

R. v. [REDACTED]

British Columbia Judgments

British Columbia Supreme Court
Campbell River, British Columbia

Baird J.

Heard: January 23-27, 2023.

Judgment: February 28, 2023

Docket: 43485-2

Registry: Campbell River

[2023] B.C.J. No. 468 | 528 C.R.R. (2d) 25 | 2023 BCSC 384

Between Rex, and [REDACTED] [REDACTED] [REDACTED]

(59 paras.)

Case Summary

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Protection against arbitrary detention or imprisonment — Right to retain and instruct counsel without delay — Remedies for denial of rights — Specific remedies — Exclusion of evidence — Charter application by accused for exclusion of cocaine and firearm from evidence in violation of s. 24 of Charter, partly granted — Evidence produced by search of accused incidental to arrest was admissible — Evidence produced by search of Beach Drive and Quatsino Crescent residences was excluded — Accused's arrest was lawful, as was search incidental to it was justified and reasonable — Alleged cocaine discovered on accused's person result of that search was admissible evidence — Residential searches formed part of continuous transaction of February 6, 2020, during which police obtained inculpatory evidence against accused — Evidence yielded during residential searches was obtained in manner that infringed accused's rights.

Charter application by accused for the exclusion of cocaine and firearm from evidence in violation of s. 24 of the Charter. Cst. Brady of Port McNeill RCMP suspected accused was trafficking in narcotics. He sought and was given approval by his supervisor, Cpl. Lingley, to organise modest surveillance operation with the assistance of police colleagues from elsewhere. Surveillance operation started on February 4, 2020 and continued on February 5 and February 6. Accused was followed around by surveillance detail and consistently seen driving here, there, and everywhere within the very small confines of Port McNeill making frequent, brief stops at various places. He appeared to be doing so without any purpose related to gainful employment or any other logical everyday routine. On February 6, 2020, surveillance team located accused's vehicle parked in front of his mother's house at Quatsino Crescent. At 11:27 a.m., vehicle departed and was seen traveling around town in manner similar to that observed on the previous two days. At 1:08 p.m., accused drove away from central Port McNeill to its outskirts, turning onto Betts Road where there were no businesses or houses. As police watched, white Chevrolet SUV parked in close proximity to accused's vehicle in small and secluded parking area. Police were justified in believing the driver of SUV had just dealt directly with accused in a brief and obviously pre-arranged meeting in an isolated location. Cst. Brady was justified in believing that a drug transaction had just occurred and that

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an indictable offence had been committed. Accused and driver of SUV, Stewart, was arrested. Stewart had spitball in his hand containing half gram of cocaine, and \$10 in change from \$60 that he said he had given accused for it. Cst. Brady promptly notified the accused of the reason for his arrest and informed him of his right to retain and instruct counsel without delay. Accused said that he wished to speak to a lawyer. The accused was transported to the police station in Port McNeill and booked into cells. Part of this procedure involved search of his person for contraband, weapons, or other hazardous items. Police found 16 spitballs of suspected cocaine secreted in the accused's underwear. The accused's car was also searched incident to arrest and his cellphone was seized. Police secured both Beach Drive and Quatsino Crescent residences by no later than 1:30 p.m. approximately 20 minutes after the accused was arrested. The search warrants for both residences were issued at approximately 6:00 p.m. The loaded prohibited firearm and additional alleged cocaine were found in the accused's bedroom at the Quatsino Crescent residence at 7:48 p.m. Other drugs and money were located at the Beach Drive apartment. Accused alleged that he was unlawfully arrested, that he was not granted access to legal counsel without delay, that he was arbitrarily detained in police cells long after the time when he ought properly to have been released, that the police failed to advise him promptly of new charges and a change in his legal jeopardy, and once they did so warn him, they again failed to provide him with access to counsel, and that he had requested but not had an opportunity to consult with counsel about the new charges, particularly respecting the loaded prohibited firearm, the police proceeded to question him with a view to obtaining confession of guilt.

HELD: Application partly granted.

The evidence produced by the search of the accused incidental to arrest was admissible. The evidence produced by the search of the Beach Drive and Quatsino Crescent residences was excluded. The accused's arrest was lawful, as was the search incidental to it was justified and reasonable. The alleged cocaine discovered on the accused's person as result of that search, which was authorised by the common law and carried out in a reasonable fashion, was admissible in evidence. It was not obtained in a manner that infringed the accused's Charter rights. The residential searches formed part of continuous transaction throughout the afternoon and evening of February 6, 2020, during which police obtained inculpatory evidence against the accused. The evidence yielded during the residential searches was obtained in a manner that infringed accused's rights. The evidence obtained from the accused's Beach Drive apartment and from his bedroom in his mother's house on Quatsino Crescent was excluded. There was no reasonable justification for suspending the accused's right to access legal advice in the two hours after his arrest, or for failing to notify him promptly of the new offences arising from the residential searches which materially changed his legal jeopardy and formed the basis for his continued and reasonably lengthy detention in police cells. The decision to interrogate the accused about the new offences after he had asked for, but not received, a legal consultation about them ran in willful contravention of decades of settled law prohibiting them from doing so.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 9, s. 10, s. 10(a), s. 10(b), s. 24(2)

Controlled Drugs and Substances Act

Criminal Code, [R.S.C. 1985, c. C-46, s. 498\(1\)](#), s. 498(1.1)

Counsel

Counsel for the Crown: C. Gibson.

Counsel for the Accused: R. **Neary**.

Oral Reasons for Judgment on *voir dire*

BAIRD J. (orally)

INTRODUCTION

1 In December 2019, Cst. Brady of the Port McNeill RCMP came to suspect that the accused, [REDACTED] [REDACTED] was trafficking in narcotics. He sought and was given approval by his supervisor, Cpl. Lingley, to organise a modest surveillance operation with the assistance of police colleagues from elsewhere. As a result of this investigation, Mr. [REDACTED] was arrested on February 6, 2020 and subsequently charged with possession of narcotics for the purpose of trafficking and possession of a loaded prohibited firearm.

2 This is a ruling on a *Charter voir dire* in which the accused alleges, first of all, that he was unlawfully arrested; secondly, that he was not granted access to legal counsel without delay; thirdly, that he was arbitrarily detained in police cells long after the time when he ought properly to have been released; fourthly, that the police failed to advise him promptly of new charges and a change in his legal jeopardy, and once they did so warn him, they again failed to provide him with access to counsel; and finally, knowing that he had requested but not had an opportunity to consult with counsel about the new charges, particularly respecting the loaded prohibited firearm, the police proceeded to question him with a view to obtaining a confession of guilt.

THE ARREST

3 I am satisfied on all of the evidence that the accused's arrest was lawful. I do not doubt that Cst. Brady subjectively believed that he had reasonable grounds to make this arrest, and I note in passing that other more experienced members of the surveillance team shared his opinion, including Cst. Mobbs and Cst. Miles, two veterans of many similar street level dial-a-dope investigations whose evidence on the topic I found to be persuasive.

4 This is not to say, however, that I have accepted all of Cst. Brady's evidence. There are aspects of his evidence that I intend to set aside as unreliable and to divorce from consideration. For example, I do not accept that Cst. Brady saw a male in the driveway of 715 Beach Drive at 3:41 p.m. on February 5, 2020. This information, by which it might be inferred that a pre-arranged meeting with the accused was about to take place, is not contained in the surveillance logs that were produced in evidence. No such person was seen by Cst. Mobbs or Cpl. Lingley, both of whom were on the same surveillance detail. A fourth surveillance team member, Cst. Miles, who was the scribe for the day, testified that he had nothing in his notes about a male in the driveway or any recollection of it. He said that he would have recorded this on the surveillance log if it had happened. He testified, furthermore, that when the team debriefed at the end of the day, no one told him that a male had been seen in the driveway anywhere near the accused at the relevant time. If he had been so advised, Cst. Miles said, it would have been an important observation and he would have recorded it.

5 I am sceptical, as well, that Cst. Brady knew at the time of surveillance that 715 Beach Drive was a residence associated with a known drug user called Sean Gagnon. If this had been known, it would have been an important fact to record in the surveillance log to support grounds for an arrest which, up until

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the second day of surveillance, at any rate, were not terribly strong. The absence of this observation, not only from the surveillance logs, but also the contemporaneous notes of the surveillance team members, indicates to me that this fact was probably not known to the investigators at the time and that, if true, it is something that Cst. Brady learned after the arrest.

6 Furthermore, I do not accept that it formed any sincere part of Cst. Brady's decision to deny Mr. [REDACTED] access to counsel that a legal consultation would somehow result in Mr. [REDACTED] cellphone being "wiped" remotely. Finally, and in general, I do not accept that there was any justification for delaying access to counsel to preserve evidence. Cst. Brady was unable to refer to any factors specific to this case that could lend any air of reality to his alleged apprehension that permitting Mr. [REDACTED] to speak with a lawyer could result in the destruction of evidence. Instead, it sounded to me like the sort of pat rationale or policy that would justify suspending the right to consult with counsel in any and every case of this type. In contrast to Cst. Brady's evidence on this subject, which remained consistent throughout, Cpl. Lingley conceded that the decision to deny this right to Mr. [REDACTED] was not sound, and was one that he would not take again in the future in similar circumstances.

7 I am entitled to accept all, part or none of a witness's evidence. I accept much of what Cst. Brady told me, because it was corroborated by other witnesses whom I have no reason to disbelieve, especially Cst. Mobbs and Cst. Miles. On the totality of the surveillance investigation, I have concluded that, even after setting aside and disabusing my mind of the features of Cst. Brady's evidence that I find to be unreliable or unpersuasive, his suspicion that Mr. [REDACTED] was dial-a-doping was confirmed, and that, when considered objectively, the threshold from suspicion into reasonably based probability was decisively crossed.

8 The surveillance operation started on February 4, 2020 and continued on February 5 and February 6. I note that these dates fell on a Tuesday, Wednesday and Thursday. The accused appeared to me to be a young, healthy-looking male. He was followed around by the surveillance detail and consistently seen driving here, there, and everywhere within the very small confines of Port McNeill making frequent, brief stops at various places - residential dwelling houses, the town's main pub, commercial buildings, and so on. He appeared to be doing so without any purpose related to gainful employment or any other logical everyday routine.

9 The most important day of surveillance was Wednesday, February 5, 2020. On that date, the surveillance detail observed Mr. [REDACTED] drive to his mother's place on Quatsino Crescent at 3:27 p.m. He departed four minutes later and was observed driving around town. He made a brief stop at a residential apartment building at 715 Beach Drive. He was seen to enter one of the units. He emerged only a minute later, got back into his car and continued driving around town to no discernible purpose, eventually returning to his apartment at 1900 Beach Drive, at 4:06 p.m.

10 Less than an hour later, the accused left his apartment and was seen driving around Port McNeill again, ending up at his mother's place on Quatsino Crescent at 4:54 p.m. Twenty minutes later, he re-emerged and his circumnavigations of Port McNeill began anew. All of the police witnesses who testified indicated that the accused was driving in a manner that indicated to them that he was engaged in "counter surveillance" or "heat checks", taking circuitous routes to places that could be reached more directly, speeding up and slowing down, making sudden turns for no obvious reason, and so on.

11 The accused was followed in a reasonably solid block from just before 5:00 p.m. until approximately 5:30 p.m., driving all around Port McNeill in the seemingly random manner observed throughout. Ultimately, at 5:50 p.m., he was spotted at a restaurant called the Hideaway in the company of an

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unknown male. At 6:07 p.m. he left the Hideaway and drove to a trailer park where he parked outside of Unit 20 at 6:10 p.m. At 6:11 p.m., he was observed driving away from the same place. He returned to his residence on Beach Drive.

12 Just over one-half hour later, the accused's vehicle was picked up driving around Port McNeill again. He stopped outside of an IGA supermarket. Cst. Brady told me that he saw and identified the accused as the driver and sole occupant of the vehicle. Defence counsel cast doubt on this, referring to Cst. Mobbs' testimony that, from his vantage, he could not identify the accused as the driver, or confirm that the car was otherwise unoccupied. I note, however, that Cst. Miles confirmed Cst. Brady's observations in his own testimony and, importantly, he made a contemporaneous note to the same effect in his police notebook. Cst. Miles struck me as an honest, reasonably non-partisan witness, and I accept his evidence on this point.

13 The police witnesses testified, and the surveillance logs record, that the accused's vehicle drove behind the IGA supermarket and was briefly out of sight. However, only two minutes later the vehicle pulled up a short distance away in front of a restaurant, and an unknown female got out of the passenger's side of the vehicle. After this, the accused was seen once again driving around Port McNeill, including, at 7:31 p.m., to the Port McNeill Community Hall, where he parked next to another vehicle such that their driver's doors were side by side, for what appeared to be a brief meeting, before he drove back to his mother's residence on Quatsino Crescent.

14 On February 6, 2020, at their morning briefing, the surveillance team resolved that they would arrest Mr. [REDACTED] on the next occasion upon which it looked like he was engaged in dial-a-doping. I do not accept Cst. Brady's evidence that there was a suspicious transaction observed at 11:28 a.m. on that date. There is no record of any such occurrence in the surveillance logs, or anywhere else for that matter. The information seems to have appeared for the first time in a "timeline" document that Cst. Brady created in preparation for testifying in court. Cst. Mobbs was riding with Cst. Brady in the same car that morning and he flatly denied the accuracy of the observations referred to in that document. I note that Cst. Mobbs was the scribe that day, and was presumably paying close attention and making contemporaneous notes of the relevant things that he saw. At the time in question, 11:28 a.m., Cst. Mobbs' surveillance notes indicate that he and Cst. Brady were somewhere else entirely.

15 I accept, however, that on February 6, 2020, after surveillance began at around 10:45 a.m., the surveillance team located the accused's vehicle parked in front of his mother's house at 10:47 a.m. At 11:27 a.m., the vehicle departed and was seen traveling around town in a manner similar to that observed on the previous two days. Eventually, at 1:08 p.m., the accused drove away from central Port McNeill to its outskirts, ultimately turning onto a semi-rural highway called Betts Road where there are no businesses or houses.

16 As the police watched, a white Chevrolet SUV pulled in behind the accused. These two vehicles proceeded down Betts Road a short distance and parked in close proximity to one another in a small and secluded "pullout" or parking area. When the police arrived there, the driver of the Chevrolet SUV was walking back from the direction of the accused' vehicle. The accused was seated in the driver's seat of his vehicle with his driver's side window rolled down.

17 In the circumstances, in my objective assessment, the police were justified in believing that the driver of the SUV had just dealt directly with Mr. [REDACTED] in a brief and obviously pre-arranged meeting in an isolated location. Combined with the accumulation of other observations made during surveillance over

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the previous couple of days, I can easily see why these observations made everything go "click" in the minds of the investigators, including Cst. Brady.

18 In my overall view, and considering the matter objectively, Cst. Brady was justified in believing that a drug transaction had just occurred and that an indictable offence had been committed. On the totality of the evidence adduced, and excising, as I have said, the previously-mentioned parts of it that I find to be unreliable, I am of the firm objective opinion that reasonable grounds then existed to arrest Mr. [REDACTED] for offences under the *Controlled Drugs and Substances Act*.

19 Cst. Mobbs arrested Mr. [REDACTED] at Cst. Brady's direction. Cst. Brady arrested the other person, the driver of the SUV, whose name turned out to be David Stewart. This latter person had what is known as a "spitball" in his hand containing half a gram of cocaine, and \$10 in change from the \$60 that he said he had given Mr. [REDACTED] for it. There was a passenger in the SUV called Korbyn Johl. He was also arrested, it is by no means clear why, at least not to me. Cst. Brady referred to "joint possession" of cocaine, by which I think he meant that perhaps Mr. Stewart and Mr. Johl had jointly purchased and were going to share the spitball, but in my view there was no foundation for this belief.

20 In order to make a valid arrest without warrant, the police have to be in possession of reasonable grounds to believe that the subject of the arrest has committed an indictable offence. The legal principles governing such an event were recently re-stated by the Supreme Court of Canada, in *R. v. Beaver*, [2022 SCC 54](#) at para. [72](#), as follows:

1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint.
2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence. Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal.
3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer.
4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism". Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience. The arresting officer's grounds for arrest must be more than a "hunc[h] or intuition".
5. In evaluating the objective grounds to arrest, courts must recognize that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete". Courts must also remember that "[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'".

6. "Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime. At the same time, police do not require a *prima facie* case for conviction before making an arrest. Nor do the police need to establish that the offence was committed on a balance of probabilities. Instead, the reasonable and probable grounds standard requires "a reasonable belief that an individual is connected to the offence". A reasonable belief exists when "there is an objective basis for the belief which is based on compelling and credible information". The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest.
7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest.
8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds.

[Citations omitted]

21 I have already said that Cst. Brady had a sincere subjective belief in his grounds for arrest, and the only question is whether those grounds, after the unreliable aspects introduced into their midst are excised, can survive an objective audit. In my view they do, and by a reasonably comfortable margin. The totality of the observations that I accept were made by the surveillance detail about the accused's activities are fully consistent with a person involved in dial-a-doping. Looked at individually, the recorded surveillance observations do not amount to much, but considered in the aggregate, in my view, they paint a pretty clear picture.

22 I would refer, first of all, to the consistently random driving all about town in the middle of the week; secondly, to the accumulation of short-duration stops at residences, commercial premises, the pub, the community centre, and, on the final day, on a secluded rural route. I would emphasise, in particular, the meeting near the IGA where, within a brief time after being seen alone in his car, the accused was spotted dropping off an unknown female, followed shortly by a brief "driver's window to driver's window" meet with another vehicle at the community centre and then, of course, the next day's brief and obviously pre-arranged meeting with Mr. Stewart on Betts Road.

23 From my objective viewpoint, as I have said, by dint of all of these observations, the threshold between reasonable suspicion and reasonable probability was crossed. The police were in possession of a compendium of credible, compelling and corroborative evidence showing the accused was probably dial-a-doping. I remind myself that the police are not required to have a *prima facie* case for conviction, or even proof of their belief on a balance of probabilities. In my view, there were ample grounds to arrest the accused without a warrant on February 6, 2020 at around 1:10 p.m.

POST-ARREST

24 Out on Betts Road, Cst. Brady complied with s. 10(a) of the *Charter* by promptly notifying the accused of the reason for his arrest. He also complied with the so-called "informational content" of s. 10(b) by informing him of his right to retain and instruct counsel without delay. There was no challenge to the substance of the warning given, which Cst. Brady read from a standard form. The accused said that he wished to speak to a lawyer. He did not ask to make a call at the scene of his arrest.

25 The accused was transported to the police station in Port McNeill and booked into cells. Part of this procedure involved a search of his person for contraband, weapons, or other hazardous items. Having concluded that the accused's arrest was lawful, in my view this incidental search was justified and reasonable. Defence counsel conceded that the search was conducted reasonably, and I agree with that concession. The police found 16 spitballs of suspected cocaine secreted in the accused's underwear, some weighing a gram, others half a gram, in the total amount of 10.5 grams. The accused's car was also searched incident to arrest and his cellphone was seized. In the absence of any *Charter* infringements concerning the manner in which this evidence was obtained, in my view it is surely admissible, even if, as I shall presently relate, a number of *Charter* rights violations occurred thereafter.

26 First of all, the accused was detained incommunicado in a police cell at the Port McNeill RCMP detachment without being granted access to counsel until just after 3:00 p.m. Cst. Brady and Cpl. Lingley testified that this was part of the investigative plan from the beginning. This delay of almost two hours from the time of the accused's arrest was intentionally imposed on the basis that it was necessary to prevent the destruction of evidence. I have already said that I do not accept that there is any plausibility to this claim, and it forms no admissible justification for suspending the accused's right to retain and instruct counsel without delay, as he had requested. The Crown has quite rightly conceded that this was a violation of the accused's s. 10(b) *Charter* rights.

27 The evidence shows that the police secured both the Beach Drive and Quatsino Crescent residences by no later than 1:30 p.m. on February 6, 2020, approximately 20 minutes after the accused was arrested. From that time, these alleged crime scenes remained firmly in control of the police, as the paperwork for search warrants was drawn up. If there had ever been any sincere concern about the destruction of evidence, it had definitely lapsed by then. I have already referred to my conclusion that the additional justification by Cst. Brady, namely that the accused had to be kept isolated so that he could not arrange, somehow, for his cellphone to be remotely "wiped" lacks any meaningful plausibility. Cst. Brady himself agreed that no lawyer would ever become involved in a chain of events producing this result.

28 With respect to the accused's ongoing and prolonged detention at the police detachment, his argument is that he was "over held" - in other words, that he was kept in police custody for longer than permitted by the *Criminal Code*. Cst. Brady and Cpl. Lingley explained that they continued to detain the accused until the search warrants for the Beach Drive and Quatsino Crescent residences were fully executed, because only then would they know the details of any other criminal allegations that might be made against him, and be in a position to make an informed decision about reasonable terms of release, or whether, instead, he should be held for court the following day. Cst. Brady said, as well, that he wanted to interview the accused on the basis of all the evidence obtained.

29 In my view, these grounds for ongoing detention were rational and justifiable, and to this extent the accused's ongoing detention did not constitute an infringement of his s. 9 *Charter* right to be free from arbitrary arrest or detention. According to Cst. Brady, the search warrants for both residences were issued at approximately 6:00 p.m. The loaded prohibited firearm and additional alleged cocaine were found in the accused's bedroom at the Quatsino Crescent residence at 7:48 p.m. I gather that other drugs and money were located at the Beach Drive apartment.

30 Cst. Brady's evidence, in particular, was to the effect that a decision was taken to keep the accused in custody in order to speak to him about this additional evidence, and also to speak to his mother, who was the sole owner of the Quatsino Crescent residence, about any knowledge that she may have about the items found in the accused's bedroom. Section 498(1) of the *Criminal Code* requires that a person

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arrested without warrant should be released as soon as practicable, but there is an exception built into this in subsection (1.1), which provides that a peace officer shall not release the person if he believes, on reasonable grounds, that detention is necessary to secure evidence. As I conceive it, this was the ground offered in evidence for the ongoing detention of the accused, and in my view, it was reasonable.

31 Then again, as emphasised repeatedly by Mr. Neary in his submissions, according to Cst. Brady and Cpl. Lingley, the investigation plan devised in advance was to arrest the accused once there were grounds to do so, to detain him while warrants were obtained and executed, and thereafter to release him without any conditions. I infer that this had to do with the fact that the accused had no record, that he was known to be a lifelong resident of Port McNeill, and that he was unlikely to pose a threat to public safety or constitute a risk to commit further offences if released. Cpl. Lingley conceded that neither he nor Cst. Brady thought it at all likely that the accused's mother might be involved in his criminal activity.

32 I derive from all of this that the discovery of the firearm, in particular, introduced a change in the original investigation plan. Cst. Brady and Cpl. Lingley seem jointly to have decided to keep the accused in custody to investigate this new-found evidence in circumstances where, in the absence of having found it, they would have released him without conditions. In my view, this means that the decision to keep him in custody, rather than to release him, was based on fresh grounds not previously known to exist involving a proposed new offence - and a serious one at that: before *R. v. Nur*, possession of a loaded prohibited firearm came freighted with a mandatory three-year penitentiary sentence and it remains an offence which, upon conviction, carries a heavy penalty.

33 I agree with defence counsel's argument that, in these circumstances - that is, new and serious charges accompanied by a resolve to extend the accused's detention for investigation on those charges, including interrogating him about them - ss. 10(a) and 10(b) of the *Charter* were re-engaged. In other words, because a decision was taken based on fresh investigative evidence to detain the accused in custody when otherwise he would have been released, and there had been a substantial uptick in the accused's exposure to penal liability or jeopardy because of it, the police had a duty to promptly inform him of the new basis for his continued detention and to provide him with immediate access to a lawyer if he asked for it: *R. v. McCrimmon*, [2010 SCC 36](#) at para. [21](#).

34 Instead, the accused was simply left in his cell, without any explanation or recourse to legal advice for almost four hours after the firearm and other evidence were secured and seized. He was finally placed under arrest for possession of the loaded prohibited firearm and the additional narcotics at 11:36 p.m. He was read his rights and said that he wanted to speak to a lawyer. Over the next hour or so, Cst. Brady and Cpl. Lingley claim that they made repeated attempts to contact legal aid, but were unsuccessful. Then, just after 1:00 a.m. on February 7, 2020, and knowing that the accused had asked for a legal consultation but had not got one, Cst. Brady and Cpl. Lingley attempted to elicit a confession from him before finally permitting him to leave the detachment.

DISCUSSION

35 In my view, then, this case is not about arbitrary detention. The accused was lawfully arrested. There were admissible and justifiable reasons for declining to release him from custody right away. Even if he was detained for somewhat longer than may have been absolutely necessary in the circumstances, the accused has failed to persuade me that he is entitled to any remedy because of the delay. To my way of thinking, this case is not about s. 9 of the *Charter*, but has to do, instead, with conduct by police constituting what I consider to be repetitive and serious failures during the interval to honour and respect the accused's fundamental right to counsel guaranteed by s. 10 of the *Charter*.

36 The law is clear by now that access to counsel is to be granted immediately: see *R. v. Taylor*, [2014 SCC 50](#), and the cases cited therein, including the passage from *R. v. Bartle*, [\[1994\] 3 S.C.R. 173](#), quoted at para. 22, in which the late Chief Justice explained the importance of the principle, in the following terms:

This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty . . . Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. . . . [T]he right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

37 I have already said, and the Crown has agreed, that there was no justification for the two-hour delay in granting the accused access to counsel after his arrest. This was a deliberate decision of the police, made in advance, that cannot be justified or claimed to have been taken in good faith. In my view, Crown counsel is perfectly right to concede that this was a breach of the accused's s. 10 *Charter* rights, and in my view, it was a willful and a serious one.

38 The right to counsel without delay exists, for emphasis, because those who are arrested or detained require immediate legal advice that they cannot access without police assistance because of their detention. There is no doubt that the accused's arrest and the searches of his private living spaces were issues about which he was in urgent need of immediate legal advice about the lawfulness of the arrest, his rights during detention, including the right against self-incrimination, as well as about the validity of the search warrants and the scope of the authority given thereby to the police: *R. v. Noel*, [2019 ONCA 860](#) at para. [24](#), citing *R. v. Debot* [\(1989\), 2 S.C.R. 1140](#) at para. [1144](#).

39 In my view, furthermore, this two-hour total suspension of the accused's right to retain and instruct counsel without delay was aggravated by a second breach. As I have said, in the course of searching the Quatsino Crescent residence, and more particularly what they believed was the accused's bedroom within that residence, the police found a loaded prohibited firearm, a discovery that could have severe legal consequences. Cst. Brady was present in the residence when this discovery was made just before 8:00 p.m. There is no doubt in my mind that the basis for the accused's continued detention in custody after that time was related to this development in the investigation.

40 In these circumstances, with an obvious change in the accused's exposure to serious penal liability, and especially because he intended to interrogate the accused about the firearm and other evidence discovered during the residential searches, it was incumbent upon Cst. Brady promptly to inform the accused of the additional grounds for his arrest and the reason for his ongoing detention, and to advise him anew of his right to retain and instruct counsel without delay. Instead, Cst. Brady left the accused to sit in his cell for almost four hours without advising him of the reason for it or permitting him immediate access to critical legal advice about the new circumstances of his heightened criminal jeopardy. The failure to do this constituted, in my mind, a second serious breach of the accused's ss. 10(a) and 10(b) *Charter* rights.

41 Both Cst. Brady and Cpl. Lingley testified that they saw no urgency in discharging these legal duties because the accused was already under arrest and had spoken briefly to a legal aid lawyer just after 3:00

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p.m., and because they did not attempt to elicit any information from him before finally placing him under arrest for possession of the loaded prohibited firearm at 11:36 p.m. In my view, however, the particular breach of his right to counsel identified above was not attenuated by the fact that the police did not commit the additional breach of seeking to elicit evidence from him between roughly 8:00 p.m., when the firearm was found, and 11:36 p.m., when he was finally arrested for possessing it and re-read his *Charter* rights.

42 Not surprisingly, when the accused was finally advised of the new charges, he asked immediately to speak to a lawyer about them. The efforts of Cst. Brady and Cpl. Lingley to arrange a legal consultation were limited to repeatedly telephoning a legal aid phone number over the ensuing hour or so which, according to them, elicited no response at all. Whether such efforts were adequate is questionable. But the more important point is that, while they knew the accused had asked to speak to a lawyer, and were fully aware that their efforts to secure that result had failed, Cst. Brady and Cpl. Lingley proceeded to question the accused about the firearm and other aspects of the case at around 1:00 a.m. before they finally released him, without any conditions, as it happened. They did not "hold off" interrogating him, as I think the law developed over recent decades clearly required, but went ahead with it regardless.

43 Through this questioning, which was led by Cst. Brady with Cpl. Lingley's involvement, a couple of statements against interest were elicited that the accused may not have blurted out if he had spoken to a lawyer beforehand. The first of these was that his mother did not know anything about the firearm, a statement made after Cpl. Lingley warned him that his mother stood exposed to a jail sentence because it was found in her house. This statement by the accused amounted, in my view, to a confession that he knew about the firearm, and effectively that it could not belong to anyone but him. He also admitted, when asked, that he lived at 1900 Beach Drive, providing direct evidence against himself on a question of fact that might otherwise have had to be proved circumstantially.

44 The Supreme Court of Canada's guidance as to when evidence is "obtained in a manner" that breached an accused's *Charter* rights so as to trigger an inquiry under s. 24(2) of the *Charter* was recently summarised in *R. v. Tim*, [2022 SCC 12](#) at para. [78](#), as follows:

1. The courts take "a purposive and generous approach" to whether evidence was "obtained in a manner" that breached an accused's *Charter* rights.
2. The "entire chain of events" involving the *Charter* breach and the impugned evidence should be examined.
3. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct".
4. The connection between the *Charter* breach and the impugned evidence can be "temporal, contextual, causal or a combination of the three".
5. A remote or tenuous connection between the *Charter* breach and the impugned evidence will not suffice to trigger s. 24(2). Such situations should be dealt with on a case by case basis. There is "no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote".

[Citations omitted]

45 In my view, the post-arrest series of decisions made by Cst. Brady and Cpl. Lingley in their dealings with the accused impacted negatively on his rights guaranteed by ss. 10(a) and 10(b) of the *Charter*, and did so to a pronounced degree. Their conduct violated clear and well-known constitutional requirements,

and betrayed what I think might best be described as a serious misunderstanding about the obligations falling upon police to provide access to counsel to detainees who have requested it. Taking a generous and purposive approach to an evaluation of the "entire chain of events", I conclude that these breaches were temporally and contextually connected to the impugned evidence, and were related to and arise from the same transaction through which evidence was obtained by the search of the Beach Drive apartment and the accused's bedroom within his mother's house.

46 In short, the residential searches formed part of a continuous transaction throughout the afternoon and evening of February 6, 2020, during which police obtained inculpatory evidence against the accused while concomitantly infringing or denying his s. 10 *Charter* rights. I find that the evidence yielded during the residential searches was obtained in a manner that infringed the accused's rights and s. 24(2) of the *Charter* is engaged. The inquiry now shifts to the question whether, in all of the circumstances, the evidence must be excluded on the basis that its reception would bring the administration of justice into disrepute.

SECTION 24(2)

47 Section 24(2) of the *Charter* provides that, where evidence was obtained in a manner that infringed or denied any rights guaranteed therein, it 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.

48 The exclusion of evidence is never automatic. The decision whether to do so requires a balancing of factors in three lines of inquiry mandated by *R. v. Grant*, [2009 SCC 32](#) at para. [71](#), namely: 1) the seriousness of the *Charter* infringing conduct; 2) the impact on the accused's *Charter* protected interests; and 3) society's interest in the adjudication of the case on its merits. The underlying assumption is that there will be a negative impact on public confidence in the criminal justice system if unlawfully gathered evidence is admitted into evidence, but that circumstances will arise in which the exclusion of evidence will have a similar negative effect.

49 The inquiry is objective. It asks whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute. It requires an assessment of the overall impact that the admission, in criminal proceedings, of unconstitutionally obtained evidence would have on society's confidence in the justice system over the long-term. The onus is on the accused to establish that the impugned evidence should be excluded.

50 I would rate the seriousness of the identified *Charter*-infringing conduct in this case at the higher end of the scale of culpability. There was no reasonable justification for suspending the accused's right to access legal advice in the two hours after his arrest, or for failing to notify him promptly of the new offences arising from the residential searches which materially changed his legal jeopardy and formed the basis for his continued and reasonably lengthy detention in police cells. The decision to interrogate the accused about the new offences after he had asked for, but not received, a legal consultation about them ran in willful contravention of decades of settled law prohibiting them from doing so.

51 From the beginning and throughout, I find that Cst. Brady and Cpl. Lingley displayed a disregard for well-established rules related to a fundamental legal right enshrined in this country's supreme law - the right to counsel. I agree with the court in *Noel* at para. 34 that the law around s. 10(b) is clear. It is not difficult for the police to understand their obligations and to carry them out. The officers in this case, quite

simply, did not do so. I conclude that the first line of *Grant* inquiry strongly favours the exclusion of evidence.

52 As for the impact of the relevant police conduct on the accused's *Charter*-protected interests, in my view, from the accused's perspective, the breaches in question were repetitive, serious, and materially compromised or denied his fundamental right to essential legal advice in circumstances where he was in dire straits and exposed to significant penal liability. The breaches in question were not inadvertent, technical or fleeting, but intentional, substantive and persistent. In my view, such clear violations of well-established rules governing state conduct pull strongly in favour of the exclusion of the evidence under this second line of the *Grant* inquiry.

53 When it comes to society's interest in the adjudication of the case on its merits, the question, succinctly stated, is whether the long-term reputation of the justice system will be better served by the inclusion or exclusion of the evidence. All of us have a compelling interest in seeing that serious criminal charges are tried on their merits, but s. 24(2) is not only concerned with individual cases. Its focus, instead, is on upholding the rule of law, maintaining the strength and vitality of the fundamental rights guaranteed by the *Charter*, and safeguarding the long-term reputation of the justice system, for the protection of everyone.

54 An exclusionary order under s. 24(2) is not to punish the police, or to provide a remedy for the accused. Instead, as I have said, I must bear in mind the long-term reputation of the justice system, the maintenance of public confidence in it, and the negative impact, over time, that would be caused by the admission of evidence obtained in violation of constitutionally protected rights. In the midst of the balancing of interests mandated by *Grant*, I would recognise that, while the charges against the accused are serious, so too are the *Charter* violations under contemplation.

55 No doubt the exclusion of reliable evidence central to the prosecution's case is a material factor in the analysis, but it cannot overwhelm the other considerations that I have discussed. The *Grant* inquiry requires a calibrated examination of each of the three relevant factors in deciding whether or not, on a balance of probabilities, the reputation of the justice system would be brought into disrepute by the admission of unconstitutionally obtained evidence. There is no case in which an exclusion is automatic, but it has been held that where, as here, the first two lines of the *Grant* inquiry strongly favour exclusion of the evidence, the third will rarely tip the balance in favour of admission: *R. v. McGuffie*, [2016 ONCA 365](#). In my view, it fails to do so here.

56 I would note, in passing, that the Crown's case is not gutted by this conclusion. The accused's arrest was lawful, as was the search incidental to it. The alleged cocaine discovered on the accused's person as a result of that search, which was authorised by the common law and carried out in a reasonable fashion, is admissible in evidence on this trial. It was not obtained in a manner that infringed the accused's *Charter* rights. For the reasons given, however, even assuming that the warrants for both residences were validly issued, I hereby order the exclusion of the evidence obtained from the accused's Beach Drive apartment and from his bedroom in his mother's house on Quatsino Crescent.

57 Having reached this decision for the reasons discussed, I find it unnecessary to address the other, lesser arguments referred to by defence counsel, except briefly. I am not concerned about the warrantless entry by Cst. Mobbs and Cst. Miles into the Quatsino residence at the insistence of the accused's mother, the sole owner of the property, who wished to attend to her pet dogs inside. The officers accompanied her inside her own residence at her request to permit this, and stood by while she

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fed and watered her pets for the sole purpose, I am satisfied, of assuring continuity of the scene while awaiting an expected warrant to be issued. I see no harm in any of this.

58 As regards the police dealings with Mr. David Stewart, in my view his arrest may have been lawful, but there were no justifiable grounds for detaining him for any length of time, certainly not for a period of hours, which is what happened. I can see no basis at all for the arrest or detention of Mr. Johl. These factors were not particularly influential to my way of thinking about the case in general, but emphasised what I consider to be a lack of appreciation for clearly-established legal rules and *Charter* compliant policing.

DISPOSITION

59 In the result, the evidence produced by the search of the accused incidental to arrest is admissible. The evidence produced by the search of the Beach Drive and Quatsino Crescent residences is excluded.

BAIRD J.