente's) arrest, and the further breach of Mr. Catalano's right to counsel. In my view, the trial judge was entitled to have regard to all of these breaches, both in placing the seriousness of the individual breaches in context, and, more particularly, in determining whether this pattern of disregard of the Charter by the authorities could bring the administration of justice into disrepute.

(See also Bohn at para. 47).

[31] However, the absence of a systemic problem "is hardly a mitigating factor" under this factor of the Grant test (Harrison at para. 25).

[32] Other kinds of systemic problems that will constitute serious abuses at this stage of the analysis include racial profiling and other forms of discrimination (Grant at para. 133).

[33] The independent 'discoverability' of the evidence, in other words whether the unlawfully-obtained evidence could have been obtained by lawful means had the police adopted them, is also a relevant factor for consideration under either or both of the first two factors of the Grant test (Côté at paras. 66-70 and 72). However, this factor will be irrelevant if discoverability of the evidence is speculative or unknown (Côté at para. 70). Further, discoverability does not necessarily favour admission of the evidence as it cuts both ways (Côté at paras. 68 and 70). Under the first Grant factor it reflects badly on the state if the police failed to obtain a warrant when they could and should have obtained one (R. v. Buhay, 2003 SCC 30 at paras. 56 and 63). However, if a warrant would have likely issued then this mitigates both the seriousness of the state's conduct under the first Grant factor (provided the police had a reasonable excuse for not seeking the necessary warrant) as well as the violation's impact on the accused under the second Grant factor (Côté at paras. 68 and 72; see also Cole at paras. 89 and 93).

[34] Any misleading in-court testimony from state authorities is also relevant at this stage of the analysis given the court's need to dissociate itself from such behaviour (Harrison at paras. 26-27).

2. Impact of the breach on the Charter-protected interests of the accused

- [35] This branch of the s. 24(2) inquiry focuses on the seriousness of the state's Charter-infringing conduct from the accused's perspective. Under this head of analysis, the court must examine the interests engaged by the infringed right (such as privacy, liberty, dignity, and the right against self-incrimination) and the degree to which the Charter infringement impacts upon or intrudes into those interests (Grant at paras. 76-78). The duration and intensity of the breach are relevant considerations here (Harrison at paras. 28-38; see also *R. v. Cheng*, 2013 BCSC 1979 at para. 86).
- [36] If the offending state conduct involves a search, it will matter whether the area searched is one in which the accused reasonably enjoys a high expectation of privacy or one closely associated with the accused's dignity (Grant at para. 78). In the context of its discussion of unreasonable search and seizure under s. 8 of the Charter, the Court in *R. v. Tessling*, 2004 SCC 67 at paras. 20-24, explained the different privacy interests that police investigations can threaten, namely personal, territorial, and informational privacy interests, and provided some guidance about the relative importance of these interests. In *Tessling*, the Court referenced its earlier decision in *R. v. Silveira*, [1995] 2 S.C.R. 297, in which the majority acknowledged "the age-old principle of the inviolability of the dwelling-house" (para. 141) and stated that "the unauthorized presence of agents of the state in a home is the ultimate invasion of privacy" (para. 148). In *Wong*, the Court of Appeal outlined the hierarchy of private locations: "[t]he search of a person is usually reckoned to be the most intrusive type of search, followed by a search of a dwelling house. A search of a vehicle is usually considered to be a less intrusive type of search" (para. 17).
- [37] Although, as discussed above, a causal connection between the Charter violation or violations and the evidence obtained is not required to trigger the s. 24(2) analysis, the lack of a causal connection between the breach and the evidence can be considered to mitigate the seriousness of the breach under this factor of the Grant test (Mian at para. 87; and *R. v. Perjalian*, 2011 BCCA 323 at para. 66).
3. Society's interest in the adjudication of the case on its merits
- [38] This factor requires the court to consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion" (Grant at para. 79). This involves assessing the reliability of the evidence and its importance to the Crown's case. The exclusion of reliable and relevant evidence may render the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute (Grant at para. 81).
- [39] However, a court analyzing this factor must be careful not to allow the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis because this would afford lesser Charter protection to those charged with more serious crimes (Harrison at paras. 34 and 40; *Côté* at para. 48; *Wong* at para. 15). While the public has a heightened interest in seeing a case adjudicated on its merits where the offence charged is serious, the public "also has a vital interest in having a justice system that is above reproach, particularly

where the penal stakes for the accused are high" (Grant at para. 84; see also *R. v. Reddy*, 2010 BCCA 11 at para. 94). Sometimes, the importance of maintaining Charter standards outweighs the "price paid by society for an acquittal" (Harrison at para. 42). Society has an interest in state actors consistently respecting Charter rights, regardless of the context.

- [40] Similarly, "[t]he fact that a Charter breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2). We expect police to adhere to higher standards than alleged criminals" (Harrison at para. 41).

C. Balancing the Grant factors

- [41] While the balancing exercise under s. 24(2) of the Charter is necessarily case-specific, Doherty J.A., writing for the Ontario Court of Appeal in *R. v. McGuffie*, 2016 ONCA 365, made the following instructive observations about balancing the Grant factors:
- [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the Charter-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in Grant. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34.
- [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see e.g. *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see e.g. *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 81-89; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 98-112. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.

IV. DISCUSSION

- [42] I will discuss each of the Grant factors as they relate to the three breaches: the entry that did not comply with the "knock and announce" rule; the unauthorised seizure of certain items; and the failure of the officer to "hold off" questioning Ms. Robertson until she could exercise her right to counsel together with the delay in providing her access to a telephone to call counsel. The discussion of the first two breaches relates to the applications of both Mr. and Ms. Robertson, while, as discussed below, the third breach relates solely to the rights of Ms. Robertson.

A. The Threshold Requirement

- [43] When executing the search warrant on May 8, 2014, the RCMP officers breached the Charter when they entered the residence of the applicants without waiting a sufficient time for any response to the initial announcement of police presence. After forcing entry, the police conducted the search and seized the items.
- [44] There is therefore a temporal and contextual connection between the Charter breaches and the seizures of the items the applicants seek to exclude from the evidence. The police located all of the items when searching the residence after breaching s. 8 of the Charter due to non-compliance with the knock and announce rule in entering the residence.
- [45] With regard to the unauthorised seizure of the miscellaneous items, the Charter breach is also causally connected to the items. It was with the breach, that the police gained entry and seized the items. However, I note that the Crown does not seek to enter these items as evidence.
- [46] The breach of Ms. Robertson's s. 10(b) rights occurred part-way through the search of the residence. On hearing her vehicle arrive at the residence at approximately 7:45 p.m., Sgt. Baker went outside to meet the vehicle and effect the arrest. In the course of the interaction and arrest, the officer engaged her in conversation which was a breach of her rights. The search continued inside the residence during and after that interaction and conversation.
- [47] The Major Incident Exhibit Flow Chart indicates what evidence the police located and seized subsequent to the breach of Ms. Robertson's right to retain and instruct counsel. However, the police located evidence both before and after this breach occurred. The subsequently-discovered evidence was temporally and contextually connected to the breach. As the discovery of evidence prior to the breach was part of the same transaction and course of conduct in the ongoing search of the residence over a total period of 3½ hours, I am satisfied that evidence located prior to the s. 10(b) breach was also "obtained in a manner" that infringed her rights.

B. The Seriousness of the Charter-Infringing State Conduct

- [48] The first line of inquiry under s. 24(2), the "seriousness of the Charter-infringing state conduct", considers the nature of the police conduct. The main concern at this line of inquiry is to preserve public confidence in the rule of law and its processes, not to punish the police, compensate the accused, or specifically deter Charter breaches.
- [49] As the Court observed in *Grant*:

- [74] State conduct resulting in Charter violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.
- [50] The seriousness of the breach depends upon the extent of, and reason for, the Charter violation. Factors increasing the gravity of the misconduct include:
- severe or deliberate police conduct contravening established Charter standards;
 - major departure from Charter standards;
 - systemic or institutional abuse;
 - wilful, flagrant or reckless disregard of Charter rights;
 - ignorance, negligence or wilful blindness to Charter standards;
 - a pattern of abuse; and
 - misleading testimony by the police.
- [51] I will deal with this first factor in relation to each of the breaches of s. 8 for both applicants, and then with regard to the s. 10(b) breaches of the Charter rights of Ms. Robertson.
- [52] Firstly with regard to the manner of entry into the residence, the s. 8 breach arises from the failure to adhere to the knock and announce rule. In the Search Ruling, I described this breach as follows:
- [27] In cross-examination Sgt. Bannerholt agreed that a "middle ground" or partially dynamic entry was used in this case. He also agreed that their choice of the middle ground entry defeated the purpose of both a "hard entry" and a "knock and announce" entry. It defeated the purpose of the "knock and announce" because only waiting four seconds after announcing "search warrant" was probably not a reasonable amount of time for the occupants to get to the door. Knocking and announcing before entering also defeated the purpose of a hard entry because if there had been occupants inside who were inclined to arm themselves with weapons in anticipation of the police coming through the door, the knock and announce would have tipped them off that a police entry was about to happen.
- [35] The police on arrival embarked on their plan to knock and announce. They intended to allow a short time for response before forcing entry. About a minute's time was intended, with two minutes thought to be too long. Four seconds were actually allowed after the notices were completed, and 27 seconds after the first notice. This very short time is a departure from the knock and announce procedure, even if a minute was sufficient time. It is not justified by pre-existing information regarding drug trafficking and attendant weapons. Having made the considered decision to proceed by way of knock and announce,

it was incumbent on the police to allow sufficient time. Given that they attended at the garage door, rather than the other door of which they were unaware, a longer time would have been needed for a possible occupant to walk through the house and out into the garage to reach the door where the police were waiting.

- [53] The Crown submits that this conduct was not serious. The Crown says that the police, pursuant to a valid search warrant, did knock and announce their presence before, during and after entry. Although they were overly eager in entering, they did not operate in bad faith nor did they act egregiously by employing more serious measures, such as using distraction devices or wearing balaclavas.
- [54] The applicants submit that the violation of the knock and announce rule was serious because, as noted in case law, people have been shot and even killed in situations where police have failed to properly knock and announce prior to entry.
- [55] The seriousness of the breach of the knock and announce entry was that the police knowingly implemented a plan of entry that did not comply with the well-known law that occupants must have an opportunity to put down anything in their hands and come to the door. In fashioning a hybrid of knock and announce with dynamic entry, the police eliminated all realistic opportunity that an occupant could have that opportunity. The 27 second time period was too short, particularly given the use of the garage door, for any occupant to respond in the manner the knock and announce rule seeks to permit.
- [56] I therefore find that the breach of the knock and announce rule was serious.
- [57] With regard to the seizure of the miscellaneous items, Cpl. Froyland testified that those seizures occurred due to the unexpected number and volume of items believed to be stolen that were located in the residence after entry. The Major Incident Exhibit Flow Chart indicates that the problematic seizures, found to be a breach of the applicants' s. 8 rights, occurred throughout the 3½ hour duration of the search.
- [58] In the Search Ruling I described these items as follows:
- [89] These items were personal property that did not have any evidentiary value and were not authorized to be seized by the warrant. Cst. Froyland testified that some of the items he seized were a fishing rod, currency from Antigua, a 10 oz. silver bar, binoculars, cologne, a cook top, the security manual for the security system, and suitcases. He also seized scanners, walkie-talkies, televisions, gift cards, and a bottle of vodka. The reason the suitcases were seized was to help the police carry out all of the other items that they had seized.
- [90] Cst. Froyland testified that some of the items he seized, in hindsight, had no evidentiary value and that if he were to do it again, he would not have seized some of them like the bottle of cologne, the fishing reel, and the binoculars. He suggested the reason this happened was because he was "overwhelmed".

- [59] I found that Cpl. Froyland had a subjective belief that the miscellaneous seized items, such as the vodka, were also stolen property, but that belief was not objectively reasonable. His seizure of carrying objects such as the suitcases was a result of his being overwhelmed by the volume. No recklessness was alleged or found. The police returned the miscellaneous items to the applicants although not as quickly as they could have.
- [60] In the circumstances, I find that the police's unlawful seizure of the miscellaneous items was not a serious breach of s. 8 of the Charter.
- [61] The Search Ruling summarised the s. 10(b) breach as follows:
- [139] In this case, Ms. Robertson is depicted in the video asking for a lawyer before she is read her rights. After she is read her rights she says she does want to talk to a lawyer. Instead of holding off, Cst. Baker and then Sgt. Senner both ask her questions related to such things as her knowledge of the guns and where the TV's came from, the whereabouts of her husband, as well as some general comments to her about how she made money. Although Cst. Baker testified that she was more concerned about her kids than speaking to a lawyer, this is not borne out in the video as it is clear she was requesting to speak to counsel from the beginning. Cst. Baker conceded that he did not hold off, even though he was fully aware he was required to hold off on the day he arrested Ms. Robertson.
- [62] The interactions between the RCMP and Ms. Robertson include the following sequence apparent from the video surveillance cameras. Ms. Robertson arrived at the residence just before 7:45 p.m. Cst. Baker immediately informed her that she was under arrest. Ms. Robertson stated that there is "some kind of mistake. My kids are in the car," and then asked about speaking with a family member to take care of her children, rather than the Ministry (of Children and Family Development). Sgt. Senner is heard explaining about the Ministry and what the plan regarding the children is.
- [63] Cst. Baker testified that Ms. Robertson wanted to deal with her children, that she did not want to deal with anything regards to a lawyer right now, and that she would deal with that later. Ms. Robertson can be heard on the video expressing concern about her children, where they will go, and with whom they will be.
- [64] However, in the midst of this conversation, Ms. Robertson can also be heard saying on the audio: "I need a lawyer." An officer can then be heard asking about Mr. Robertson's whereabouts and when he will be back. Cst. Baker asks another officer for a Charter card, and while waiting for that officer to bring him one, he said to Ms. Robertson: "so you didn't see this happening at all?"
- [65] When Cst. Baker read Ms. Robertson her s. 10 rights, she said that she wished to call a lawyer. He then read her the police warning and asked her to explain back to him what that means. Cst. Baker soon after asks if Ms. Robertson knows the code to the firearm safe, and she says she does not. (The locksmith resumes cutting into it). Cst. Baker can be heard asking more about Mr. Robertson's whereabouts, and about what he does. Cst. Baker

described this as "general conversation" and that he had no specific reason for asking those questions.

[66] Also overheard on the audio recording is some conversation about some of the items in the house. Cst. Baker described his question of: "Where'd those come from?" when he saw televisions coming out of the house as an "off-of-the-cuff" remark.

[67] RCMP officers stayed with Ms. Robertson and her children, ensuring they were warm and had what they need, while a representative from the Ministry arrived to look after the children for the time that Ms. Robertson will be at the detachment. Someone from the Ministry arrived just before 8:33 p.m. and Ms. Robertson is seen leaving with a uniformed member at 8:47 p.m. on the video.

[68] In this context, the evidence regarding the breach of Ms. Robertson's s. 10(b) rights includes the following evidence of Sgt. Baker:

Q And what happened next [after the official warning]? Did you have any further conversation with her at . . .

A There was -- for the conversation -- most of the time it was about her children. She lived in Kamloops her whole life. Just general -- general conversations. But I did ask her several questions, yes.

Q What questions did you ask her?

A At one point there were some televisions coming out of -- of the garage, and people were making noise, so I -- I turned around and I saw that the televisions -- she saw the televisions, so I said, "Where'd those come from?" and she responded that she did not know -- no, I asked her if she knew where they came from and she said no.

Q And why did you ask her that --

A It was -- it was kind of an -- an off-of-the-cuff remark at that point. So I -- I hadn't strategically asked that question. It was just -- somebody was making noise, I looked back. So the television -- she saw the televisions, and I asked, "Where did that come from?" -- or "Where did those come from?"

Q And did you ask her any other questions?

A Yeah, I did. I believe I'd asked where she works or -- or how she -- how she makes her money, or something like that.

Q Do you recall what she said?

A She -- she owned a photography business, which I already was aware of. And that's -- that's all I can recall at this point. I think she said that J.R. was on EI or something.

Q And why were you asking those questions of her?

A Well, in -- in the beginning, it was just -- just general conversation, "Where do you work? What do you do?" and then -- I didn't have a specific reason, I suppose, to ask those questions. I was -- was aware at this point that -- that she hadn't spoken with -- with a lawyer or anything to that point, but I -- I knew also that she understood anything that she said could be used against her, so I wasn't -- wasn't a hundred percent concerned about her not being aware of that.

Q And was there any other conversation that you remember at the time?

A Um -- that there was more conversation, that I recall. Oh, I had -- had said that I -- I just found it strange how -- how they owned all of these vehicles and their house but they didn't actually have employment at all. I just found it odd.

Q Did --

A I --

Q -- was that a question?

A -- it wasn't a question, it was a statement.

Q And did she respond to that statement?

A I don't believe so.

Oh, um -- sorry. If I might add something? She did say at one point that they couldn't actually afford all the stuff they had. I think that was actually earlier. So they were trying to sell things off. She -- she did mention that.

Q And do you recall what -- if that was in response to anything you said?

A That was earlier in the conversation I -- I think. Prior to the comment about the trucks and the house that I made.

[69] It is apparent that the testimony of Sgt. Baker does not include the entirety of the interactions between him, other officers and Ms. Robertson when he was present.

[70] Sgt. Baker was forthright regarding his knowledge of the law requiring an officer to "hold off" when an arrested person states that they want to speak with a lawyer. In cross-examination he testified that his perspective of the conversation with Ms. Robertson was that her priority was to take care of her children. However, he does not acknowledge that she also said early in the conversation: "I need a lawyer."

Q And you understood back in May of 2014, that when a person indicates that they do want to speak to a lawyer --

A Right.

Q -- that you have a duty to hold off asking them questions until they have had an opportunity to speak to a lawyer, right?

A Right.

Q And you understood that constitutional principle at the time you made this arrest?

A I did understand that, yeah.

Q Pardon me?

A I did understand that.

Q Now, when you arrested her, she did say she wanted to speak to a lawyer, correct?

A Yes, she -- she did.

Q And I have it in your notes at page 102 in response to the question, "Do you want to call a lawyer," you have noted, "Yeah," and then she told you that she didn't know one.

A Right.

Q Is that right?

A That's correct, yeah.

Q All right. And my understanding of your evidence, you're taking the position that although she indicated that she did want to speak to a lawyer, she was more concerned about dealing with her kids first before she -- before she wanted to speak to a lawyer, is that right?

A Right. Right.

[71] Sgt. Baker also fairly acknowledged in cross-examination that there was time for Ms. Robertson to speak with a lawyer from the residence while she was waiting with her children, and that he had asked her questions at the residence before she spoke with a lawyer.

Q And you'd agree with me that it would have been possible for her to, say, use a cell phone to try to speak to a lawyer while she was waiting at the scene, correct?

A If she wanted to, yeah.

Q There was enough time for that to happen?

A There was enough time for that to happen, yeah.

Q Now, you'd agree with me that you didn't exactly hold off asking her questions while she was still at the scene, did you?

A I -- I'd agree with that, yes. There were some questions I asked.

[72] This is the implementation breach arising from the delay in providing access to a telephone. She was not provided with a phone before she was taken to the Detachment at 8:47 p.m. - more than an hour later.

- [73] One of the purposes of s. 10(b) is to protect arrested persons from self-incrimination. Ms. Robertson, in the interactions with Sgt. Baker and the officers, did not make any incriminating statements. However, she clearly wished to speak with a lawyer and indeed said that she needed a lawyer. That did not prevent Sgt. Baker in particular from continuing with questions capable of eliciting an incriminating response such as querying the source of the family income. The comment: "So you didn't see this coming?" was clearly inappropriate and not befitting an RCMP officer.
- [74] I find these breaches of Ms. Robertson's s. 10(b) Charter rights to be serious.

C. The Impact of the Breach on Charter-Protected Interests

- [75] The second branch of the s. 24(2) inquiry focuses on the seriousness of the infringement from the accused's perspective. This involves examining the interests engaged by the infringed right and the degree to which the violation impacts on those interests.
- [76] The breach of the knock and announce rule in gaining entry to the residence engages the privacy interests of both applicants. Although the applicants were not in the residence at the time the police forcefully gained entry, the analysis cannot depend on that fact alone. The court must consider the entirety of the circumstances. Indeed, as the applicants submit, were it not for the video system, evidence supporting the allegation of breach would not exist.
- [77] In this case, it is an important fact that the RCMP had a valid search warrant which permitted their entry to the applicants' home. That the search warrant authorised the police to enter and search the residence minimises the impact of the failure to comply with the knock and announce rule. If the police had observed the appropriate waiting time and thus complied with the Charter then the officers would have gained entry approximately 90 seconds later than they actually did.
- [78] I therefore find that the s. 8 breach, arising from the failure to properly execute the entry pursuant to the knock and announce rule, had only a minor impact on the applicants' Charter-protected interests.
- [79] The applicants submit that the unlawful seizure from the home of numerous personal items that had no evidentiary value had a significant impact on the Charter protected interest of both applicants. Given the nature of the items, not particularly personal or private, and the relatively few miscellaneous items unlawfully seized, I respectfully cannot agree with this submission.
- [80] The seizure of the miscellaneous items, which I found to be a breach of s. 8 of the Charter, had a minimal impact on the applicants' Charter-protected interests.
- [81] I find that the breaches of Ms. Robertson's s. 10(b) rights had a major impact on her Charter-protected interests. The officer's repeated questioning of Ms. Robertson after she stated that she both wished to speak to a lawyer by answering in the affirmative and independently

stating that she needed a lawyer was a flagrant breach of her right to silence. Further, the nature of some of the questions and comments was provocative which I take to be an intentional effort to obtain answers to the questions regarding the property and her husband. That an accused person is questioned in that manner after requesting a lawyer cannot but have a serious impact on an individual who has the right to remain silent.

- [82] Cst. Baker knew of the principle of holding off at the time he was dealing with Ms. Robertson. He flagrantly violated his duty to hold off. Further, he could have provided Ms. Robertson with cell phone access to a lawyer while they were waiting for the Ministry to assist with the children, and failed to do so. There is a well-established impact on an arrested person who is denied timely access to counsel. At a minimum, the officer's actions were a reckless disregard of Ms. Robertson's Charter rights.

D. Society's Interest in the Adjudication of the Case on its Merits

- [83] The final factor that this Court must consider is society's interest in the adjudication of the case on the merits. Since society generally expects criminal allegations to be adjudicated on the merits, the third branch of the s. 24(2) inquiry examines whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence.
- [84] The evidence of offences that was located in the residence of the applicants consisted of approximately 40 firearms of assorted varieties and related materials such as ammunition, as well as a large amount of stolen property.
- [85] This evidence is highly reliable and the breaches do not undermine this fact. The evidence is essential to the determination of the merits of the case. Excluding the evidence would bring an end to the prosecution as against both applicants.
- [86] I find, and the defence concedes, that this factor weighs in favour of admission.

E. Balancing the Factors

- [87] The Court must balance the assessments under each of these three lines of inquiry to determine whether, considering all the circumstances, admitting the evidence would bring the administration of justice into disrepute. The qualitative balancing exercise is not capable of mathematical precision. It is "not simply a question of whether the majority of the relevant factors favour exclusion in a particular case" (Harrison at para. 36).
- [88] The Crown submits that when the evidence on each line of inquiry is weighed in the balance, admission of the real evidence would not bring the administration of justice into disrepute.

- [89] With regard to the Charter rights of both Mr. Robertson and Ms. Robertson, I have found that the police gained entry to their residence by a serious breach because officers failed to properly follow the knock and announce rule which weighs to exclusion. However, the impact of the breach was minimal because the officers had a valid search warrant which weighs in favour of admission. The s. 8 breach due to seizure of miscellaneous items was not serious nor did it have a major impact, also therefore weighing to admission.
- [90] Counsel for Mr. Robertson submitted that the court can consider the breaches of Ms. Robertson's right to counsel when determining whether to exclude the evidence regarding Mr. Robertson. In these circumstances, where Mr. Robertson was not at the residence at all during any of the search, the necessary connection between Mr. Robertson and the breach of Ms. Robertson's s. 10(b) rights does not exist. I do not take that into account in the balancing regarding Mr. Robertson.
- [91] In the result, after consideration and the required balancing of the factors regarding Mr. Robertson, the balancing favours admitting the evidence located and seized in the search of the residence. I dismiss the application of Mr. Robertson.
- [92] With regard to Ms. Robertson, I must consider the seriousness of the s. 8 breach in entry to the residence, and the seriousness and impact of the breaches of her s. 10(b) rights. The balancing of the factors for Ms. Robertson favours exclusion of the evidence. I grant the application of Ms. Robertson and order that the evidence against her is excluded.

"The Honourable Madam Justice Watchuk"

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