COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Samuels, 2024 ONCA 786
DATE: 20241028
DOCKET: COA-23-CR-1010

MacPherson, Dawe and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Rashawn Samuels

Appellant

James Lockyer and Jeffery Couse, for the appellant

Sunil S. Mathai, for the respondent

Heard: July 3, 2024

On appeal from the conviction entered on January 16, 2023, by Justice W. Danial Newton of the Superior Court of Justice.

DAWE J.A.:

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[1] The appellant, Rashawn Samuels, was arrested by the Thunder Bay police as part of a drug investigation. The police advised him of his right to counsel and he asked to speak to a lawyer. However, the police had already decided that they would not let the appellant speak with counsel, or with anyone else, until after they searched his apartment. Nearly ten hours passed before the appellant spoke to his lawyer.

[2] The trial judge found that the police delay in letting the appellant speak to counsel violated his s. 10(b) *Charter* rights, but admitted into evidence a gun the police found when they searched the appellant's car, as well as cash they found on his person. Based on this evidence, the appellant was convicted of various firearms offences and of possessing proceeds of crime.

[3] The appellant appeals against his convictions only, arguing that the trial judge erred by not excluding the gun and seized currency as a s. 24(2) remedy for the breach of his s. 10(b) *Charter* rights.

[4] I would allow the appeal. The breach in this case was a serious departure from well-established *Charter* standards. The police had grounds to obtain a search warrant for the appellant's apartment the day before they arrested him, but chose to wait until after they made the arrest to apply for the warrant, and to suspend the appellant's right to counsel in the interim. The entirely predictable

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result of this operational plan was that the appellant's right to counsel was delayed much longer than was reasonably necessary.

[5] In my view, the trial judge erred in his s. 24(2) analysis by treating the impact of the s. 10(b) *Charter* breach on the appellant's protected interests as "neutral at best" because the breach did not lead to the police obtaining any evidence. This ignored the serious impact it had on the appellant's security of the person. He was held in custody without access to counsel for ten hours, nine of which I find were unjustified.

[6] In view of the trial judge's error, it falls to us to conduct our own assessment of the applicable s. 24(2) factors. Although the seized evidence was reliable and essential to the prosecution's case, for the following reasons, I would find this to be "one of those cases in which the long-term repute of the administration of justice requires the sacrifice of the short-term benefit of an adjudication on the merits of this case": *R. v. Rover,* 2018 ONCA 745, 143 O.R. (3d) 135, at para. 49.

A. FACTUAL BACKGROUND

(1) The police investigation up to September 1, 2020

[7] In 2019 and 2020, the Thunder Bay Police Service ("TBPS") received information from multiple confidential informants that someone named "Sammy" was selling drugs out of an apartment unit at 515 Gore Street West. Their

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subsequent investigation confirmed certain aspects of the CI tips, and also led them to conclude that “Sammy” was the appellant, Mr. Samuels.

[8] By September 1, 2020, the lead investigator, Det. Veal, believed he had sufficient grounds both to arrest the appellant and to obtain a warrant to search the apartment. He had a search warrant information “practically completed”, but he and his superiors decided not to apply for the warrant until after the appellant had been arrested, in order to avoid having to use the Emergency Task Force to enter the apartment.

(2) The appellant’s arrest on September 2, 2020

[9] On the morning of September 2, 2020, the police observed the appellant’s vehicle in the parking lot of a downtown Thunder Bay hotel. They also learned that a woman associated with the appellant had rented a hotel room. This led Det. Veal to decide that he would also seek warrants to search the appellant’s vehicle and the hotel room, in addition to the 515 Gore Street West apartment.

[10] At 10:00 a.m., Det. Veal directed his team to arrest the appellant on sight. He and his superiors also decided that once the appellant was arrested, he would not be allowed to contact counsel until after the police obtained and executed the search warrants. Det. Veal was concerned that if other people learned about the appellant’s arrest, they might conceal or destroy evidence, but he denied that it was standard TBPS policy to delay access to counsel in these circumstances.

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[11] Det. Veal also decided that because he was the “most familiar” with the appellant, he should join the arrest team waiting outside the hotel. This meant that he could not keep working on the search warrant application to have it ready to submit as soon as the appellant was arrested. He did not assign the task of finishing the search warrant application to another officer, because “[t]hey would’ve been starting a warrant from scratch whereas I had a warrant practically completed”.

[12] At 1:54 p.m., officers spotted the appellant walking from the hotel towards his parked vehicle. They arrested him for possession of cocaine for the purpose of trafficking. When the appellant was advised of his right to counsel, he asked to speak with counsel “right now”. He was not told at this time that his opportunity to speak with counsel would be delayed.

[13] The appellant was searched incident to arrest, which turned up approximately $2,500 in cash on his person, but no drugs. He was then taken to a nearby police station, arriving at around 2:17 p.m. Events in the booking room after he arrived were video and audio recorded.

[14] While the appellant was being taken to the station, officers made a warrantless entry to the hotel room to secure it until they obtained a search warrant. The woman who had rented the room was also arrested and taken to the police station, but she was eventually released without charges.

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[15] Shortly after the appellant arrived at the police station and was brought into the booking room, he expressed concern that his wrist had been broken during his arrest. A few minutes later, he suddenly collapsed onto the floor, although he quickly recovered sufficiently to get up and sit on a nearby bench. Paramedics were summoned. When the appellant was questioned about whether he had taken any drugs that day, he replied that he had “touched fentanyl”. The appellant was taken to another room and strip searched, but nothing significant was found.

[16] By this time, it was around 2:30 p.m. While the appellant was being strip searched, the paramedics arrived at the station. They suggested to the appellant that he should go with them to the hospital to have his wrist x-rayed. The appellant asked if he would be able to call his lawyer from the hospital, but an officer told him: “No, not right now”. This prompted a lengthy argument, during which the appellant, who became increasingly agitated, repeatedly insisted that he be allowed to call his lawyer before going to the hospital, and questioned why he was not being allowed to do this. One officer told him that police were doing “further investigation”, and that the appellant would be able to speak to a lawyer “as soon as we’re done what we’re doing”. Another officer told the appellant that he would not be able to speak to his lawyer from the hospital. However, the police eventually clarified that whether or not the appellant went to the hospital he would not be allowed to speak to a lawyer until the police had obtained and executed the search warrants, but that once that happened he would be allowed to speak to counsel

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from either the police station or the hospital. When the appellant asked when he would be allowed this phone call, he was told:

> We don't have a timeline. If we had one our whole day would be a lot planned out better, but we don't know.

[17] The appellant continued to insist that he be allowed to speak to a lawyer before going to the hospital. Eventually, a few minutes after 3:00 p.m., the appellant was taken to a cell, and the paramedics left the police station.

(3) The search warrants

[18] Later that afternoon, at around 4:30 p.m., Det. Veal completed and submitted the search warrant applications. He received the signed warrants back two hours later. The police proceeded to search the hotel room and the apartment. They found nothing significant in the hotel room and a quantity of cocaine in the apartment.

[19] At around this same time, the appellant, who was still complaining of pain in his left wrist, was taken from the police station to the hospital by PC Simon, who was instructed not to let the appellant speak with counsel until he heard otherwise from Det. Veal.

[20] By 8:00 p.m., the hotel and apartment search warrants had both been executed. At 8:30 p.m., Det. Veal called PC Simon and said that the appellant could now speak with counsel. PC Simon asked the appellant for the number of

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the lawyer he wanted called, and the appellant gave a name and a phone number. When PC Simon called this number, he learned that it belonged to someone who was not a lawyer, but a member of the appellant's family. (Mr. Lockyer advised that she is the appellant's mother). PC Simon told the appellant that he needed to speak to an actual lawyer, and the appellant then gave him the name of counsel. PC Simon could not remember if the appellant also provided a phone number, or if PC Simon found it on the internet.

[21] For reasons that were not fully explained at trial, more than three more hours passed before PC Simon arranged for the appellant to speak with counsel, which he finally did at 11:50 p.m. PC Simon suggested that since they were at the hospital this delay "could've very well been" because the appellant was having "x-rays or bloodwork or anything like that", but he did not remember whether this was the actual reason for the delay.

[22] Meanwhile, at 9:44 p.m., the police executed the warrant to search the appellant's vehicle, and found a loaded handgun. PC Simon told the appellant that he was being charged with additional firearms offences before the appellant spoke by phone with counsel at 11:50 p.m.

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B. ANALYSIS

(1) The breach of the appellant's s. 10(b) *Charter* rights

(1) The law

[23] Section 10(b) of the *Charter* places two different duties on police officers who detain suspects. As Doherty J.A. explained in *Rover,* at para. 25:

> Section 10(b) obliges the police to advise a detained person of the right to speak with counsel without delay and, if the detained person exercises that right, the police must immediately provide the detainee with a reasonable opportunity to speak to counsel. [Citations omitted.]

There is no dispute in this case that the police properly complied with their informational duty, and that the appellant exercised his right by immediately asking to speak to counsel. The issue is with the subsequent police delay in carrying out their implementational duty.

[24] When access to counsel is delayed, as it was here, "[t]he burden is on the Crown to show that a given delay was reasonable in the circumstances": *R. v. Taylor,* 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 24; *R. v. Hobeika*, 2020 ONCA 750, 153 O.R. (3d) 350 at para. 73. In *R. v. Keshavarz,* 2022 ONCA 312, 413 C.C.C. (3d) 263, at para. 71, Fairburn A.C.J.O. explained:

> [I]n specific circumstances the implementational component of the right to counsel may be suspended. Those specific circumstances often involve concerns over police or public safety or the preservation of evidence. [Citations omitted.]

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The need to execute search warrants can sometimes justify a suspension of the right to counsel. However, the police must have "turned their minds to the specific circumstances of the case"; they must have "reasonable grounds to justify the delay"; and they "must move as efficiently and reasonably as possible to minimize any ensuing delay": *Keshavarz,* at paras. 71-75; see also *Rover,* at paras. 26-27, 33.

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(2) The trial judge's ruling

[25] The trial judge found that the police breached the appellant's s. 10(b) *Charter* rights. He accepted the police evidence that what happened in this case was "a rare or very infrequent occurrence" in Thunder Bay, rather than a "routine practice". However, he stated:

> I conclude that priority was given, in this case, to police convenience rather than [the appellant's] *Charter* rights. The decision to arrest [the appellant] prior to attempting to execute the search warrant was a sound and reasonable decision based on his history of violence with firearms. But grounds for the search warrant existed prior to [the appellant's] arrest and the search warrant for the apartment could have been obtained prior to arresting [the appellant]. As Doherty J. noted in *Rover* [at para. 33]:
>
> > The police cannot create a justification for delaying access to counsel by choosing, for reasons of convenience or efficiency, to arrest an individual before seeking, obtaining and [executing] a search warrant.

[26] The trial judge observed that there was “no case specific evidence for delay” in this case, “except a general concern that information may be leaked”. He noted further that in *Keshavarz,* where this court found that the police were justified in suspending of the accused’s access to counsel while they applied for and executed search warrants, there had been “no plan, as there was in this case, to arrest and then [obtain] a search warrant”.

[27] The Crown does not challenge the trial judge’s finding that the appellant’s s. 10(b) *Charter* rights were infringed. I accept this concession. As Mr. Lockyer points out, there were a number of other ways the police could have achieved their objectives without delaying the appellant’s ability to speak to counsel at all, or at the very least, without delaying it for as long as they did.

[28] First, since Det. Veal already had grounds to obtain a search warrant for the apartment by September 1, 2020, he could have prepared and submitted the application for the warrant before the appellant was arrested. Even if it was reasonable for Det. Veal and his superiors to want to delay the apartment search until after the appellant had been arrested, “[t]here is no statutory time limit for the execution of conventional search warrants”: *R. v. Jodoin*, 2018 ONCA 638, at para. 18. A search warrant with no express execution date must be executed on the same day that it is issued, but a justice of the peace can also specify “a range of dates”: *R. v. Saint,* 2017 ONCA 491, 353 C.C.C. (3d) 467, at paras. 1, 19-21. Since Det. Veal’s grounds for believing that drugs were in the apartment were not

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particularly time-sensitive, he could have submitted his search warrant application on September 1, but asked the issuing justice to extend the execution period long enough to give the police time to first find and arrest the appellant. Indeed, Det. Veal agreed at trial that he knew he could have requested a 24-hour execution window.

[29] Second, even if Det. Veal did not have time to finish drafting the search warrant application on the morning of September 2, 2020 because he wanted to be on the arrest team, he could have assigned this task to another officer. His belief that another officer would have had to start "from scratch" was incorrect. Search warrant affiants may rely on investigative hearsay, so another officer could have simply adopted what Det. Veal had already drafted on the basis of information and belief.

[30] Third, Mr. Lockyer suggested in oral argument that the police might also have been able to make a warrantless entry to the apartment to secure it pending the issuance of a search warrant, as they did with the hotel room: see *Controlled Drugs and Substances Act,* S.C. 1996, c. 19, s. 11(7). There is no evidence that the police considered this option as a way of minimizing the delay in the appellant speaking with counsel.

[31] Even when circumstances exist that justify "some delay in granting access to counsel … the police must also take reasonable steps to minimize the delay":

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Rover, at para. 27. The situation here was not like that in *Keshavarz,* where the police were confronted with unexpected developments that required them to improvise. Rather, the police in this case could have arranged things differently ahead of time so that any delay in the appellant contacting counsel was eliminated, or at least very substantially reduced. I accordingly agree with the trial judge's conclusion that the appellant's s. 10(b) *Charter* rights were infringed. As I have already noted, the Crown does not take issue with this finding.

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(3) The duration of the s. 10(b) breach

[32] The parties disagree about when the breach of the appellant's s. 10(b) *Charter* rights began, and for how long it persisted. The trial judge did not make any findings about either of these points. I note at the outset that while the duration of the s. 10(b) *Charter* breach is of some importance in the s. 24(2) *Charter* exclusion analysis, a proper assessment of the relevant factors does not require the length of the breach to be quantified precisely, down to the minute.

[33] The appellant submits that the breach of his s. 10(b) *Charter* rights began when he was first arrested at 1:54 p.m., and then continued until he was finally able to speak to a lawyer at 11:50 p.m., nearly 10 hours later.

[34] The Crown's position is that the s. 10(b) *Charter* breach did not start until the appellant was "in a safe and secure location where a private call with counsel could be facilitated": *Keshavarz,* at para. 67. According to the Crown, this did not

occur until the appellant was taken to the cells at the police station, which happened at around 3:12 p.m. (i.e., about an hour and 18 minutes after his arrest). The Crown argues further that the breach ended a little more than five hours later, at around 8:30 p.m., when the appellant was told that he could now speak to counsel, but gave what turned out to be his mother's name and phone number, instead of the name of a lawyer. The Crown contends that by not immediately giving the name of a lawyer, the appellant waived his s. 10(b) *Charter* rights and terminated the breach.

[35] Since the trial judge did not make any findings about when the breach of the appellant's s. 10(b) *Charter* rights started and ended, we must draw our own conclusions from the trial record. As I will explain, I find that the breach of the appellant's rights lasted for approximately nine hours.

(1) When did the s. 10(b) breach start?

[36] I agree with the Crown that the breach of the appellant's s. 10(b) *Charter* rights only started once it would have been feasible for the appellant to speak with counsel in private. Even if the police had not decided to delay the appellant's ability to speak to counsel, it would still have taken them approximately 20 minutes after his arrest to transport him to the police station, and some additional time to complete the booking procedure and arrange a phone call. The appellant's

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collapse onto the booking room floor a few minutes after he arrived at the station would then have delayed things further.

[37] However, in my view it would have been reasonably practicable for the police to have put the appellant in touch with counsel by around 2:45 p.m. By this time they had addressed the medical and safety concerns arising from the appellant's collapse, and the appellant had recovered and was insisting on speaking to counsel immediately. The only reason this did not happen at this time is because Det. Veal had already decided that the appellant's right to speak with counsel would be suspended until the search warrants had been obtained and executed. Indeed, the video reveals that nearly all of the time between 2:30 p.m. and 3:12 p.m., when the appellant was taken to the cells, was taken up by the appellant and the police arguing about whether he would be allowed to speak to a lawyer. If the police had acceded to the appellant's repeated requests to speak to counsel, it would likely have only taken them a few minutes to arrange a phone call.

(2) When did the s. 10(b) breach end?

[38] I would find further that the breach of the appellant's s. 10(b) *Charter* rights continued until he first spoke with counsel at 11:50 p.m., and that he did not waive his s. 10(b) *Charter* rights when he gave PC Simon his mother's name and phone

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number at 8:30 p.m., rather than immediately giving the officer the name of a lawyer (which he did provide a few minutes later).

[39] I acknowledge that the appellant might possibly have been able to speak to counsel sooner if he had given PC Simon the name of a lawyer when he was first asked for one. This is a relevant consideration to bear in mind in the s. 24(2) analysis. However, I do not agree with the Crown that the appellant's conduct amounted to an implicit waiver of his s. 10(b) *Charter* rights. "[T]he standard for waiver [is] high, especially in circumstances where the alleged waiver has been implicit": *R. v. Bartle,* [1994] 3 S.C.R. 173, at p. 192. As Lamer C.J.C. noted in *R. v. Prosper,* [1994] 3 S.C.R. 236, at pp. 274-75:

> Given the importance of the right to counsel … once a detainee asserts the right there must be a clear indication that he or she has changed his or her mind, and the burden of establishing an unequivocal waiver will be on the Crown. [Citations omitted.]

[40] In this case, the appellant repeatedly and vociferously asserted his right to counsel for more than an hour after his arrest. While it might have been imprudent for him five hours later to have tried to get PC Simon to call his mother before calling a lawyer, I am not prepared to draw the inference that he had changed his mind about wanting to speak with a lawyer. Indeed, PC Simon did not draw this conclusion either, since when he learned that the person he first called was not a lawyer, he spoke to the appellant again and obtained a lawyer's name.

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[41] I would add that the appellant also had no reason to believe at 8:30 p.m. that giving PC Simon his mother's name and number would delay his speaking with a lawyer for more than three more hours. It is implausible that the appellant was undergoing medical treatment continuously between 8:30 p.m. and 11:50 p.m., such that his call with counsel could not have been arranged earlier. I would accordingly find that the Crown has not met its burden of demonstrating that the delay between 8:30 p.m. and 11:50 p.m. was "reasonable in the circumstances": *Taylor,* at para. 24.

[42] I would also add that even if I were to find that the appellant did implicitly waive his s. 10(b) *Charter* rights at 8:30 p.m., his rights were reengaged when the police found the gun in his vehicle at 9:45 p.m., which significantly changed his jeopardy: see, e.g., *R. v. Black,* [1989] 2 S.C.R. 138, at pp. 152-53; *R. v. Evans,* [1991] 1 S.C.R. 869, at p. 892. At most, a finding of waiver at 8:30 p.m. would only reduce the duration of the s. 10(b) *Charter* breach by an hour and a quarter.

(2) Should the gun be excluded under s. 24(2)?

(1) The trial judge's s. 24(2) reasons

[43] The trial judge concluded that the gun seized from the appellant's vehicle was "obtained in a manner" that violated the *Charter*, even though there was no causal connection between the search and the breach of the appellant's s. 10(b) *Charter* rights: see *R. v. Pino,* 2016 ONCA 389, 130 O.R. (3d) 561. The trial judge

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focused his attention on the admissibility of the gun, and did not expressly address the cash that had been previously seized from the appellant's person. Although the seizure of the cash preceded the breach of the appellant's s. 10(b) *Charter* rights, *Pino* establishes that "the 'obtained in a manner' requirement allows the court, in an appropriate case, to exclude the evidence because of a *Charter* breach occurring after the evidence was discovered": *Pino,* at para. 48.

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[44] The trial judge went on to find that the balance of the *Grant* factors favoured admission of the gun: *R. v. Grant, 2*009 SCC 32*,* [2009] 2 S.C.R. 353. With respect to the first set of *Grant* factors – the seriousness of the *Charter*-infringing state conduct – he stated:

> In this case the breach was serious. It was not, however, unlike *Rover*, a breach that was the direct result of systemic police practices.

[45] Turning to the second set of *Grant* factors – the impact of the breach on the appellant's *Charter*-protected interests – the trial judge held:

> The search of the vehicle was authorized by a validly obtained warrant that was not challenged. There is no causal connection between the delay of implementation of the right to counsel and the search of the vehicle. Therefore, the impact of the breach on Mr. Samuels' *Charter* rights is, as in *Keshavarz,* neutral at best*.*

[46] With respect to the third set of *Grant* factors – society's interest in an adjudication on the merits – the trial judge concluded:

> [T]he prevalence and use of firearms in the drug trade is a very serious problem. Society has a "heightened" interest in the adjudication of a case on its merits when the offence charged is serious, as in this case.

[47] He accordingly admitted the gun into evidence. Although his reasons did not expressly address the admissibility of the seized cash, it was evidently also not excluded from evidence.

(2) Standard of review

[48] A trial judge's decision to admit or exclude evidence under s. 24(2) is entitled to significant appellate deference. As Jamal J.A. (as he then was) noted in *R. v. Griffith*, 2021 ONCA 302, 408 C.C.C. (3d) 244, at para. 49:

> A trial judge's decision to admit or exclude evidence under s. 24(2) of the *Charter* attracts appellate deference absent an error in principle, a failure to consider the proper factors, a palpable and overriding factual error, or an unreasonable determination. [Citations omitted].

An "error in principle" includes "failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, [and] overemphasizing relevant factors": *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 719.

[49] As I will now explain, I find that the trial judge erred in principle when he assessed the impact of the s. 10(b) breach on the appellant's *Charter*-protected interests. We must accordingly conduct our own s. 24(2) admissibility analysis

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afresh, although the trial judge's factual findings remain entitled to appellate deference.

(3) The *Grant* factors

(1) The seriousness of the *Charter*-infringing state conduct

[50] The first *Grant* line of inquiry requires courts to consider whether admitting evidence would "[send] a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law": *Grant*, at para. 72. This involves assessing "the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*": *Grant*, at para. 73. The *Grant* majority added at para. 75:

> "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.

[51] The trial judge found that TBPS, unlike the police in *Rover*, did not have a policy of routinely delaying detainees' access to counsel: see *Rover*, at paras. 15, 29. I agree that this finding places the breach of the appellant's *Charter* rights at a lower point on the spectrum of seriousness, as compared to the breach in *Rover*.

[52] Even so, the breach of the appellant's s. 10(b) *Charter* rights was a significant departure from established *Charter* standards. "A serious breach of a

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long-established and well-understood constitutional right can lead to exclusion of evidence, even where the breach is not systemic in nature, or part of a pattern of police misconduct": *Hobeika,* at para. 82. As McLachlin C.J.C. noted in *R. v. Harrison,* 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 25:

> [W]hile evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor.

See also *R. v. McGuffie,* 2016 ONCA 365, 131 O.R. (3d) 643, at para. 67.

[53] Moreover, even if the Thunder Bay police do not commonly commit similar s. 10(b) violations, the breach of the appellant's rights cannot be characterized as merely "an isolated act of a single misguided police officer": *R. v. Clayton,* 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 129, *per* Binnie J.; see also *McGuffie,* at paras. 68-69. Rather, it was the predictable outcome of a deliberately chosen operational plan, approved by senior officers, that treated the appellant's s. 10(b) *Charter* rights as unimportant.

[54] It is also an important consideration that the police investigation of the appellant took place almost two years after this court's decision in *Rover*. The police practice in *Rover* of routinely delaying detainees right to counsel was not the only problem this court identified. Doherty J.A. also sharply criticized the police failure to consider alternative approaches that would have avoided any delay in

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putting the accused in touch with counsel, or at least reduced the length of this delay. As he explained at para. 39:

> Apart entirely from never turning their mind to the actual need to delay the appellant's access to counsel, the officers showed no interest in mitigating the delay. For example, there is no evidence that the police considered obtaining a search warrant before arresting the appellant. I see nothing in the circumstances that would have prevented the police from obtaining the warrant first. This would have avoided, or at least substantially minimized, any delay in affording the appellant his constitutional right to speak with counsel. Even if the police wanted the appellant out of the residence before executing the warrant, they could have obtained the warrant, watched the residence, arrested the appellant when he left and proceeded to execute the warrant. Had the police followed that procedure, they could have allowed the appellant immediate access to counsel. Instead, by arresting the appellant before obtaining the warrant, the police ensured that he would be held without access to his lawyer for hours. [Emphasis added.]

[55] Most of these criticisms apply with equal force here. As I have already discussed, there was no legal or practical impediment to the TBPS obtaining a search warrant for the apartment before the appellant was arrested, either by applying for it the day before and requesting an extended execution period, or by applying for it on the morning before the appellant's arrest. To whatever extent Det. Veal and his superiors may have considered these options, they seem to have rejected them for no good reason. As in *Rover*, they instead adopted a course that "ensured that [the appellant] would be held without access to his lawyer for hours": *Rover,* at para. 39.

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[56] In my view, the seriousness of the breach of the appellant's s. 10(b) *Charter* rights falls somewhere on the spectrum between the breaches in *Rover* and *Hobeika*, but closer to the *Rover* end.

[57] In *Hobeika*, where the accused was denied access to counsel for more than four hours, there was no evidence that this resulted from a deliberate police decision rather than an unfortunate oversight. Although Doherty J.A. found a "troubling police indifference" to the accused's s. 10(b) rights, he nevertheless found the breach less serious than that in *Rover,* charactering it as "a situation-specific, isolated failure, albeit a serious one, by the officers who had custody of Hobeika during the relevant time period": *Hobeika,* at para. 88.

[58] In contrast, the breach of the appellant's s. 10(b) *Charter* right was the readily foreseeable consequence of the operational plan that the TBPS had deliberately adopted in this case. While the gravity of the breach would have been even worse if the TBPS, like the police in *Rover*, had been following a protocol that they used in every drug investigation, "[t]he absence of evidence of systemic non-compliance with Charter requirements by the police is not a mitigating factor": *McGuffie,* at para. 67.

[59] In summary, I concluded that the first set of *Grant* factors weigh in favour of exclusion, albeit somewhat less heavily than in *Rover*.

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(2) The impact of the breach on the appellant's *Charter*-protected interests

[60] The second *Grant* line of inquiry focusses on the seriousness of the impact of the breach on the *Charter*-protected interests of the accused. As the *Grant* majority explained, at para. 76:

> It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[61] The trial judge addressed the second set of *Grant* factors by focussing exclusively on the lack of any causal link between the breach of the appellant's s. 10(*b*) rights and the search of his vehicle where the gun was found. I agree that this lack of causal connection was a relevant consideration, and leads to the conclusion that the s. 10(b) breach had no impact on the appellant's s. 8-protected privacy interest: see *Grant,* at para. 122; *Rover,* at para. 43. However, the trial judge erred in principle by ignoring how the breach affected the appellant's other important *Charter*-protected interests.

[62] As Doherty J.A. observed in *Rover,* at para. 45:

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> 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.

See also *R v. Dussault*, 2022 SCC 16, at para. 56.

[63] In this case, the appellant was denied that lifeline for ten hours, nine of which I find were unjustified. It is apparent from the booking room video that he was confused and upset about why, after being told when he was arrested that had the right to speak to a lawyer, he was now being denied that right. Unlike the situation in *Rover,* where the accused sat in the cells for "several hours" without ever being told why he was not being allowed to speak to counsel, the police eventually did explain to the appellant that he would be allowed to speak to counsel once the police obtained and executed the search warrants. However, he was still not told how long he would have to wait.

[64] The trial judge also erred by analogizing the circumstances of this case to those in *Keshavarz,* where this court characterized the impact of the breach on the Charter-protected interests of the accused as not "particularly serious". In my view, *Keshavarz* is distinguishable on two different bases.

[65] First, while the accused in *Keshavarz* was not given the option of speaking with counsel until nearly 8 hours after his arrest, most of this delay was found to

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have been justified in the circumstances. The breach of the accused's s. 10(b) *Charter* rights only crystallized during the last hour before he was permitted a phone call. The *Charter* breach in this case started much earlier and lasted considerably longer.

[66] Second, when the accused in *Keshavarz* was finally given the chance to speak with a lawyer, he chose to instead call a friend. After speaking with his friend, he then declined an offer by the police to arrange a further call with duty counsel. This substantially blunted any inference that his *Charter*-protected interests had been severely affected by the one-hour delay in giving him the opportunity to call counsel, which this court found had violated his s. 10(b) *Charter* rights.

[67] In contrast, the appellant in this case was not given the opportunity to speak with counsel until more than six and a half hours after he was arrested. As I have explained, I would find that approximately five hours and 45 minutes of this delay was unjustified, and infringed the appellant's s. 10(b) *Charter* rights. Moreover, unlike the situation in *Keshavarz,* where the police let the accused speak with his friend, PC Simon did not allow the appellant to speak with his mother, and the appellant did not decline the officer's subsequent offer to call his counsel of choice, but gave PC Simon the name of his lawyer. The ensuing three hours and 15 minutes that it took PC Simon to call this lawyer was not adequately explained. Moreover, during this time the police found the gun in the appellant's vehicle, which significantly increased his jeopardy and required that he be given a fresh

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opportunity to consult with counsel, even if his conduct at 8:30 p.m. is treated as an implied waiver of his s. 10(b) rights.

[68] In my view, the record in this case does not support the inference that the appellant suffered no significant psychological distress from having been held *incommunicado* since his arrest. To the contrary, the booking video reveals that the appellant badly wanted to speak to his lawyer right away, and was upset and distressed when he learned that he would be denied the right to do so for some unknown time, which ultimately stretched well into the night.

[69] In these circumstances it was an error for the trial judge to dismiss the impact of the breach on the appellant's protected interests as "neutral at best." Even though the breach had no discernible impact on his right to privacy and his right against self-incrimination, it substantially interfered with his "security of the person interest protected by s. 10(b)": *Rover,* at para. 47. To adopt what Doherty J.A. said in *Rover*, at para. 47:

> I would hold that the s. 10(*b*) breach had a significant negative impact on the appellant's *Charter*-protected rights. While that impact was certainly not as serious as it would have been had there been a causal connection between the breach and the obtaining of the evidence, it was nonetheless significant.

[70] This set of *Grant* factors accordingly favours exclusion of the evidence.

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(3) Society's interest in an adjudication on the merits

[71] As usual in cases involving the admission or exclusion of real evidence, the third *Grant* inquiry, which looks to society's interest in an adjudication on the merits, favours admitting the seized handgun, and to a lesser extent the seized cash. Both items of evidence were essential to the Crown's case on the charges under appeal, so excluding them will lead to the appellant being acquitted of serious charges, despite his factual guilt.

[72] However, the trial judge somewhat oversimplified the analysis by suggesting that the seriousness of the charges uniformly favoured admission. As the *Grant* majority explained at para. 84, "while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways", since:

> While the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[73] Although I agree with the trial judge's conclusion that on balance the third *Grant* inquiry weighs in favour of admitting the seized evidence, the societal interest in preventing the justice system from being tainted by police misconduct also cannot be ignored. As Doherty J.A. put it in *McGuffie,* at para. 73:

> [S]ociety's concerns that police misconduct not appear to be condoned by the courts, and that individual rights be taken seriously, come to the forefront when the

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> consequences to those whose rights have been infringed are particularly serious.

(4) Balancing the three sets of *Grant* factors

[74] As Doherty J.A. explained in *McGuffie,* at paras. 62-63:

> The first two [*Grant*] 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.
>
> 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. 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. 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. [Citations omitted].

[75] In this case, the first *Grant* inquiry favours exclusion of the evidence, albeit somewhat less strongly than it did on the facts of *Rover*, which raised broader systemic concerns that on the trial judge's findings of fact do not arise here.

[76] However, in my view, the second set of *Grant* factors weigh in favour of exclusion somewhat *more* strongly than they did in *Rover,* where the accused was unconstitutionally denied access to counsel for "almost six hours". The breach of

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the appellant's s. 10(b) *Charter* rights went on considerably longer, which increases the weight of the second set of *Grant* factors here.

[77] On balance, I would find that this is a case where, like in *Rover*, "the long-term repute of the administration of justice requires the sacrifice of the short-term benefit of an adjudication on the merits of this case": *Rover,* at para. 49. The first and second sets of *Grant* factors both favour exclusion, and while the first set does so somewhat less strongly than it did in *Rover,* this is offset to some extent by the increased weight of the second set. In my view, this is not a case where the overall balance is tipped back in favour of admission by the strength of the societal interest in an adjudication on the merits. I would add that even if I agreed with my colleague MacPherson J.A.'s conclusion that the duration of the s. 10(b) breach in this case was shorter than I have found, this would not change my conclusion that the balance of *Grant* factors favours exclusion.

C. DISPOSITION

[78] In the result, I would exclude the seized gun and cash from evidence as a s. 24(2) *Charter* remedy for the violation of the appellant's s. 10(b) *Charter* rights. Since this evidence was essential to the Crown's case on the charges on appeal, I would allow the appeal, set aside the appellant's convictions on Counts 2, 4, 5, 6 and 8 of the indictment, and enter acquittals on these counts. I would also lift the

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conditional stay of proceedings entered by the trial judge on Counts 1, 3 and 7, and enter acquittals on those counts.

"J. Dawe J.A."

"I agree. L. Madsen J.A."

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MacPherson J.A. (Concurring):

[79] I have read the reasons of my colleague Dawe J.A. I disagree with his conclusion about the length of the police breach of the appellant's s. 10(b) *Charter* rights in this case. However, in the end, I agree with his disposition of the appeal.

(a) Length of delay

[80] In his reasons, my colleague says:

> In my view, the trial judge erred in his s. 24(2) analysis by treating the impact of the s.10(b) *Charter* breach on the appellant's protected interests as "neutral at best" because the breach did not lead to the police obtaining any evidence. This ignored the serious impact it had on the appellant's security of the person. He was held in custody without access to counsel for ten hours, nine of which I find were unjustified. [Emphasis added.]

[81] I do not agree that the unjustified delay in this case was nine hours.

[82] For s. 10(b) purposes, the clock does not start from the moment of arrest. The clock starts when the accused is "in a safe and secure location where a private call with counsel could be facilitated": *R. v. Keshavarz*, 2022 ONCA 312, at para. 67. Given the time it took to transport the appellant to the police station, to book him at the station, and to transfer him to a cell where he would have privacy, the clock for s. 10(b) purposes began to run at about 3:12 p.m.

[83] The police gave the appellant the opportunity to contact counsel at about 8:30 p.m. The appellant cheated and tried to talk to his mother. In *Keshavarz*, this

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court accepted that the s. 10(b) breach ended "when [the accused] called his friend and chose not to call counsel or duty counsel": see para. 103. Accordingly, the delay in providing the appellant his right to speak to counsel was about five hours and eighteen minutes.

(b) Disposition

[84] Although my assessment of the police delay in providing the appellant his right to speak to counsel was shorter than my colleague's assessment (five hours and eighteen minutes versus nine hours), I join my colleague in concluding that the delay was too long and, therefore, breached the appellant's s. 10(b) *Charter* right.

[85] I specifically endorse my colleague's analysis and conclusion:

> I would allow the appeal. The breach in this case was a serious departure from well-established Charter standards. The police had grounds to obtain a search warrant for the appellant's apartment the day before they arrested him, but chose to wait until after they made the arrest to apply for the warrant, and to suspend the appellant's right to counsel in the interim. The entirely predictable result of this operational plan was that the appellant's right to counsel was delayed much longer than was reasonably necessary.

[86] I agree with the disposition in paragraph 78 of his reasons.

Released: October 28,2024 "J.C.M."

"J.C. MacPherson J.A."

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