SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Connolly*, 2019 NSSC 89

Date: 20190318
Docket: CRH No. 459066
Registry: Halifax

Between:

Tavia Patrice Connolly

Applicant

v.

Her Majesty the Queen

Respondent

CHARTER DECISIONS

Judge:	The Honourable Justice Kevin Coady
Heard:	February 25-26, 2019, in Halifax, Nova Scotia
Written Decision:	March 18, 2019
Counsel:	Susan Bour, Crown Counsel Ian Hutchison, Counsel for the Defendant

By the Court:

Introduction:

[1] Tavia Connolly stands charged on a 27-count Indictment filed pursuant to the *Controlled Drugs and Substances Act* (CDSA) and the *Criminal Code of Canada.* These charges arose as a result of a search of her residence at 327-B Kearney Lake Road, Halifax, on May 8, 2015. The search resulted in the seizure of large quantities of various drugs including powder cocaine, crack cocaine, ecstasy, cannabis, hashish and heroin. The search also resulted in the seizure of four operational handguns as well as related ammunition.

[2] Prior to trial, Ms. Connolly filed an application seeking an order that the warrantless search of 327-B Kearney Lake Road, Halifax and the search of her motor vehicle incidental to arrest violated s. 8 of the *Canadian Charter of Rights and Freedoms.* Furthermore, that the delay in implementing Ms. Connolly's right to counsel violated s. 10(b) of the *Canadian Charter of Rights and Freedoms.* She seeks a further order excluding any and all evidence obtained as a result of the search of 327-B Kearney Lake Road, Halifax, and of her vehicle.

[3] The parties agreed that this application will be heard in a blended *voir dire* and that the application evidence will become the evidence at trial. Additionally, the following agreements were struck at the start of the *voir dire:*

- All drugs seized at 327-B Kearney Lake Road, Halifax, and in Ms. Connolly's vehicle are what the Crown purports them to be without formal analysis.
- All firearms seized at 327-B Kearney Lake Road, Halifax, meet the definition of firearm found in s. 2 of the *Criminal Code of Canada*.
- Continuity of all exhibits is admitted.

The Facts:

[4] On May 8, 2015 the RCMP received confidential source information that 327-B Kearney Lake Road, Halifax, was being used as a "stash house" and that cannabis marijuana was being stored at that location. That tip was shared with two members of the drug team. Those officers drove by 327-B Kearney Lake Road to

verify the location. After returning to police headquarters it was decided surveillance would be initiated. At that time, Cst. Whynott was asked to draft an Information To Obtain (ITO) a Search Warrant for the subject property.

[5] The surveillance team began to conduct surveillance on the subject property at 5 p.m. on May 8, 2015. At approximately 6 p.m. a gray vehicle pulled into the driveway and a male got out of the vehicle and entered 327-B Kearney Lake Road. That same individual exited 14 minutes later and left the property. Officers followed and observed the gray vehicle stop at several locations and then park in a Shopper's Drug Mark parking lot. A black vehicle arrived and the police observed what they considered to be a drug deal. The drivers of both vehicles were immediately arrested. The driver of the gray vehicle was identified as Ricky Lawrence. The driver of the black vehicle was identified as Derrick Hennessey. A search of Mr. Hennessey's vehicle produced 150 grams of cannabis marijuana. A search of Mr. Lawrence's vehicle resulted in a seizure of a bundle of cash, a key to 327-B Kearney Lake Road, two cell phones and a ball of cannabis resin (hashish).

[6] While the Lawrence/Hennessey takedown was unfolding, 327-B Kearney Lake Road remained under surveillance. At approximately 7 p.m. a vehicle pulled into the driveway. Ms. Connolly was driving the vehicle while her young son was in the passenger seat. Ms. Connolly acknowledged that 327-B Kearney Lake Road was her home. She was then arrested for possession of marijuana for the purpose of trafficking. When advised of her right to counsel, she immediately indicated she wanted to speak with counsel. She was distraught. The arresting officer permitted Ms. Connolly to phone her mother to care for the child.

[7] Ms. Connolly's vehicle was searched shortly after 7 p.m. A small quantity of marijuana and ecstasy, as well as scales, were seized. She was then arrested for possession of these substances and provided with her *Charter* rights and police caution. She was then transported to police headquarters and placed in a cubicle at 8 p.m. At 8:45 p.m. she was taken to booking to be held for court without exercising the implementation of her s. 10(b) right to consult with counsel.

[8] Once Ms. Connolly was removed from the property, Sgt. Mike Willett conducted a warrantless search of 327-B Kearney Lake Road. In a bedroom behind a closet door he located bags of marijuana. He determined no one was inside the apartment. He was alone in the apartment for several minutes.

[9] Upon Ms. Connolly's arrival at police headquarters at 8 p.m., the police delayed implementation of her right to counsel until 10:30 a.m. the following day, a period of 15.5 hours.

[10] Once Ms. Connolly was arrested, the police secured 327-B Kearney Lake Road while waiting for a search warrant to arrive. It arrived at 12:50 a.m. The search lasted until 3 a.m. and resulted in the seizure of the drugs and guns earlier referenced.

[11] There is very little dispute as to the facts and I find the aforementioned narrative to be the facts in the application. The issue is not what happened but, rather, the impact of those facts on Ms. Connolly's s. 8 and s. 10(b) rights.

The Issues:

[12] There are three issues that figure prominently in this application. They are as follows:

- Whether Ms. Connolly's right to be free from unreasonable search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms* was violated when Sgt. Willett searched her apartment without a warrant.
- Whether Ms. Connolly's s. 8 right was violated when Cst. Fry searched her vehicle and whether that search was truly incidental to arrest.
- Whether the delay in implementing Ms. Connolly's s. 10(b) right to counsel for 15.5 hours violated her right to speak to counsel immediately upon arrest or detention.

There are other issues involving the Information to Obtain and s. 24(2) of the *Charter* which will come into play later in this decision.

The Residence Search:

[13] Ms. Connolly argues that Sgt. Willett's entry into her residence without a warrant was a search not authorized by law. The Crown takes the view that this entry was authorized by s. 11(7) of the CDSA. Nonetheless, it was warrantless and, as such, the Crown acknowledges it bears the evidentiary burden of showing this search was reasonable.

Section 11(7) of the CDSA states as follows:

> A Peace Officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

The Applicant argues that exigent circumstances did not exist. The Crown responds stating that officer safety and the preservation of evidence are exigent circumstances.

[14] In ***R. v. Paterson***, 2017 SCC 15, the Supreme Court of Canada discussed the Crown's burden of establishing that a warrantless search is justified on the basis of exigent circumstances. The Court determined that the Crown will discharge this burden when it shows that the circumstances required immediate police action to preserve evidence, or to guarantee the safety of the police or the public. The Court commented at paras. 33 and 34:

> 33 The common theme emerging from these descriptions of 'exigent circumstances' in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. This threshold is affirmed by the French version of s. 11(7), which reads '*l'urgence de la situation'*.
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> 34 Even where exigent circumstances are present, however, they are not, on their own, sufficient to justify a warrantless search of a residence under s. 11(7). Those circumstances must render it 'impracticable' to obtain a warrant. In this regard, I respectfully disagree with the Court of Appeal's understanding of s. 11(7) as contemplating that the impracticability of obtaining a warrant would itself comprise exigent circumstances. The text of 11(7) ('by reason of exigent circumstances it would be impracticable to obtain [a warrant]') makes clear that the impracticability of obtaining a warrant does not support a finding of exigent circumstances. It is the other way around: exigent circumstances must be shown to make it impracticable to obtain a warrant. In other words, 'impracticability', however understood, cannot justify a warrantless search under s. 11(7) on the basis that it constitutes an exigent circumstance. Rather, exigent circumstances must be shown to cause impracticability.

The Court further stated that "impracticability suggests on balance a more stringent standard, requiring that it be impossible in practice or unmanageable to obtain a warrant."

[15] The Ontario Court of Appeal in *R. v. Kelsey*, 2011 ONCA 605, found that exigent circumstances are extraordinary and should only be invoked to justify a violation of a person's privacy when necessary.

[16] In conducting a warrantless exigent search the police must hold a subjective belief that immediate action is required and that belief is objectively reasonable (***R. v. McCormick***, 2000 BCCA 57).

[17] In ***R. v. Silveira***, [1995] 2 S.C.R. 297 Justice La Forest discussed the limits of an exigent entry into a private dwelling house. He states at para. 85:

> The difficulty with finding that exigent circumstances justified a warrantless entry in this case is that the conditions are far from unique, as Abella J.A. correctly noted in her dissent. Public arrests are not unusual, and narcotics, by their very nature, are often easily removable or destructible. To maintain that anytime a public arrest occurs there could be exigent circumstances giving rise to the fear that evidence will be destroyed, thereby justifying a warrantless police entry into a suspect's home to preserve that evidence, would be to set at nought the attempt made in s. 10 of the *Narcotic Control Act*, which identifies a dwelling-house as deserving of special protection. I add that such an approach is by no means peculiar to narcotic offences. The same reasoning would apply to a vast array of other crimes. Such a broad approach to exigent circumstances would give the police little incentive to acquire a warrant in advance.

This case also stands for the proposition that there is no distinction between an initial warrantless search and a subsequent search with a warrant. Justice Cory commented as follows at para. 144:

> 144 In my view, the respondent very properly conceded that the entry by the police, undertaken in order to secure the premises and prevent the destruction of evidence, was indeed a form of search not authorized by law. There is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'. No matter how good the intentions of the police may have been, their entry into the dwelling-house without a warrant infringed the appellant's rights guaranteed by s. 8 of the *Charter*. Moreover, there can be no artificial division between the entry into the home by the police and the subsequent search of the premises made pursuant to the warrant. The two actions are so intertwined in time and in their nature that it would be unreasonable to draw an artificial line between them in order to claim that, although the initial entry was improper, the subsequent search was valid. It follows, then, that the question to be resolved is whether or not the admission of the cocaine and the money discovered during the search could bring the administration of justice into disrepute.

In dissent Justice La Forest reached a similar conclusion calling this distinction unrealistic.

[18] ***R. v. Silveira,*** *supra,* also dealt with the issue of the limits of exigent circumstances in justifying a warrantless entry based on officer safety and preservation of evidence. Justice La Forest, in dissent, commented at para. 89:

> I turn finally to the attempt to link drugs automatically to the possible presence of firearms so as to ground a claim of exigent circumstances as justification for pre-warrant securing of premises. That attempt should, in my view, be resisted. The police testified at trial that they were concerned that there might be firearms on the premises, which created an exigency. To begin with, I do not quite see how officers who enter a house without a warrant can be in a better position to ensure their safety than if they enter with a warrant. If officers are legitimately in danger from firearms in a dwelling-house, a pre-warrant entrance will not advance their security. Moreover, many serious crimes, by their very nature, involve firearms. Does that mean that a search warrant can be avoided every time it is thought firearms may be involved? Surely not. In this appeal, there was no evidence prior to the entry that firearms were present in the appellant's house, and indeed, as it turned out, there were none. All we are told is that firearms were frequently involved with the drug trade in Toronto. The law does not permit the police to effect warrantless entry into a house simply because they may have reason to suppose there is a connection between drugs and firearms. In *R. v. Genest,* supra, has already spoken to this. This court there found that only if the police had prior knowledge that there were firearms in the house at the time they chose their course of conduct would that be a relevant consideration. To accept that mere suspicion that there may be firearms based on the connection between drugs and guns justifies a warrantless entry would be to obliterate effectively s. 10 of the *Narcotic Control Act* and the protections afforded by s. 8 of the *Charter.* For in any serious police investigation involving drugs, the spectre of firearms could always be raised. Such a drastic departure from the clear terms of the *Narcotic Control Act* should come from Parliament. Certainly, in the absence of such legislative direction, I reject any implicit suggestion that a general suspicion that firearms may be present can be used to bolster a claim of urgency.

There is nothing in the majority decision that challenges these principles which are consistent with related jurisprudence.

[19] In order to decide this aspect of the application, it is necessary to review the evidence on point. Cst. Adam Whynott is a 14-year veteran police officer with experience in the drug section. He described this as an evolving investigation and that the police didn't really know what they had until Mr. Lawrence's arrest. He received the tip from the RCMP and confirmed it did not mention firearms. He

drafted the ITO and it did not mention firearms. He has no recollection of officer safety being discussed at a briefing meeting. He stated that when firearms are thought to be present, the Emergency Response Team (ERT) is called to clear the premises. They were not called in this case. Cst. Whynott acknowledged he had limited knowledge of the criteria for a warrantless search.

[20] Sgt. Mike Willett is a 24-year veteran police officer with experience in the drug unit. He entered 327-B Kearney Lake Road without a warrant. He testified to conducting "hundreds" of drug investigations. Sgt. Willett drew a distinction between clearing premises and searching. When asked why he entered without a warrant, he gave four reasons: (1) The location of the arrest, (2) preservation of any drugs, (3) concerns about violence to the police or the public, and (4) a gut feeling. He testified that violence and guns are often associated with drugs. Sgt. Willett admitted he had no knowledge of anyone being in the premises, or of the presence of firearms. He confirmed the ERT was not called. He admitted he was not familiar with recent jurisprudence on warrantless searches.

[21] Cst. Martin Fry is a 13-year veteran police officer with experience in "hundreds" of drug investigations and drug searches. He observed Sgt. Willett enter the premises but does not recall discussing it in advance. He does not recall discussions about officer safety at the scene. He had no information firearms were located at 327-B Kearney Lake Road. He testified planning was minimal and he was unsure how the evening would evolve.

[22] Cst. Steve Wagg is a 15-year veteran police officer with experience in the drug unit. He testified that this investigation was a "fluid" investigation.

[23] I conclude the evidence does not disclose any exigent circumstances that would justify Sgt. Willett's warrantless entry into Ms. Connolly's home. Concerns about officer safety and the preservation of evidence may have been viewed by the police as subjectively reasonable but they are not objectively reasonable. All concerns were speculative. There was no urgency. Other options were available. My conclusion is consistent with Justice Smith's comments at para. 94 of ***R. v. Crocker***, 2009 BCCA 338:

> I am unable to see how Cst. Johnson had anything more than a general concern that any potential evidence inside the penthouse might have been destroyed by Mr. Crocker's daughter (or any other unknown occupants), if she or any other individuals became aware, by some unknown means, that Mr. Crocker had been arrested. Such a vague and speculative basis for a warrantless entry by the police into a private residence cannot be lawful. While Cst. Johnson may have

> subjectively believed in the potential loss of evidence from the penthouse there was no subjective basis for that belief. The officer's concerns could not be said to have risen to the level of 'imminent danger' of the loss, removal, destruction or disappearance of the evidence if the search and seizure is delayed' or to a situation where 'immediate action is required . . . to secure and protect evidence of a crime.'

In Ms. Connolly's case, there was no evidence that anyone was in her apartment. Consequently, any concerns about officer safety and the preservation of evidence is entirely speculative and does not create exigent circumstances.

[24] In the seminal case of ***Hunter v. Southam Inc.***, (1984) 2 S.C.R. 145, the Court affirmed that the standard for securing the right to be free from unreasonable search and seizure should be where credibility-based probability replaces suspicion.

[25] I conclude that the searches of Ms. Connolly's home were unreasonable and offended her s. 8 rights. This was her home which afforded her the greatest expectation of privacy.

The Vehicle Search:

[26] Ms. Connolly takes the view that the search of her vehicle incidental to arrest was unlawful and violated her right under s. 8 of the *Charter*. The Crown takes the position that the vehicle search was truly incidental to arrest and, as such, was reasonable and *Charter* compliant.

[27] In ***R. v. Morrison***, (1987) 58 C.R. (3d) 63, the Ontario Court of Appeal summarized this common law power as follows:

> The Ontario Court of Appeal for many years relied on the following summary of the power by Mr. Justice Martin:
>
> > At common law there is no power to search premises without a warrant (or with a warrant except for stolen goods) save as incident to a lawful arrest. After making a lawful arrest, an officer has the right to search the person arrested and take from his person any property which he reasonably believes is connected with the offence charged, or which may be used as evidence against the person arrested on the charge, or any weapon or instrument that might enable the arrested person to commit an act of violence or effect his escape . . .

[28] In ***R. v. Caslake***, [1998] 1 S.C.R. 51, the Supreme Court of Canada discussed search incidental to arrest at paras. 13 and 21:

> 13 In this case, the Crown is relying on the common law power of search incident to arrest to provide the legal authority for the search. In *Cloutier*, supra, my colleague L'Heureux-Dubé J. (for a unanimous Court) discussed this power in detail. She held that it is an exception to the ordinary requirements for a reasonable search (articulated in *Hunter, supra*) in that it requires neither a warrant nor independent reasonable and probable grounds. Rather, the right to search arises from the fact of the arrest. This is justifiable because the arrest itself requires reasonable and probable grounds (under s. 494 of the *Code*) or an arrest warrant (under s. 495). However, since the legality of the search is derived from the legality of the arrest, if the arrest is later found to be invalid, the search will be also. As Cory J. stated in *R. v. Sillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607, at para. 27, '[n]o search, no matter how reasonable, may be upheld under this common law power [of search incident to arrest] where the arrest which gave rise to it was arbitrary or otherwise unlawful.
>
> 21 In my view, it would be contrary to the spirit of the *Charter*'s s. 8 guarantee of security against unreasonable searches or seizures to allow searches incident to arrest which do not meet both the subjective and objective criteria. This Court cannot characterize a search as being incidental to an arrest when the officer is actually acting for purposes unrelated to the arrest. That is the reason for the subjective element of the test. The objective element ensures that the police officer's belief that he or she has a legitimate reason to search is reasonable in the circumstances.

The Court went on to indicate that for a search to be truly incidental to arrest, there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested.

[29] Once again, in order to decide this aspect of the application, it is necessary to review the evidence on point. Cst. Adam Whynott received the source tip from the RCMP on May 8, 2015. When drafting the ITO he stated, "Tavia Connolly had a few pounds of weed at 327 Kearney Lake Road, Halifax, within the last 48 hours" and that "Tavia Connolly lives in the upper flat."

[30] Sgt. Mike Willett testified that Ms. Connolly arrived at 327 Kearney Lake Road at approximately 7 p.m. and was arrested by Cst. Fry at 7:04 p.m. She was placed in a police vehicle in handcuffs. Cst. Fry testified that Ms. Connolly and her son arrived and that he arrested Ms. Connolly for possession of marijuana for the purpose of trafficking. He then searched her vehicle and found a purse with cash inside and a dime bag of white powder. He also located a bag that contained

marijuana and a set of digital scales. When asked why he searched the vehicle, he replied it was because of Ms. Connolly's connection to the marijuana reported by the confidential source; that it was incidental to arrest and that he was looking for further evidence of drug trafficking.

[31] I conclude that the search of Ms. Connolly's vehicle was truly incidental to arrest. There is no issue as the legality of the arrest. The search was to locate marijuana, the substance disclosed by the confidential informant. I find this search to be both subjectively and objectively reasonable and, as such, did not offend Ms. Connolly's s. 8 rights.

Delay in Implementing Right to Counsel:

[32] Section 10(b) of the *Canadian Charter of Rights and Freedoms* states:

> Everyone has the right on arrest or detention to retain and instruct counsel without delay, and to be informed of that right.

Ms. Connolly argues that the 15.5 hour delay in implementing her s. 10(b) rights is unreasonable in the circumstances. She was advised of her right to counsel at 7:04 p.m. and immediately indicated she wanted to speak to counsel.

[33] The comments of the Supreme Court of Canada in ***R. v. Taylor***, 2014 SCC 50, from para. 21 onward, are instructive and summarized the law with regard to the police duty to inform a detainee of their right to counsel, and to implement that right.

> 21 The purpose of the s. 10 (*b*) right is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *Manninen*, at pp. 1242-43. The right to retain and instruct counsel is also "meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination": *R. v. Suberu*, [2009] 2 S.C.R. 460, at para. 40. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police investigators that is both free and informed": *R. v. Sinclair*, [2010] 2 S.C.R. 310, at para. 25.
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> 22 In *R. v. Bartle*, [1994] 3 S.C.R. 173, Lamer C.J. explained why the right to counsel must be facilitated "without delay":
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> > 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.

23 He also confirmed the three corresponding duties set out in *Manninen* which are imposed on police who arrest or detain an individual:

> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

(*Bartle*, at p. 192, citing *Manninen*, at pp. 1241-42; *R. v. Evans*, [1991] 1 S.C.R. 869, at p. 890; and *R. v. Brydges*, [1990] 1 S.C.R. 190, at pp. 203-4.)

24 The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention (*Suberu*, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (*R. v. Luong* (2000), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

25 This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(*b*) rights *and* facilitate access to those rights where requested, both without delay. This includes "allowing [the detainee] upon his request to use the telephone for that purpose if one is available" (*Manninen*, at p. 1242). And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so (see *Brownridge v. The Queen*, [1972] S.C.R. 926, at pp. 952-53).

. . . . . .

28 But the police nonetheless have both a duty to provide phone access as soon as practicable to reduce the possibility of accidental self-incrimination and to refrain from eliciting evidence from the individual before access to counsel has

> been facilitated. While s. 10(*b*) does not create a "right" to use a specific phone, it *does* guarantee that the individual will have access to a phone to exercise his right to counsel at the *first* reasonable opportunity.

[34] In ***R. v. Suberu***, 2009 SCC 33, the Supreme Court of Canada considered the meaning of the words "without delay" and commented at para. 42:

> 42 To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(*b*) creates an ill-defined and unworkable test of the application of the s. 10(*b*) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(*b*). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

[35] Once again, it is necessary to review the evidence on point. Cst. Adam Whynott testified that he was aware Ms. Connolly was taken to booking but he was not aware of any issues around her right to consult with counsel. He subsequently learned it was Cst. Basso's decision to suspend Ms. Connolly's contact with counsel. He testified there were phones in both the cubicles and in booking which allowed for both incoming and outgoing calls in both locations.

[36] Sgt. Mike Willett testified he had no involvement in the decision to suspend the implementation of Ms. Connolly's s. 10(b) rights. He stated that the investigation did not start at the office with a defined plan.

[37] Cst. Martin Fry testified that Cst. Basso was acting as the chief investigator and was given leeway to make certain decisions. He stated that Cst. Basso would discuss issues with Sgt. Willett. Cst. Fry was the arresting officer and provided the usual cautions. He confirmed that Ms. Connolly immediately requested contact with legal counsel. Cst. Fry testified he felt she would get her call once they got to police headquarters, as it was not practical to do so at 327-B Kearney Lake Road. He further testified that, until the preliminary inquiry, he was not aware that her right to counsel was delayed for 15.5 hours. He stated he was surprised to learn of the delay.

[38] Cst. Lee Cooke worked in booking for ten years. He testified that phones can be taken into several rooms when they are needed to call counsel. He testified that in drug cases it was not uncommon to delay the phone call while other searches or arrests were ongoing. He stated that such a decision to suspend was the sole responsibility of the watch commander. Cst. Cooke indicated he did not know of any authority for such a practice. He stated that Ms. Connolly arrived at booking at 8 p.m. and was left in a room until 8:45 a.m. She was not offered a phone during that 45 minutes.

[39] On cross-examination Cst. Cooke reiterated that in drug cases it was common practice to suspend an accused's phone call to counsel. When asked about the 15.5 hour suspension, he stated he had no recall of any other such lengthy suspensions in his ten years as a booking officer. He also testified that Ms. Connolly was taken from booking to the cubicle at 8:45 p.m. and that was when the watch commander suspended her s. 10(b) rights.

[40] Sgt. Peter Burdock is a 30-year veteran of the Halifax Regional Police. On May 8, 2015 he was filling in for the usual watch commander and it was his first shift in that role. The evidence discloses that Cst. Basso instructed him to suspend Ms. Connolly's phone call to counsel. Sgt. Burdock acquiesced to Cst. Basso's request. He testified that this was his first s. 10(b) suspension and that he had no idea how long that suspension would last. Further, he went off shift not knowing the status of that suspension.

[41] Sgt. Burdock acknowledged he had limited recollection of the events of May 8, 2015. He stated that a watch commander's notes are taken in a watch commander's book. That book has gone missing. He has no memory of the conversation with Cst. Basso. He has no recall of the reasons Cst. Basso gave for the suspension. This is significant given that the Crown chose not to call Cst. Basso as a witness.

[42] Cst. Phil Apa was tasked with interviewing Ms. Connolly. At 10:35 a.m. on May 9th he permitted her to call legal counsel. Ms. Connolly was resistant to questioning and she was returned to the cells and held for court.

[43] The onus is on the Crown to establish that the 15.5 hour delay was reasonable in the circumstances. The essence of the Crown's position is that the police were concerned that Ms. Connolly, or her counsel, might tip off someone about other arrests or searches that were ongoing at the time of Ms. Connolly's detention. I do not find the evidence supportive of the Crown's position.

[44] Cst. Whynott was unable to provide evidence as to why the suspension occurred. He did say that it was Cst. Basso's call. Sgt. Willett stated he had no involvement in the issue of counsel. Cst. Fry stated he was not involved in the decision to suspend. However, he surmised that it might be based on a concern that Ms. Connolly might hang up on her counsel and call someone else. Cst. Cooke testified that he made no decisions on this file and that all decisions were Cst. Basso's. Sgt. Burdock was unable to give any evidence about other warrants or arrests. In fact, I found little support in the evidence that Ms. Connolly's suspension was necessary to protect related operations. In fact I found little testimony that fully explained these so-called related arrests and/or searches.

[45] The Crown stated at para. 73 of their brief:

> The Respondent further acknowledges that the Application was not afforded with access to counsel until fifteen and a half hours after her arrest. Evidence will be heard during the course of the *voir dire* which will provide some context to this situation and additional details.

The evidence before me does not meet those expectations. The only persons capable of giving this kind of evidence were Cst. Basso and Sgt. Burdock and, for reasons already stated, that testimony was unavailable to the Court. Consequently, I conclude that the 15.5 hour suspension breached Ms. Connolly's s. 10(b) right to counsel. She was not afforded access to counsel "at the first reasonably available opportunity."

Section 24(2) of the *Charter*:

[46] Section 24 of the *Charter* states:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[47] In ***R. v. Grant***, 2009 SCC 32, the Court set out the applicable test in a s. 24(2) analysis at para. 71:

> . . . [U]nder s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

[48] In ***R. v. Cote***, 2011 SCC 46, the Court made the following comments as to the Grant analysis at para. 47:

> [47] The first line of inquiry involves an evaluation of the seriousness of the state conduct. The more serious the state conduct constituting the *Charter* breach, the greater the need for courts to distance themselves from that conduct by excluding evidence linked to the conduct. The second line of inquiry deals with the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused. The impact may range from that resulting from a minor technical breach to that following a profoundly intrusive violation. The more serious the impact on the accused's constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute. The third line of inquiry is concerned with society's interest in an adjudication on the merits. It asks whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. The reliability of the evidence and its importance to the prosecution's case are key factors. Admitting unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective. The importance of the evidence to the Crown's case is corollary to the inquiry into reliability. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution's case, but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to "gut" the prosecution's case.
>
> [48] After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination. There is no "overarching rule" that governs how a court must strike this balance (*Grant*, at para. 86). Rather, "[t]he evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute" (*Harrison*, at para. 36). No one consideration should be permitted to consistently trump other considerations. For instance, as this Court

> explained in *Harrison*, the seriousness of the offence and the reliability of the evidence should not be permitted to "overwhelm" the s. 24(2) analysis because this "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'" (para. 40, citing 2008 ONCA 85 (CanLII), 89 O.R. (3d) 161, at para. 150, *per* Cronk J.A., dissenting). In all cases, courts must assess the long-term repute of the administration of justice.

[49] The first step in the ***Grant*** analysis was discussed in ***R. v. Harrison***, [2009] 2 S.C.R. 494 at para. 22:

> At this stage the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern.

[50] In ***R. v. Paterson***, 2017 SCC 15, the Court held that police must be held to a high standard when well established *Charter* protected rights are endangered. The Court so commented at para. 44:

> . . . This Court has cautioned that negligence in meeting *Charter* standards cannot be equated to good faith (*Grant* 2009, at para. 75). Even where the *Charter* infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 24-25).

The principles around s. 8 and s. 10(b) of the *Charter* are likely the most well known to the police. Arrest and search are among their most utilized powers.

[51] The second ***Grant*** line of inquiry deals with the interests protected by *Charter* rights. In ***Grant***, at para. 76, the Supreme Court described this aspect of the analysis:

> 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 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.

The breaches in Ms. Connolly's case are neither fleeting nor technical. On the evidence I find they are profoundly serious and deliberate.

[52] The third factor in the ***Grant*** analysis is whether society's interest in a trial on its merits favors admission of the evidence. In ***R. v. Cote***, *supra*, the Supreme Court discussed this factor at paragraphs 47 and 53:

> It asks whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. The reliability of the evidence and its importance to the prosecution's case are key factors. Admitting unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective. The importance of the evidence to the Crown's case is corollary to the inquiry into reliability. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution's case, but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to "gut" the prosecution's case.
>
> Under this branch, relevant, reliable evidence that is crucial to the prosecution's case will often point towards admission, though these considerations will have to be balanced against other relevant factors.

This third factor is highly discretionary. In ***Grant*** the Supreme Court described this final step at para. 127:

> The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

[53] The difficulty with this final stage was captured in ***R. v. Paterson,*** *supra*, at paras. 53-56:

> [53] To summarize, the police conduct, while not egregious, represented a serious departure from well-established constitutional norms. The impact of the s. 8 infringement on the appellant's interests protected thereunder was considerable, intruding into a place in which he was entitled to repose the highest

expectation of privacy. But the value of the evidence to deciding the truth of the charges against the appellant is also considerable.

[54] This is a close call. As was observed in *Grant* 2009, at para. 140, "[t]he balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision." Indeed, because the *Grant* 2009 factors are mutually incommensurable — balancing seriousness of state conduct, seriousness of the infringement of *Charter* rights and the impact upon society's interest in adjudication — the "balancing" will never be an entirely objective exercise. A reviewing court must, however, come to a reasoned conclusion. While the effective destruction of the Crown's case weighs heavily, so does the warrantless entry into a private residence, having occurred to prevent the appellant from destroying three roaches which the police themselves intended to destroy.

[55] In weighing these considerations, my colleague relies on the seriousness of the offence to hold that excluding the evidence will be "far more likely to cause the public to lose faith and confidence in our criminal justice system" (para. 94). This is premised, however, upon a limited view of public confidence which this Court has already rejected. As the Court observed in *Grant* 2009 (at para. 84), "seriousness of the alleged offence . . . has the potential to cut both ways. . . . [W]hile 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." The public interest in maintaining a justice system "above reproach" has helpfully been explained by Doherty J.A. in *R. v. McGuffie*, 2016 ONCA 365, 348 O.A.C. 365, at para. 73:

> On the one hand, if the evidence at stake is reliable and important to the Crown's case, the seriousness of the charge can be said to enhance society's interests in an adjudication on the merits. On the other hand, society'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 consequences to those whose rights have been infringed are particularly serious . . . .

[56] It is therefore important not to allow the third *Grant* 2009 factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant's *Charter* right. In this case, I find that the importance of ensuring that such conduct is not condoned by the court favours exclusion. As Doherty J.A. also said in *McGuffie*, at para. 83, "[t]he court can only adequately disassociate the justice system from the police misconduct and reinforce the community's commitment to individual rights protected by the *Charter* by excluding the evidence. . . . This unpalatable result is the direct product of the manner in which the police chose to conduct themselves."

The Residence Search:

[54] I find that Sgt. Willett's entry into Ms. Connolly's home was serious. Sgt. Willett had in excess of 20 years' experience at the time of the entry. He served as a Detective Constable in the drug section for eight years, including one year as a supervisor. Additionally, he spent seven plus years on the ERT doing high-risk searches and entries. He has been involved in "hundreds" of drug investigations and has been accepted as a "drug expert" in prosecutions. Sgt. Willett testified he entered the premises to preserve drugs and for officer safety. On the whole of the evidence, I find that Sgt. Willett's reasons for entry were not objectively justified.

[55] He had no knowledge of anything beyond marijuana in the residence. He had no knowledge there were firearms in the residence. He had no knowledge anyone occupied the premises at the material time. In fact, he stated he knew nothing about occupants in the premises "then or at any time". He admitted, "this did not start at the office with a defined plan." He testified he went in as a result of a gut feeling or intuition. That intuition was based on his belief that violence is often associated with drugs and that there is a prevalence of guns in drug cases.

[56] On the second ***Grant*** factor I find the protection from unreasonable search and seizure is among the most sacred of *Charter* protected rights. It is very connected to individual privacy especially when the search relates to one's private residence. This breach was not technical or fleeting. I accept the words in ***Grant*** that the more serious the breach, the greater the risk that admission of the evidence may signal to the public that the protected right is more imaginary than real.

[57] On the third ***Grant*** factor I accept that when the seized evidence is physical and reliable society's interests will usually favor admission of the evidence. However, this decision is discretionary and the breach of s. 8 was egregious. This is a case where exclusion is warranted notwithstanding the evidence's reliability.

[58] In conclusion I have assessed all three ***Grant*** factors and I am not prepared to admit into evidence the drugs and guns found in Ms. Connolly's residence. To do otherwise would bring the administration of justice into disrepute.

The Vehicle Search:

[59] I have already determined that the search of Ms. Connolly's vehicle did not offend her s. 7 rights. She did not have the same expectation of privacy as she did

with her residence. Cst. Fry did not require independent reasonable grounds. To use the phrase in ***R. v. Caslake***, supra, the search was "temporally and spatially connected to the arrest".

The Delay in Implementing Ms. Connolly's 10(b) Rights:

[60] There are two components to the breach of Ms. Connolly's s. 10(b) rights. The first relates to the period of time between 8 p.m. and 8:45 p.m. Ms. Connolly was arrested at 7:04 p.m. and at that time clearly indicated that she wished to speak to legal counsel. It was decided that the call would have to wait until she arrived at police headquarters. She arrived at booking at 8 p.m. and was left alone in a room until 8:45 p.m. Cst. Cooke's evidence was that the s. 10(b) rights suspension occurred when Ms. Connolly was removed from the room in booking and taken to the cubicles. Consequently, Ms. Connolly's s. 10(b) rights were breached as no formal suspension had been implemented by the watch commander. This was a blatant breach that the Crown cannot justify.

[61] The second component relates to the period of 8:45 p.m. (May 8, 2015) and 10:30 a.m. (May 9, 2015). This lengthy suspension was the result of the Watch Commander's directive as requested by Cst. Basso. No evidence came to light as a result of denying Ms. Connolly's s. 10(b) rights. She was not questioned during the suspension. Nonetheless she was left in a position where she was at risk of self-incrimination and had no ability to participate in gaining her liberty (***R. v. Taylor,*** *supra).*

[62] The question remains as to what remedy, if any, is available to Ms. Connolly as a result of two very serious breaches of her s. 10(b) rights. The only relief available would be to rule inadmissible the small amount of drugs found in her vehicle. I find the authority to do so in ***R. v. Pino***, 2016 ONCA 389, where the Ontario Court of Appeal allowed for the exclusion of evidence seized before the *Charter* violation. Justice Laskin commented on this principle at paras. 70 and 72:

> [70] In his text, *Constitutional Remedies in Canada*, loose-leaf, 2d ed. (Toronto: Canada Law Book) at para. 10.880, Professor Kent Roach takes a similar view. He emphasizes that the admission of evidence obtained before a *Charter* breach may still bring the administration of justice into disrepute:
>
> > Does it matter in the temporal connection test whether the evidence is found after or before a *Charter* violation? Parts of *Strachan* suggest that it is necessary for the evidence to be discovered after a *Charter* violation, but this may be a hangover of the causation based test. From a regulatory

> perspective, it should not matter whether the evidence was obtained before or after a serious *Charter* violation. In both cases, the administration of justice could be brought into disrepute if the courts appear to condone a serious *Charter* violation. If the court is concerned with responding to serious violations, there is no reason why evidence discovered before a violation should not be considered for exclusion.
>
> . . .
>
> [72] Based on the case law, the following considerations should guide a court's approach to the "obtained in a manner" requirement in s. 24(2):
>
> - The approach should be generous, consistent with the purpose of s. 24(2)
> - The court should consider the entire "chain of events" between the accused and the police
> - The requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct
> - The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections.
> - But the connection cannot be either too tenuous or too remote.

After consideration of these five factors, and applying the test in ***R. v. Grant,*** *supra*, I rule that the drugs in Ms. Connolly's vehicle are excluded as a result of her s. 10(b) violations.

Coady, J.