SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Cater*, 2019 NSSC 302

Date: 20191001
Docket: CRH No. 484442
Registry: Halifax

Between:

Her Majesty the Queen

v.

Matthew Earl Cater

Decision – Voir Dire 1

Judge: The Honourable Justice Darlene Jamieson

Heard: August 16, 2019, in Halifax, Nova Scotia

Oral Decision: October 1, 2019

Written Release of Oral Decision: October 1, 2019

Counsel: Ian Hutchison, for the Applicant Matthew Cater
Christian Girouard, for the Respondent Crown

By the Court (Orally):

Introduction

[1] Mr. Matthew Cater has been charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act,* SC 1996, c. 19 ("*CDSA*"). There are also *Criminal Code* charges relating to the possession of prohibited or restricted weapons (a handgun and a taser). The cocaine and weapons were seized pursuant to a search warrant issued on April 12, 2018, and carried out by police on the same date at Mr. Cater's home.

[2] Prior to trial, Mr. Cater made this application arguing he was unreasonably strip-searched following his arrest in violation of s. 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and seeks a remedy of a stay of proceedings under s. 24(1) of the *Charter*. Mr. Cater further argues there was an unreasonable delay in implementing his right to counsel which violated s. 10(b) of the *Charter*. Under s. 24(2) of the *Charter*, Mr. Cater seeks an order excluding any evidence obtained as a consequence of the violation of his right to counsel.

Factual Background

[3] On April 12, 2018, the police were granted a search warrant for Mr. Cater's home at Lynch Street, Halifax. Prior to the search warrant being issued, Detective

Constable Nickel Joseph (“D/C Joseph”), who was waiting to execute the warrant, was outside the Lynch Street property in an unmarked police vehicle. Both D/C Joseph and Detective Constable Daniel Parent (“D/C Parent”) were part of an investigative team conducting a drug investigation of Mr. Cater. Both were part of a mobile team on April 12, 2018.

[4] D/C Parent testified he had fourteen years’ experience with HRM police and seven years as a military police officer. D/C Joseph testified he had been an HRM police officer since November 2006. On April 12, 2018, they were both assigned to the Integrated Drugs and Gangs Unit of HRM police.

[5] D/C Joseph followed Mr. Cater, who was driving a GMC Terrain, from the Lynch Street residence to Barrington Street. Both D/C Parent and D/C Joseph gave evidence that the lead investigator, Detective Constable Robbie Baird (“ D/C Baird”) gave instructions to arrest Mr. Cater for possession for the purpose of trafficking. As a set of traffic lights turned green on Barrington Street just prior to Morris Street, D/C Joseph turned on the vehicle’s emergency lights and siren. Mr. Cater’s vehicle was immediately in front of D/C Joseph’s vehicle. D/C Parent’s vehicle was immediately behind D/C Joseph’s vehicle. Mr. Cater proceeded to drive from the traffic lights to the next street, where he turned right onto Harvey Street and came to a stop some distance along the street. Prior to stopping, D/C

Parent, who had also activated his vehicles emergency lights and siren when the traffic light turned green, manoeuvred his police vehicle past D/C Joseph's vehicle on the left and past Mr. Cater's vehicle and then pulled beside Mr. Cater's vehicle blocking it from moving forward.

[6] D/C Joseph gave evidence that Mr. Cater travelled a city block from Morris to Harvey Street before turning and then 400 to 500 feet up Harvey Street. He said that as they approached Harvey Street there was room to stop but Mr. Cater did not pull over. He did not stop but turned onto Harvey Street. He testified that from the time lights and sirens were initiated to the point of interception was between 30 and 45 seconds. D/C Parent gave evidence that from the time the emergency equipment was initiated until Mr. Cater stopped his vehicle was less than two minutes and the total distance Mr. Cater travelled was 500 metres.

[7] Mr. Cater did not dispute that the police turned on the emergency lights when the lights turned green at the intersection and that he turned onto Harvey Street before stopping. He testified that he recalled pulling through a set of lights, getting ready to take a turn, and looking behind him and noticing an unmarked police vehicle with lights. He did not see the police vehicle's lights until he was about to turn right off of Barrington Street. He recalled hearing sirens but was unsure whether the sirens were initiated simultaneously with the lights. He

indicated he was unsure of the time frame that elapsed after he took the corner onto Harvey Street but said he pulled over where there was a gap between vehicles. He testified that he pulled over immediately when he realized the police vehicle was behind him.

[8] Mr. Cater was then arrested at the scene for possession for the purpose of trafficking and for failing to stop for police. This was at 11:40 am. A roadside search or pat-down of Mr. Cater was done and nothing was found. The vehicle was also searched and nothing was found. Both D/C Joseph and D/C Parent gave evidence that, from their past experience, they suspected Mr. Cater was concealing evidence or had thrown evidence from the vehicle when he didn't immediately stop. D/C Joseph testified that he walked the route travelled by Mr. Cater's vehicle, checking both sides of the road for anything that may have been thrown from the vehicle.

[9] There is no dispute that the police cautioned Mr. Cater and advised him of his right to counsel immediately upon arrest. D/C Parent testified that he asked Mr. Cater if he had a lawyer of his own and Mr. Cater said he would like to speak to duty counsel. D/C Parent said Mr. Cater did not delay in asking to speak to counsel. Mr. Cater's evidence was that when provided his right to counsel, he told the police at roadside he would like to speak to a lawyer. At that point he did not

reference his own legal counsel, Mr. Chris Manning (now the Honourable Judge Chris Manning of the Provincial Court).

[10] Mr. Cater testified that at roadside he was told by police, 'you better not have anything on you because when you get back to the police station you're gonna be strip-searched.' This evidence was not contradicted by the police officers who were at the scene.

[11] D/C Joseph indicated he was given a set of keys, seized during Mr. Cater's arrest, and went to the Lynch Street property to clear it, thereby ensuring no evidence relevant to the investigation could be destroyed. He indicated this was done in case someone had learned of the stop or Mr. Cater had made a telephone call before stopping his vehicle. D/C Joseph attended the Lynch Street property at 12:05 pm and would have been inside the house only five minutes. On completing the search he advised the investigative team the house had been cleared.

[12] Mr. Cater was transported to Police Headquarters on Gottingen Street where he arrived at 12:05 pm. The strip search of Mr. Cater began at 12:07 pm.

[13] There was no evidence from the police witnesses as to the process carried out during the strip search of Mr. Cater. D/C Parent and Constable Christopher McMahon were the officers present during the strip search. D/C Parent gave

evidence that the reason Mr. Cater was subjected to a strip search was because he believed he may have been concealing drugs on his person. He said they had been advised Mr. Cater was arrestable for possession of cocaine and nothing had been found roadside. He further testified that D/C Baird had advised him that Mr. Cater had drugs on him. D/C Parent indicated there was a period of time that Mr. Cater continued driving after the emergency equipment on the police vehicles had been activated. On cross- examination, he agreed that the reason he searched Mr. Cater was because it was customary in drug investigations to conduct a strip search because people who transport drugs will conceal drugs in their clothing. He further said it was usual practice for a strip search to be conducted when they believed something may be concealed. D/C Parent provided the following answers on cross-examination:

> Q. … In terms of the reasons why Mr. Cater was subject to a strip search… It's correct to say that the reason why that you made the decision to search Mr. Cater is because it is customary on drug investigations that people who are transporting drugs will conceal drugs within their clothing. That's correct?
>
> A. In my experience yes.
>
> Q. And that the search of Mr. Cater was conducted, the strip search, because it is the usual practice to conduct a strip search in a drugs arrest?
>
> A. When we believe that something may be concealed.
>
> Q. And in Mr. Cater's case the reason why you believe something was concealed was what?

> A. The fact that he was - I was advised he was arrestable for possession of cocaine… And that nothing had been found. In my experience, as I said, people do conceal drugs within their clothing.
>
> Q. But you didn't know that Mr. Cater actually had drugs on his person did you ?
>
> A. Not personally.
>
> Q. No you had no knowledge provided to you by Constable Baird that my client had drugs upon his person at the time of the arrest did you?
>
> A. Detective Constable Baird advised me that he did.
>
> … Not specifics of where the drugs were…
>
> Q. In the circumstances it was a guess upon your behalf that potentially Mr. Cater was in possession of drugs on his person?
>
> A. I wouldn't say it was a guess it was reasonable and probable grounds provided by Constable Baird… reasonable and probable grounds provided by Detective Constable Baird. When reasonable and probable grounds are provided from another officer we are not always given a specific as to this person is in possession of drugs specifically in their car or on their person.

[14] Later in relation to further questions on cross-examination concerning reasonable and probable grounds, D/C Parent provided the following answers to questions:

> Q. What were those reasonable and probable grounds?
>
> A. No drugs were found within the vehicle or in his pockets. In my experience people transporting drugs will transport it within their clothing.
>
> Q. Did you ever witness Mr. Cater place his hand in his pants trying to hide drugs?
>
> A. No but there was a period of time where Mr. Cater continued driving while police had emergency equipment activated behind him.

[15] Mr. Cater's evidence concerning the strip search is as follows: he was taken to an interrogation room which was approximately 10′ x 10′, with no windows. He said that he had absolutely no choice in whether to submit to the strip search. Mr. Cater testified the door to the room was open a crack. He said it was pulled over but not completely closed. The officers were three to four feet from his body during the strip search. He indicated he was told to remove his clothing and, when naked, he was asked to open his mouth and using his own fingers to rub along the inside of his mouth and under and around his tongue. He was told to run his hands through his hair, show behind his ears with his hands which he demonstrated to the Court by pulling his ears forward. Mr. Cater gave evidence that he was naked while undertaking the search of his mouth, hair and behind his ears. He was also required to show the bottoms of his feet. Mr. Cater then indicated he was told to bend over, to spread his buttocks cheeks with his hands and to cough two times. He said at this point in time the officers were two to three feet from him. He was told to lift up his scrotum and show there was nothing hidden under it. He indicated he was naked for a period of between three and five minutes. Mr. Cater said he found the strip search extremely embarrassing and indicated his embarrassment in discussing it with the Court. No drugs or weapons were found as a result of the strip search.

[16] There were no significant differences in the witnesses' evidence, with one major exception: what occurred in relation to the implementation of Mr. Cater's right to counsel after the strip search. Otherwise the evidence was generally consistent, with any inconsistencies being minor.

[17] Mr. Cater testified that after the strip search he was taken to another room. He indicated police put him in contact with Ms. Anna Mancini, duty counsel. He testified that duty counsel provided him with the telephone number for his lawyer, Mr. Chris Manning. He then summoned police by speaking through the door to police, the police opened the door and he gave a police officer Mr. Manning's telephone number to write down for him. Mr. Cater had no pen (as D/C Parent confirmed, all items had been removed from his person). Mr. Cater said he stayed on the phone long enough to get the telephone number and then passed it on to the police. He said the telephone call terminated when he got the number for his lawyer. He testified that on termination of the call, he asked police to contact Mr. Manning and was told he would have to wait until the search warrant was concluded at his residence on Lynch Street. He said he was then put in a cell.

[18] Mr. Cater gave the following answers in his direct examination in relation to the call with duty counsel:

A. The truth is there really was no advice. I asked to be put in contact with a second lawyer, I more or less just told to duty counsel what my charges were and then I told her that I would like to speak to Chris Manning and she got the number for Chris Manning and gave me that number.

… Anna gave me the telephone number … She's the duty counsel that I was put in contact with… And then I gave it to the officer-the number…

Q. Did you have a pen or a pencil in your possession?

A. I didn't no

Q. How are you able to record or pass the information on to the officer?

A. I had to just say it through the door

Q. Say what through the door please sir?

A. Sorry. The number for Chris Manning.

Q. Okay. The Officer was standing where in relation to the door please?

A. Outside of the door, I'm not exactly sure. I just kinda came to the door and yelled out and they came and opened the door.

Q. The telephone call with duty counsel, has that terminated, has that come to an end?

A. I just kinda stayed on the phone long enough to give the number that I received through duty counsel and then the phone, the call was terminated.

Q. So duty counsel's providing you the telephone number and then you are then passing the telephone number on to the police?

A. Exactly

Q. Okay. Having passed that information onto the police what happens in relation to the call with duty counsel?

A. In terms of what, sorry?

Q. Did the call continue?

A. No, no it's terminated after I got the number for the, for my lawyer?

> Q. What discussion, if any, takes place between yourself and the police immediately after the call with duty counsel comes to an end, please?
>
> A. I asked to contact Chris Manning, which was my lawyer at this time, and they advised me that I wasn't able to contact him until after the search warrant was concluded.
>
> Q. Any sense of time in terms of when this call is taking place?
>
> A. I'm not 100% sure, they just more or less told me that until they conclude the search warrant that I can't contact him…

[19] D/C Parent testified that there was a private telephone call between Mr. Cater and duty counsel from 12:21 pm to 12:28 pm. At the end of the call he was asked to write the name and number of the lawyer, Chris Manning, which he wrote in his notebook. He indicated that there was then a discussion about the search at Mr. Cater's house and that they would wait to see what happened at the house, following which they would attempt to contact Mr. Manning**.** D/C Parent said, as there were no drugs found at that point, there were no charges laid. He gave evidence that Mr. Cater was advised that he would be able to contact Mr. Manning should charges be laid. D/C Parent said on conclusion of the call with duty counsel, Mr. Cater did not ask to speak to Mr. Manning (at that point in time).

[20] During cross-examination, D/C Parent said he had no recall as to whether the name and number of Mr. Manning was provided to him by Mr. Cater during or after the call with duty counsel. His notebook containing notes taken contemporaneously to events indicates "provided name of other lawyer while

speaking with duty counsel…”. When asked on cross-examination whether it was likely that the information was provided during the call as he used the word ‘while,’ he said he disagreed because Mr. Cater was in a private room for the call with duty counsel.

[21] During cross-examination, D/C Parent’s evidence at the preliminary inquiry was put to him. D/C Parent confirmed he gave the following evidence at the preliminary inquiry:

> Q. … Would you agree with me that, once Mr. Cater concluded the call with Anna Mancini, the first call, he asked to speak to Mr. Manning and you told him that he could only do so after the search of the residence was complete?
>
> A. Yes

[22] During cross-examination, D/C Parent indicated that he had a chance to review his evidence and, on reflection, this was a two-part question and his answer of “yes” applied only to the second part of the question, being that Mr. Cater could contact Mr. Manning if he wished to do so after the search was completed. In other words, he was not answering “yes” to the question as to whether Mr. Cater asked to speak with Mr. Manning on conclusion of the call with duty counsel. He confirmed he did not share this information with Crown Counsel before the *voir dire*. D/C Parent said on several occasions during his testimony that Mr. Cater did not ask to speak to Mr. Manning on the conclusion of the call with duty counsel.

[23] D/C Parent's "Can Say" prepared at 4:20 pm on April 12, 2018, which forms part of the Crown brief, was put to him on cross-examination. It states: "Cater was advised that Mr. Manning could be contacted once the search of his residence was complete."

[24] The following exchange from the preliminary inquiry evidence of D/C Parent concerning delay was also put to him on cross-examination, and he confirmed the evidence given was accurate:

> Q. And the reason for delaying Mr. Cater's right to counsel in respect of Mr. Manning is what?
>
> A. The way I understand it is that at that point we didn't understand all of the charges at that point.
>
> …
>
> Q. Okay.
>
> A. So once the search is completed, then we would know if there were new charges.
>
> Q. What do you mean, you don't understand all of the charges that that point, please officer?
>
> A. I don't recall at that point.
>
> …
>
> A. . . . and his jeopardy was likely to change after the search, the search that was being executed at his house.
>
> Q. okay, but I fail to understand here the clarity of your thought in terms of why you're not allowing Mr. Cater to contact Mr. Manning.
>
> A. I cannot answer that.
>
> …
>
> Q. …When you use the phrase 'I can't say' I presume you mean you can't remember why?
>
> A. Yes …

[25] D/C Parent denied that the reason Mr. Cater's right to counsel was suspended was because they were executing a search warrant at the Lynch Street property. He testified that an agreement had been reached with Mr. Cater whereby he could contact Mr. Manning once the search was done, if there were charges. He acknowledged during cross-examination that such an agreement had not been previously referenced in his notebook, the Crown brief (his "Can Say") nor in his preliminary inquiry evidence. D/C Parent further acknowledged during cross-examination that at this *voir dire* was the first time he had mentioned such an agreement to anyone.

[26] D/C Parent testified he felt he had implemented the right to counsel by providing Mr. Cater with access to duty counsel.

[27] After the interaction with Mr. Cater concerning calling Mr. Manning once the search of the home was complete, D/C Parent then attended at Lynch Street where he was advised that a loaded firearm, ammunition and a functioning taser had been seized. D/C Parent assisted in the search but did not seize any evidence himself. He was then told by D/C Baird to return to the station to arrest Mr. Cater in relation to the seized items. The time of the arrest was 2 pm. D/C Parent provided Mr. Cater with his right to counsel a second time. Mr. Cater indicated he understood and asked to speak with his lawyer, Mr. Manning. At 2:10 pm D/C

Parent contacted Mr. Manning's office and was advised that he was on his way to New Brunswick but his office would try to contact him. Mr. Manning's office called back at 2:33 pm advising that Mr. Manning was not available. Mr. Cater was advised of this and was asked if he wished to speak to duty counsel. At 2:35 pm Mr. Cater spoke to duty counsel for eight minutes.

[28] D/C Baird gave evidence that he had fifteen years' experience in policing. He confirmed he was the directing officer for the investigation of Mr. Cater. He was the applicant for the search warrant executed at the Lynch Street property. None of the evidence concerning the arrest or post-arrest was included in the Information To Obtain ("ITO"). He indicated that when he received the search warrant he then took it himself to the Lynch Street property. He said he spoke with D/C Joseph at 11:55 am. D/C Baird said he advised D/C Joseph that he had the warrant. He told them to get some guys to clear the house, as he feared that when Mr. Cater didn't stop right away he may have been able to make a call, or that someone had seen the car stopped. He confirmed he would have arrived at the Lynch Street property 20 to 25 minutes after his call with D/C Joseph (by 12:15 to 12:20 pm).

[29] Constable Philip Apa gave evidence that he had been with the RCMP for eleven years. On April 12, 2018, he was in a seconded role with the Integrated

Drugs and Gangs Unit. He was the exhibit officer at the Lynch Street property, taking possession of the various items that had been seized including a handgun, scale, 123 grams of cocaine, two types of ammunition, and $22,000 in cash. He indicated the safe containing the cocaine and ammunition was located at 12:50 pm, turned over to him and logged by him at 1:02 pm. The cash was found at 1 pm and logged at 1:01 pm.

[30] Mr. Cater is not contesting whether there were reasonable and probable grounds for his arrest, nor is he contesting the validity of the search warrant for the Lynch Street property.

Issues:

1. Was Mr. Cater's right to be free from unreasonable search and seizure under s. 8 of the *Charter* violated?

(a) Did the police have reasonable and probable grounds to believe that it was necessary to strip search Mr. Cater ?

(b) Was the manner in which the strip search was conducted reasonable?

2. Were Mr. Cater's rights guaranteed by s. 10(b) of the *Charter* violated? Was there a delay in implementing Mr. Cater's right to

counsel? If so, was the delay in implementing the right to counsel reasonable in the circumstances?

3. If a violation of Mr. Cater's s. 8 or s. 10(b) *Charter* rights is found, what is the appropriate remedy under s. 24?

The Strip Search

Was Mr. Cater's right to be free from unreasonable search and seizure under s. 8 of the *Charter* violated?

(a) Did the police have reasonable and probable grounds to believe that it was necessary to strip search Mr. Cater ?

(b) Was the manner in which the strip search was conducted reasonable?

[31] Section 8 of the *Charter* states: "Everyone has the right to be secure against unreasonable search or seizure."

[32] Strip searches are one of the most personally-invasive forms of common-law searches carried out by police. The Supreme Court of Canada in ***R v. Golden***, 2001 SCC 83, discussed the significant interference with personal privacy associated with a strip search and the acute need to prevent unjustified searches before they occur:

> 89 Given that the purpose of s. 8 of the *Charter* is to protect individuals from unjustified state intrusions upon their privacy, it is necessary to have a means of preventing unjustified searches before they occur, rather than simply determining after the fact whether the search should have occurred (*Hunter, supra* , at p. 160). The importance of preventing unjustified searches before they occur is particularly acute in the context of strip searches, which involve a significant and very direct interference with personal privacy. Furthermore, strip searches can be humiliating, embarrassing and degrading for those who are subject to them, and any *post facto* remedies for unjustified strip searches cannot erase the arrestee's experience of being strip searched. Thus, the need to prevent unjustified searches before they occur is more acute in the case of strip searches than it is in the context of less intrusive personal searches, such as pat or frisk searches. As was pointed out in *Flintoff* , *supra* , at p. 257, "[s]trip-searching is one of the most intrusive manners of searching, and also one of the most extreme exercises of police power".
>
> 90 Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy. The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can affect detainees: "humiliating" "degrading", "demeaning", "upsetting", and "devastating" (see *King* , *supra* , *R. v. Christopher*, [1994] O.J. No. 3120 (Ont. Gen. Div.) ; J.S. Lyons, Toronto Police Services Board Review. "*The Search of Persons Policy - The Search of Persons - A Position Paper* " (April 12, 1999)). Some commentators have gone as far as to describe strip searches as "visual rape" (Paul Shuldiner, "Visual Rape: A Look at the Dubious Legality of Strip Searches" (1979), 13 *J. Marshall L. Rev.* 273). Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault (*Lyons*, *supra* , at p. 4). The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse (Commission of Inquiry into Certain Events at the Prison for Women in Kingston (1996), at pp. 86-89). Routine strip searches may also be distasteful and difficult for the police officers conducting them (*Lyons*, *supra* , at pp. 5-6).

[33] Because of its extraordinarily intrusive nature, a strip search is unlike regular searches incident to arrest. A strip search cannot be based on the reasonable and probable grounds for the arrest. The police must have reasonable and probable

grounds for concluding that the strip search is necessary in the particular circumstances of the arrest.

[34] The burden of justification is on the Crown to show that the search is necessary, based on reasonable and probable grounds. Not only must the police believe that they have sufficient justification, there must be an objective basis to support that conclusion (***R v DeYoung***, 2018 NSSC 39, at para. 18). In ***Golden***, ***supra***, the Supreme Court of Canada stated:

> 98 The fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search, even where the strip search meets the definition of being 'incident to lawful arrest' as discussed above. Rather, additional grounds pertaining to the purpose of the strip search are required… A strip search is a much more intrusive search and, accordingly, a higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity. In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest.
>
> 99. In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the *Charter.*
>
> [Emphasis added]

[35] In ***Golden, supra***, the Court adopted the following framework to assist police in deciding how best to conduct a *Charter*-compliant strip search incidental to arrest:

> 101 In this connection, we find the guidelines contained in the English legislation, P.A.C.E. concerning the conduct of strip searches to be in accordance with the constitutional requirements of s. 8 of the *Charter*. The following questions, which draw upon the common law principles as well as the statutory requirements set out in the English legislation, provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*:
>
> 1. Can the strip search be conducted at the police station and, if not, why not?
>
> 2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
>
> 3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
>
> 4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
>
> 5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
>
> 6. What is the minimum of force necessary to conduct the strip search?
>
> 7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
>
> 8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
>
> 9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
>
> 10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
>
> 11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[36] The police offered two justifications for conducting the strip search. Both are related to D/C Parent's belief Mr. Cater had hidden drugs on his person: (1) Mr. Cater's failure to immediately stop at the scene provided him with an opportunity to conceal drugs on his person and the police had not found drugs anywhere else at the scene; and (2) the officer in charge (D/C Baird) advised that Mr. Cater had drugs on him. There were no grounds advanced to justify Mr. Cater being strip searched for any safety reasons. The police had no information suggesting there was a concealed weapon.

[37] What is reasonable must be assessed in context. The Alberta Court of Appeal in ***R v. Loewen***, 2010ABCA 255, affirmed, 2011 SCC 21, said the following concerning the meaning of "reasonable and probable grounds":

> 18 Therefore "reasonable and probable grounds" does not necessarily mean the same thing as "more likely than not on a balance of probabilities". In *Storrey* at p. 251 it was observed that even a standard of "reasonable and probable grounds" does not require a *prima facie* case. Rather than meaning "more probable than not", "reasonable grounds" conveys more the idea of an event not unlikely to occur for reasons that rise above mere suspicion: *Mugesera* at para. 114; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 (S.C.C.) at paras. 34, 41; *R. v. Hall* (1995), 22 O.R. (3d) 289 (Ont. C.A.) at p. 298. It follows that a belief in the existence of a set of facts can be "reasonable" even if the existence of those facts is not "probable". In this context "reasonable" relates to legitimate expectations that a fact exists, without being able to say that it is "more likely than not".

[38] While there are some differences in the evidence as to timeline and the total distance Mr. Cater's vehicle travelled after the emergency equipment was

activated, there is no dispute that the emergency police lights were activated at the intersection's traffic lights. Both police officers confirmed in their testimony that both lights and sirens were activated on both police vehicles when the traffic lights turned green. Mr. Cater does not dispute this but simply says he saw the lights behind him as he was getting ready to take the turn and recalls seeing the lights before hearing the sirens. On direct examination Mr. Cater testified that he was pulling through the lights and ready to take a turn when he looked behind and saw the lights of the unmarked police vehicle. The following exchange occurred on cross examination of Mr. Cater: Crown counsel: "After the light turns green that's when police activates lights and sirens?" Mr. Cater: "Yes I believe so. I just kind of remember looking in my rearview as I was taking a corner and seeing the lights activated."

[39] After turning right from Barrington Street, Mr. Cater drove some distance on Harvey Street before his vehicle came to a stop with D/C Parent's vehicle on the left, blocking his vehicle. D/C Joseph gave evidence that Mr. Cater travelled a city block from Morris to Harvey Street before turning, and then 400 to 500 feet up Harvey Street. D/C Joseph gave evidence that from the time lights and sirens were initiated to the point of interception was between 30 and 45 seconds. D/C Parent gave evidence that from the time the emergency equipment was initiated until Mr.

Cater stopped his vehicle was less than two minutes and the total distance Mr. Cater travelled was 500 metres.

[40] Mr. Cater did not recall how far he had travelled on Harvey Street when his vehicle came to a stop. Mr. Cater said that after he saw the police lights he stopped when there was a gap in vehicles allowing him to pull over on Harvey Street. He testified he rolled to a stop with one police car behind him and one beside him. D/C Joseph testified that as they approached Harvey Street there was room to stop on Barrington Street, however, Mr. Cater did not pull over, but turned right onto Harvey street. The evidence given by Mr. Cater does not contradict what the officers said in their testimony.

[41] I find the police had reasonable and probable grounds to believe that it was necessary in the circumstances of the arrest, to conduct a strip search of Mr. Cater. The failure to immediately stop roadside provided D/C Parent with reasonable and probable grounds to conduct a strip search of Mr. Cater at the police station. I find the police officers' experience (D/C Joseph - 13 years and D/C Parent - 21 years, including their collective experience in the Drug Unit), supports their position that the failure to stop when the emergency lights and sirens were activated, thereby allowing Mr. Cater to travel one block and then some distance on Harvey Street, provided an opportunity to either throw evidence from the vehicle or to hide

evidence on Mr. Cater's person. Mr. Cater's failure to stop is consistent with the officers belief he was evading an immediate stop in order to hide evidence. This belief is supported by the fact that D/C Joseph, while at the scene with D/C Parent, retraced Mr. Cater's route from the time the lights and sirens of the police vehicles were initiated to the point where Mr. Cater's vehicle came to a stop, searching both sides of the road to determine if drugs had been thrown from the vehicle. Having searched the immediate area, searched the vehicle, and conducted a pat-down of Mr. Cater's person, the officers were left with the conclusion there must be evidence hidden on Mr. Cater's person. I find this evidence supports an honest subjective belief of the police that there were controlled substances /drugs hidden on his person.

[42] In addition, D/C Joseph and D/C Parent were part of the investigative team about to execute a search warrant at Mr. Cater's residence. They knew the search warrant request was in progress. Mr. Cater was followed from that residence on Lynch Street, to Barrington Street where he failed to immediately stop when the emergency lights and sirens were activated. The police clearly believed Mr. Cater had failed to stop, as he was arrested at roadside for possession for the purpose of trafficking and for failing to stop for police.

[43] A further factor, while not conclusive on its own in the present circumstances, also supports the police officers subjective belief: D/C Parent was advised by the lead investigator that Mr. Cater had drugs on him. Constable Baird did not advise of the specifics of where the drugs were, nor did D/C Parent contact D/C Baird prior to the strip search to inquire where the referenced drugs were suspected to be located. Regardless, there was a belief there were drugs on him.

[44] Viewed cumulatively, I am of the opinion there were reasonable and probable grounds for the police to believe Mr. Cater had drugs hidden on his person. The search for drugs was related to the reason for Mr. Cater's arrest, being possession for the purpose of trafficking in cocaine.

[45] I further find there to be a basis for this conclusion when viewed objectively in the circumstances. I find that it was objectively reasonable for D/C Parent to believe, in the above described circumstances, that Mr. Cater was concealing drugs on his person. It is not necessary that the Crown show this belief was certain.

[46] Mr. Cater argued that the evidence supports a conclusion that HRM police routinely conduct strip searches where there has been an arrest for a drug offence. A policy to routinely conduct strip searches for any drug-related offence would be contrary to the law. As the Court in ***Golden***, ***supra*****,** said, at paragraph 90, "Strip searches are … inherently humiliating and degrading for detainees regardless of

the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy."

[47] D/C Parent agreed on cross-examination that the reason he searched Mr. Cater was because it was customary in drug investigations to conduct a strip search because people who transport drugs will conceal drugs in their clothing. While this statement is concerning, D/C Parent qualified it by adding that it was usual practice for a strip search to be conducted when they believed something may be concealed. On the evidence given at the *voir dire*, I see no basis on which to conclude the police as of April 12, 2018, had a policy to routinely conduct a strip search whenever an individual was arrested on an alleged drug offence.

[48] Having concluded that the police had reasonable and probable grounds for concluding a strip search was necessary, I now turn to whether the strip search was conducted in a reasonable manner.

[49] On consideration of the guidelines set out in ***Golden, supra***, for police when conducting strip searches, it is obvious that the manner in which the police conducted this strip search was unreasonable. The door to the room where the strip search was conducted was not completely closed, meaning people passing the door may have been able to see into the room; there was no authorization for the strip search given by a senior officer; no notes were taken of the reasons for the strip

search, nor of the manner in which it was conducted; and the police did not provide any justification for why Mr. Cater was completely naked when he was asked to search his own mouth, hair, and behind his ears, and to show the bottoms of his feet. There was no reason for Mr. Cater to be naked when those bodily searches were conducted. As was said in ***Golden, supra***, strip searches are to be conducted as quickly as possible and "in a way that ensures that the person is not completely undressed at any one time." All of the above are contrary to the principles set out in ***Golden***, ***supra*** at para. 101.

[50] Strip searches must be conducted in a manner that interferes with the privacy and dignity of the person being searched as little as possible (***Golden***, para. 104). The strip search in this case was not so conducted. I find that the manner in which the police conducted the strip search did not comply with the requirements of reasonableness and was in violation of s. 8 of the ***Charter***.

[51] It is also concerning that the officer in charge of the strip search had no formal training concerning how to conduct a proper strip search. He had not received any training regarding the ***Golden*** decision and principles. His only training was informal training by colleagues or on-the-job training. He did not appear to understand the difference between having reasonable and probable grounds for arrest and having reasonable and probable grounds for a strip search,

in other words, that they are two separate tests. There is no excuse for this senior police officer's lack of knowledge of the law. The Supreme Court of Canada's guidance in ***Golden*** has been the law since 2001. The police should have known how to reasonably conduct a strip search. This is not a situation where the current state of the law is unclear.

Delay in implementing Mr. Cater's s.10(b) rights ?

> Were Mr. Cater's rights guaranteed by s. 10(b) of the *Charter* violated? Was there a delay in implementing Mr. Cater's right to counsel? If so, was the delay in implementing the right to counsel reasonable in the circumstances?

[52] Section 10 of the *Charter* states:

> 10. Everyone has the right on arrest or detention:
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and
>
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

[53] In 2010, the Supreme Court of Canada released three companion cases elaborating on the nature and limits of the right to counsel under s. 10(b) (***R v. Sinclair,*** 2010 SCC 35***;*** ***R v. Willier***, 2010 SCC 37; and ***R. v. McCrimmon***, 2010

SCC 36). The a majority in ***R v. Sinclair***, ***supra***, spoke of the purpose of the right to counsel:

> 26 The purpose of the right to counsel 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": *R. v. Manninen*, [1987] 1 S.C.R. 1233 (S.C.C.), at pp. 1242-43. The emphasis, therefore, is on assuring that the detainee's decision to cooperate with the investigation or decline to do so is free and informed. Section 10(*b*) does not guarantee that the detainee's decision is wise; nor does it guard against subjective factors that may influence the decision. Its purpose is simply to give detainees the opportunity to access legal advice relevant to that choice.
>
> 27 Section 10(*b*) fulfills its purpose in two ways. First, it requires that the detainee be advised of his right to counsel. This is called the informational component. Second, it requires that the detainee be given an opportunity to exercise his right to consult counsel. This is called the implementational component. Failure to comply with either of these components frustrates the purpose of s. 10(*b*) and results in a breach of the detainee's rights: *Manninen*. Implied in the second component is a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel. The police obligations flowing from s. 10(*b*) are not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: *R. v. Tremblay*, [1987] 2 S.C.R. 435 (S.C.C.), at p. 439, and *R. v. Black*, [1989] 2 S.C.R. 138 (S.C.C.), at pp. 154-55.
>
> [Emphasis added]

[54] In ***R v. Willier, supra***, the majority of the Supreme Court of Canada further commented on the purpose of s. 10(b) and confirmed the police duties are triggered immediately upon arrest or detention:

> 28 Accordingly, s. 10(*b*) provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy. The purpose of s. 10(*b*) is to provide detainees an opportunity to mitigate this legal disadvantage.
>
> 29 The purposes of s. 10(*b*) serve to underpin and define the rights and obligations triggered by the guarantee. In *Bartle*, Lamer C.J. summarized these

> rights and obligations in terms of the duties imposed upon state authorities who make an arrest or effect a detention (p. 192). Section 10(*b*) requires the police
>
> > (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).
>
> 30 The first duty is an informational duty, while the second and third duties are implementational in nature and are not triggered until detainees indicate a desire to exercise their right to counsel. As explained in *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460 (S.C.C.), these duties are triggered immediately upon an individual's arrest or detention, as "the concerns about self incrimination and the interference with liberty that s. 10(*b*) seeks to address are present as soon as a detention is effected" (para. 41).
>
> [Emphasis added]

[55] The Supreme Court of Canada in ***R. v. Taylor,*** 2014 SCC 50, again confirmed that the duty to facilitate access to counsel arises immediately upon the arrestee's request to speak to counsel, and that the burden is on the Crown to show that any delay was reasonable in the circumstances:

> 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.…
>
> 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, rises immediately upon the detainees 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 (Alta. C.A.), at para. 12). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.
>
> [Emphasis added]

[56] Section 10(b) also entitles an arrested or detained person the right to consult with a lawyer of his or her choice (***R. v. Ross***, [1989] 1 S.C.R. 3). The Supreme Court of Canada in ***R v. McCrimmon***, ***supra,*** discussed the 10(b) right to counsel of choice:

> 17 As explained in *Willier*, the right to choose counsel is one facet of the guarantee under s. 10(*b*) of the *Charter*. Where the detainee opts to exercise the right to counsel by speaking with a specific lawyer**,** s. 10(*b*) entitles him or her to a reasonable opportunity to contact chosen counsel. If the chosen lawyer is not immediately available, the detainee has the right to refuse to contact another counsel and wait a reasonable amount of time for counsel of choice to become available. Provided the detainee exercises reasonable diligence in the exercise of these rights, the police have a duty to hold off questioning or otherwise attempting to elicit evidence from the detainee until he or she has had the opportunity to consult with counsel of choice. If the chosen lawyer cannot be available within a reasonable period of time, the detainee is expected to exercise his or her right to counsel by calling another lawyer, or the police duty to hold off will be suspended: *R. v. Leclair*, [1989] 1 S.C.R. 3 (S.C.C.); *R. v. Black*, [1989] 2 S.C.R. 138 (S.C.C.).

[57] In ***R v. Willier***, ***supra***, the majority discussed the principles applicable to the s. 10(b) entitlement to counsel of choice, emphasizing the detained person must be reasonably diligent in exercising these rights:

> 35 Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(*b*) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning… As Lamer J. emphasized in *Ross*, diligence must also accompany a detainee's exercise of the right to counsel of choice (pp. 10-11):

> Although an accused or detained person has the right to choose counsel, it must be noted that, as this Court said in *R. v. Tremblay*, [1987] 2 S.C.R. 435, a detainee must be reasonably diligent in the exercise of these rights and if he is not, the correlative duties imposed on the police and set out in *Manninen* are suspended. Reasonable diligence in the exercise of the right to choose one's counsel depends upon the context facing the accused or detained person. <u>On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly.</u> By contrast, when seeking the best lawyer to conduct a trial, the accused person faces no such immediacy. Nevertheless, accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer.
>
> [Emphasis added]

[58] The s.10(b) right to retain and instruct counsel without delay imposes a corresponding duty on the police to ensure individuals are given a reasonable opportunity to exercise that right. The Crown has the burden of establishing that, when Mr. Cater asserted his right to speak to counsel, he was provided with a reasonable opportunity to exercise that right. The burden is on the Crown to show that any delay in facilitating Mr. Cater's right to counsel was reasonable in the circumstances. (See ***R. v. Luong***, 2000 ABCA 301, cited with approval in ***R. v. Taylor***, 2014 SCC 50). This is a factual inquiry.

[59] Once the arrestee asserts his right to counsel then the implementation duty of the police is triggered. Did the police provide Mr. Cater with a reasonable opportunity to exercise the right? Do the circumstances, viewed as a whole, indicate that Mr. Cater required more than the initial call to duty counsel to fulfill

the purpose and intent of s. 10(b)? Should Mr. Cater have been afforded a reasonable opportunity to contact counsel of his choice after the call with duty counsel? I find, in the circumstances of this matter, police did not provide Mr. Cater with a reasonable opportunity to exercise his right to counsel of choice because police intentionally delayed his request to speak to counsel of choice for one hour and 42 minutes.

[60] D/C Parent testified that roadside Mr. Cater asked to speak to duty counsel. Mr. Cater says at roadside he told police he wanted to speak with a lawyer. Mr. Cater acknowledged on cross examination that he did not use Chris Manning's name when he was given his right to counsel roadside. Neither D/C Parent nor Mr. Cater gave any evidence as to whether there was a discussion about who Mr. Cater wished to contact for legal advice once Mr. Cater arrived at the station and before duty counsel was contacted. I, therefore, conclude there was no such discussion.

[61] I find on the totality of the evidence that Mr. Cater spoke to duty counsel from 12:21 pm until 12:28 pm, obtained the telephone number of Mr. Manning from duty counsel, provided Mr. Manning's name and telephone number to the officer during the call with duty counsel, and then he asked to speak with Mr. Manning, who was his counsel of choice. Mr. Cater testified that he stayed on the call with duty counsel long enough to get the number for Mr. Manning and then

terminated the call. At this point he asked to speak with Mr. Manning. For the reasons set out in detail below, I do not accept D/C Parent's evidence that Mr. Cater did not ask to speak with Mr. Manning on concluding the call with duty counsel nor do I accept his evidence that there was an agreement reached with Mr. Cater to delay calling Mr. Manning until after the search of the Lynch Street property

[62] It should have been obvious to the police that Mr. Cater utilized duty counsel to obtain the name and number of Mr. Manning. Mr. Cater spoke to duty counsel for seven minutes, during which time he yelled through the door to get police attention, and the police came to the room and opened the door. They then spoke with Mr. Cater, writing down Mr. Manning's name and number. At the end of the conversation with duty counsel, Mr. Cater did not say he was satisfied with the consultation with duty counsel, but said he wished to speak to Mr. Manning. The only conclusion to be reached on the whole of the evidence (both what Mr. Cater said and what he did) is that he required the advice of his counsel of choice. The circumstances should have raised with the police officer the possibility that Mr. Cater had not exercised his right to counsel. At a minimum these circumstances required the police to seek clarification. It was not sufficient in the circumstances for D/C Parent to simply advise Mr. Cater that he could speak to

counsel of his choice once the search warrant was completed. Much more was required of the police to fulfill their implementation duties.

[63] On cross-examination when asked whether he knew duty counsel could give free and immediate legal advice as referred to in the police caution, Mr. Cater replied "But not the legal advice I was seeking. I would have been more comfortable speaking with my lawyer." Mr. Cater testified that he didn't receive any advice from duty counsel and that after he received Mr. Manning's contact information, he terminated the call and asked to speak with Mr. Manning.

[64] On being arrested, Mr. Cater was faced with an immediate need for legal advice. The right to counsel includes an arrestee's counsel of choice but the arrestee must be reasonably diligent in the pursuit of that choice. Here, Mr. Cater acted diligently. He did not delay but asked immediately on termination of the call with duty counsel, to speak with Mr. Manning. He was advised he could not do so until after the search warrant was concluded. This resulted in a delay of one hour and 42 minutes before a call was initiated to Mr. Manning.

[65] The police are not required to monitor the quality or adequacy of the advice received by the arrestee. However, they cannot ignore circumstances indicating that the consultation with counsel is inadequate. The Supreme Court of Canada in

R. v. Willier, ***supra***, stated that police are entitled to assume the advice is adequate unless the detainee indicates otherwise:

> 41 While s. 10(*b*) requires the police to afford a detainee a reasonable opportunity to contact counsel and to facilitate that contact, it does not require them to monitor the quality of the advice once contact is made. The solicitor-client relationship is one of confidence, premised upon privileged communication. Respect for the integrity of this relationship makes it untenable for the police to be responsible, as arbiters, for monitoring the quality of legal advice received by a detainee. To impose such a duty on the police would be incompatible with the privileged nature of the relationship. The police cannot be required to mandate a particular qualitative standard of advice, nor are they entitled to inquire into the content of the advice provided. Further, even if such a duty were warranted, the applicable standard of adequacy is unclear. As this Court recognized in ***R. v. B. (G.D.),*** 2000 SCC 22, [2000] 1 S.C.R. 520 (S.C.C.), at para. 27, there is a "wide range of reasonable professional assistance", and as such what is considered reasonable, sufficient, or adequate advice is ill defined and highly variable.
>
> 42 As noted, s. 10(*b*) aims to ensure detainees the opportunity to be informed of their rights and obligations, and how to exercise them. However, unless a detainee indicates, diligently and reasonably, that the advice he or she received is inadequate, the police may assume that the detainee is satisfied with the exercised right to counsel and are entitled to commence an investigative interview. In this case, despite the brevity of Mr. Willier's conversations with Legal Aid, Mr. Willier gave no indication that these consultations were inadequate. Quite the contrary, he expressed his satisfaction with the legal advice to the interviewing officer, prior to questioning. Mr. Willier is not entitled to express such satisfaction, remain silent in the face of offers from the police for further contact with counsel, remain silent in the *voir dire* as to the alleged inadequacies of the actual legal advice received, and then seek a finding that the advice was inadequate because of its brevity. A s. 10(*b*) *Charter* breach cannot be founded upon an assertion of the inadequacy of Mr. Willier's legal advice.
>
> [Emphasis added]

[66] The police are not entitled to disregard the circumstances. Mr. Cater's actions and statements to police raised a reasonable prospect that he had not exercised his 10(b) rights by speaking with duty counsel. The circumstances

surrounding the call to duty counsel indicated the consultation was not adequate. As the Ontario Court of Appeal said in ***R v. Badgerow***, 2008 ONCA 605:

> 45 As the trial judge noted, there is also ample authority that what the police are required to say and do in a particular case to fulfill their duties under s. 10(b) will depend on what the accused says and does and what the police could reasonably surmise in the circumstances: see, for example, *R. v. Leclair* (1989), 46 C.C.C. (3d) 129 (S.C.C.); *R. v. Tremblay* (1987), 37 C.C.C. (3d) 565 (S.C.C.); *R. v. Top* (1989), 48 C.C.C. (3d) 493 (Alta. C.A.).
>
> 46 Although the police cannot be expected to be mind readers, they are not entitled to ignore statements by an accused that raise a reasonable prospect that the accused has not exercised his or her s. 10(b) rights. Rather, where an accused makes such a statement, the police must be diligent in ensuring that an accused has a reasonable opportunity to exercise his or her rights, and may not rely on answers to ambiguous questions as a basis for assuming that an accused has exercised his or her rights.
>
> [Emphasis added]

[67] The actions of Mr. Cater in calling to the police officers through the door of the room where he was speaking to duty counsel, asking them to write down Mr. Manning's contact information, and then terminating the call and asking to speak with Mr. Manning equates to Mr. Cater messaging loudly to police 'I am not satisfied with a call to duty counsel. I have obtained from duty counsel my lawyer's telephone number and I need his advice to fulfil my right to counsel.' I find in the circumstances described, that Mr. Cater indicated diligently and reasonably to police that he had not exercised his right to counsel. I find the consultation was inadequate and should have been known to be inadequate by the police in the circumstances.

[68] The reasons given by D/C Parent for delaying the call to Mr. Manning for one hour and 42 minutes were that Mr. Cater did not ask to speak to Mr. Manning on conclusion of the call with duty counsel, and that he agreed to wait to call Mr. Manning until after the search of the Lynch Street property and that the right to counsel was fulfilled by speaking with duty counsel. I find that D/C Parent accepted there had been a delay in implementation and attempted to manufacture an explanation for the delay by (1) stating that there was an agreement with Mr. Cater not to contact Mr. Manning until after the search of his residence and (2) by denying Mr. Cater asked to speak with Mr. Manning on conclusion of the call with duty counsel.

[69] In relation to whether Mr. Cater asked to speak with Mr. Manning on conclusion of the call with duty counsel, the question and answer sequence from D/C Parent's preliminary inquiry evidence, put to him on cross examination, suggests he did:

> Q. … Would you agree with me that, once Mr. Cater concluded the call with Anna Mancini, the first call, he asked to speak to Mr. Manning and you told him that he could only do so after the search of the residence was complete?
>
> A. Yes

[70] The above evidence given at the preliminary inquiry is consistent with Mr. Cater's evidence. The circumstances surrounding the initial call to duty counsel

made it clear Mr. Cater wished to speak to his counsel of choice, Mr. Manning. This was understood by D/C Parent, as he recorded the following in his notes: "provided name of other lawyer while speaking with duty counsel…". In addition, in the Crown brief D/C Parent, who prepared page 19 of the report at 4:20 pm on April 12, 2018, confirmed on cross examination that he wrote the following:

> At 12:18 PM on April 12, 2018 he contacted duty counsel on behalf of Cater and placed him in telephone contact with Anna Mancini. Call lasted from 12: 21 to 12:28 PM. Cater obtained a number from Ms. Mancini for another lawyer Chris Manning who he had previously used. <u>Cater was advised</u> that Mr. Manning could be contacted once the search of his residence was complete. [Emphasis added]

[71] Why would D/C Parent note in his report that "Cater was advised that Mr. Manning could be contacted once the search of his residence was complete" immediately after the written reference to obtaining a telephone number from duty counsel for another lawyer, if Mr. Cater hadn't asked to speak to Mr. Manning? D/C Parent's testimony that his prior evidence on cross-examination, indicating Mr. Cater asked to speak to Mr. Manning on conclusion of the call with duty counsel, was, on reflection, an answer of "yes" only to the second part of the question and not confirmation that Mr. Cater asked to speak with Mr. Manning, is not credible. The only conclusion from the evidence is that D/C Parent clearly knew Mr. Cater wished to speak to Mr. Manning.

[72] D/C Parent confirmed, during his evidence at the *voir dire*, that this was the first time he had referenced the existence of an agreement with Mr. Cater to delay contacting counsel of choice. On cross-examination he acknowledged the alleged agreement did not appear in the Crown brief, nor in his contemporaneous notes. He also confirmed such an agreement was not referenced in his evidence given at the preliminary inquiry. Given its importance, one would have expected it to have been referenced previously in the officers' notes, in the "Can Say" Statement, or in his preliminary inquiry evidence.

[73] I find that the totality of the evidence, including the officers' own notes, the "Can Say" statement, and prior evidence at the preliminary inquiry, contradicts the assertion that there was an agreement between Mr. Cater and D/C Parent to wait to contact Mr. Manning. I find that the evidence of an agreement, first raised at the *voir dire*, was self-serving and contrived. His evidence that there was an agreement with Mr. Cater to delay, stands in direct conflict with D/C Parent's notes indicating Mr. Cater provided the name and telephone number of Mr. Manning during the call with duty counsel, and with his own preliminary inquiry evidence that upon the termination of the seven minute call with duty counsel Mr. Cater requested to speak with Mr. Manning. Further, his report, contained in the Crown brief, states, "Cater <u>was advised</u> that Mr. Manning could be contacted once the search of his

residence was complete…”. This does not connote agreement, it connotes direction by the police. An agreement is simply not plausible, given his prior evidence, notes, and report, as well as Mr. Cater’s evidence. It defies logic.

[74] During cross-examination of D/C Parent, his evidence at the preliminary inquiry concerning the one hour and 42 minute delay was put to him. His answers did not contradict that there was a delay, rather he attempted to explain it. On the totality of the evidence, I find D/C Parent was well aware Mr. Cater’s right to counsel had been intentionally delayed for one hour and 42 minutes and the reason for this was execution of the search warrant. Immediately on completion of the search and the further arrest of Mr. Cater on weapons-related offences, police attempted to contact counsel of choice, Mr. Manning.

[75] I am left with the conclusion D/C Parent scripted his evidence at the *voir dire* to reply to the allegations that he had not properly implemented Mr. Cater’s right to counsel. In assessing the totality of the evidence provided by D/C Parent in relation to implementation of Mr. Cater’s right to counsel, I must conclude that the officer attempted to mislead the Court.

[76] In contrast, Mr. Cater’s evidence concerning his interaction with the police with regard to his right to counsel and the call with duty counsel was straightforward. Where he was unsure, he said so. When he could not remember,

he said so. I accept Mr. Cater's evidence that he provided Mr. Manning's telephone number to the police during the call with duty counsel and that on termination of the call he immediately asked to speak with Mr. Manning and was told he would have to wait until the search of his residence at Lynch Street was complete. As noted above D/C Parent's notes, the "Can Say," and prior Preliminary Inquiry evidence also supports Mr. Cater's evidence. While I am mindful the following was said in a civil context, the majority in ***Faryna v. Chorny [1951]*** B.C.J. No. 152 (CA) provided helpful comments on witnesses evidence at para 11:

> …In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances…

[77] There was no reason offered by the police as to why they could not have provided Mr. Cater with an opportunity to immediately speak with Mr. Manning. There was no evidence to suggest that allowing Mr. Cater to speak to his lawyer, Mr. Manning, may have caused the destruction of evidence or put officer safety at risk, or in any way jeopardized the police investigation. To the contrary, there was no concern for destruction of evidence. The Lynch Street property had been cleared by 12:10 pm at the latest. The search warrant was issued and at approximately 12:25 pm D/C Baird arrived there with the warrant.

Coincidentally, Mr. Cater was asking to speak to Mr. Manning at the time the search was beginning.

[78] There is no evidence the police elicited any information or attempted to interview Mr. Cater in the intervening period of one hour and 42 minutes. In the circumstances, this does not matter. Mr. Cater was under arrest, had been strip-searched, and was about to be placed in a cell. These were circumstances where he was deprived of liberty and in the control of the state. He was in a position of legal jeopardy despite no charges having been laid. He was entitled to his s. 10(b) rights.

[79] The Crown says Mr. Cater did have his right to counsel properly implemented when he spoke to duty counsel. They view the request to speak to Mr. Manning as a second consultation with counsel and say that once an arrestee has consulted with counsel, a different framework governs subsequent consultations.

[80] I agree that normally s.10(b) provides an arrestee with a single consultation with counsel. Where there is a second consultation it typically involves a material change in the arrestee's situation, such as a change in the arrestee's jeopardy. As was stated in ***Sinclair***, ***supra***:

> 47 Section 10(*b*) should be interpreted in a way that fully respects its purpose of supporting the detainee's s. 7 right to choose whether or not to cooperate with

> the police investigation. Normally, this purpose is achieved by a single consultation at the time of detention or shortly thereafter. This gives the detainee the information he needs to make a meaningful choice as to whether to cooperate with the investigation or decline to do so. However, as the cases illustrate, sometimes developments occur which require a second consultation, in order to allow the accused to get the advice he needs to exercise his right to choose in the new situation.
>
> 48 The general idea that underlies the cases where the Court has upheld a second right to consult with counsel is that changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not. The concern is that in the new or newly revealed circumstances, the initial advice may no longer be adequate.
>
> …
>
> 53 The general principle underlying the cases discussed above is this: where a detainee has already retained legal advice, the implementational duty on the police under s. 10(*b*) includes an obligation to provide the detainee with a reasonable opportunity to consult counsel again where a change of circumstances makes this necessary to fulfill the purpose of s. 10(*b*) of the *Charter* of providing the detainee with legal advice on his choice of whether to cooperate with the police investigation or decline to do so.

[81] These are not the circumstances in the present case. This is not a situation where, for example, there was a change in jeopardy and the accused argues that a second consultation with counsel was required. Here we are dealing with the initial right to counsel on detention or arrest, not whether there has been a change in circumstances warranting a second consultation. The circumstances in this case relate to properly implementing the right to counsel at first instance (on arrest) by facilitating contact with counsel of choice.

[82] In my view, on the totality of the evidence, a second call to counsel of choice (being Mr. Manning) was required in the circumstances to ensure Mr.

Cater's s.10(b) rights were met. I am not satisfied the Crown has established, on a balance of probabilities, that Mr. Cater's request to access counsel of his choice, Mr. Manning, was facilitated at the first reasonable opportunity. The Crown has not satisfied its burden to show that the delay of one hour and 42 minutes in implementing Mr. Cater's right to counsel was reasonable in the circumstances. I further find that the reason for delaying the implementation of Mr. Cater's right to counsel was execution of the search warrant at the Lynch Street property.

[83] Considering the evidence as a whole, I find there was a violation of Mr. Cater's s.10(b) right to counsel.

Remedy: Section 24 of the *Charter*

> If a violation of Mr. Cater's s. 8 or s. 10 (b) *Charter* rights is found what is the appropriate remedy under s. 24?

Section 24(1): Breach of s. 8

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

> **s. 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.

[85] Mr. Cater submits that no evidence was obtained as a consequence of the strip search and, therefore, a remedy under s. 24(2) is not available to him, and that the appropriate remedy is a stay of proceedings under s. 24(1). The Crown says that if a breach is found, the appropriate remedy would be a reduction in sentence in the event Mr. Cater is found guilty. I now turn to a consideration of whether a stay of proceedings under s. 24(1) is an appropriate remedy for the s. 8 breach.

[86] The majority of the Supreme Court of Canada in ***R. v. Babos***, 2014 SCC 16, said that a stay of proceedings is the most drastic remedy a criminal court can order and that on rare occasion, being in the clearest of cases, a stay will be ordered (paras. 30 and 31). The Ontario Superior Court, in the recent decision of ***R. v. Tashanna Mullings***, 2019 ONSC 2408, provided an overview of the law relating to a stay of proceedings and the test to be applied:

> 40 A stay of proceedings is the most drastic remedy available in a criminal case for a *Charter* violation. A stay will be warranted only in the clearest of cases, where state conduct either compromises the fairness of an accused's trial, or risks undermining the integrity of the judicial process. The test for determining whether to grant a stay has three requirements:
>
>> (1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome,
>>
>> (2) there must be no alternative remedy capable of redressing the prejudice, and

> (3) where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the Court must balance the interests in favor of granting a stay against the interest that society has in having a final decision on the merits.
>
> (4) See *R. c. Piccirilli*, 2014 SCC 16 (S.C.C.); *R. v. Regan*, 2002 SCC 12 (S.C.C.).

[87] In relation to the first stage of the test, Mr. Cater does not argue he cannot receive a fair trial as a result of the misconduct. He says a stay of proceedings is necessary to protect the integrity of the justice system. The majority said in ***Babos, supra*** at paragraph 35 that when this residual category is invoked the court must look at whether proceeding with the trial in light of the conduct would be harmful to the integrity of the justice system:

> …the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with the trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial-even a fair one-will leave the impression that the justice system condones conduct that offends societies sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met. (para 35)
>
> [Emphasis added]

[88] In relation to the first part of the test, the Court must also consider whether proceeding with the trial would lend judicial condonation to the impugned conduct (para 38). I find the conduct of the senior officer charged with conducting the strip search, while not a deliberate or malicious breach of the ***Golden*** principles, was serious. The officer should have known about the principles in ***Golden*** as they had

been in place since 2001, seventeen years before the strip search in this matter. The law is clear. Added to this is the evidence that the officer, as a member of the Integrated Drugs and Gangs Unit, received no formal training in the law concerning strip searches, but was left to learn on the job from his colleagues. This is unacceptable. As the Supreme Court said in ***Golden***, ***supra***: "The importance of preventing unjustified searches before they occur is particularly acute in the context of strip searches, which involve a significant and very direct interference with personal privacy."

[89] I find the above-described conduct poses a threat to the integrity of the justice system.

[90] With regard to the second stage of the test, the Supreme Court of Canada said in ***R v. Babos***, ***supra***, that where the residual category is invoked and the prejudice complained of is prejudicial to the integrity of the justice system, any remedy must be directed toward that harm:

> 39 At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. <u>It must be remembered that for those cases which fall solely within the</u>

> residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.
>
> [Emphasis added]

[91] The Crown argues, under the second stage of the test, that lesser remedies are available, including a reduction in sentence if Mr. Cater is found guilty of the offences charged. This second part of the test is not about granting Mr. Cater a remedy for the section 8 breach, but is to determine if a lesser remedy would allow the justice system, on a go forward basis, to sufficiently dissociate from the conduct. I am not convinced a remedy of a reduced sentence, if found guilty, is properly directed at the harm of dissociating the conduct from the justice system. It seems to me a reduced sentence would more likely be perceived as a redress for the wrong done to Mr. Cater by breach of his s. 8 right. Therefore, given my uncertainty, I find it is necessary to proceed to stage three of the test.

[92] In relation to the third part of the test, being the balancing stage, the majority, in ***Babos, supra,*** emphasized the importance of the balancing stage when the residual category is in issue and set out examples of the criteria the court must consider:

> 41 However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must

> consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. <u>But in residual category cases, balance must always be considered.</u>
>
> [Emphasis added]

[93] The majority in ***Babos, supra***, also stated that there is an onerous burden on the accused, as a stay will only be available in the clearest of cases:

> 44 <u>Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden.</u> Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (*Tobiass*, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).
>
> [Emphasis added]

[94] The balancing required at stage three of the assessment requires weighing the seriousness of the police misconduct against society’s interest in conducting a full trial. The situation in the present circumstances is not similar to the conduct in the ***Tashanna Mullings, supra*** case. I found that the police did have reasonable and probable grounds to conduct a strip search. The s. 8 *Charter* violation occurred solely from the manner in which the strip search was conducted. While serious and in violation of s. 8, I find the police were acting out of a lack of knowledge, not recklessly or with malice.

[95] The nature of the conduct of the police in failing to follow the ***Golden*** principles included a failure to ensure complete privacy -- the door was not completely closed; failure to get a superior's authorization and to take notes; and failure to ensure Mr. Cater was not completely undressed at any one time, as when he performed the self search of his mouth, hair, and ears he was needlessly naked. D/C Parent gave evidence that he never sought the authorization of a superior when conducting a strip search, because, as members of the drug unit, if they had reasonable and probable grounds to search, then the responsibility was on the arresting officer. Regardless of the authority given to members of the Drug Unit, authorization by a police officer in a supervisory capacity is one of the ***Golden*** principles and, given that a strip search is one of the most personally invasive types of searches carried out by the police, it is necessary.

[96] In the present case, the accused is charged with very serious offences including possession of cocaine for the purposes of trafficking and various weapons-related offences. Society has a substantial interest in seeing such serious matters determined by way of a trial on the merits. I do not find the police conduct was sufficiently egregious, in the circumstances of the strip search, that "proceeding with the trial in the face of that conduct would be harmful to the integrity of the justice system" (***Babos*** at para 35). I do not find the police conduct

to be such a gross departure from the expected standard as to warrant a stay of proceedings. I am satisfied this is not one of the rare, exceptional, occasions where a stay of proceedings is warranted.

[97] Mr. Cater argued that HRM police had a policy to routinely strip search all individuals arrested for drug related offences. I found the evidence presented at the *voir dire* did not support such a conclusion. If there had been evidence to support such a conclusion, my decision on the appropriateness of a stay would be different.

S. 24(2): Breach of s. 10(b)

[98] For breach of his s.10(b) *Charter* rights, Mr. Cater seeks the remedy under s. 24(2) of exclusion of the evidence obtained as a result of the search warrant executed at the Lynch Street property. Before evidence will be excluded, an accused must meet the two requirements of s. 24(2). The accused must show, on a balance of probabilities, that (1) the evidence sought to be excluded was obtained in a manner that infringed a *Charter* right; and (2) the admission of the evidence would bring the administration of justice into disrepute (***R. v. Pino***, 2016 ONCA 389, para. 36). Mr. Cater has the burden to show the evidence should be excluded.

Was the Evidence Obtained in a Manner that Infringed a Charter Right ?

[99] Mr. Cater argues that the phrase “evidence obtained in a manner” should be given a generous and wide interpretation in applying s. 24(2) and refers to ***R. v. Pino, supra***. He submits that the evidence seized from his home on Lynch Street is causally, temporally and contextually connected to the violation of his right to counsel.

[100] The Crown argues that the evidence seized was not “evidence obtained in a manner.” The Crown submits there is no causal link between the delay in the right to counsel and the search of the residence with a warrant. Given the lack of a causal link, the Crown says the court should not find a temporal link of substance that is sufficient to exclude the evidence.

[101] The Supreme Court of Canada has stated that the analysis under s.24(2) must be purposive and generous. It is not necessary to establish a strict causal relationship between the breach and the evidence. However, the breach must have a sufficient connection to the evidence which is sought to be excluded. The court stated the following in ***R. v. Wittwer*,** 2008 SCC 33**:**

> 21 In considering whether a statement is tainted by an earlier *Charter* breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *Strachan*, at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376 (Ont. C.A.), at para. 45. A

> connection that is merely "remote" or "tenuous" will not suffice: *R. v. Goldhart*, [1996] 2 S.C.R. 463 (S.C.C.), at para. 40; *Plaha*, at para. 45.

[102] The Ontario Court of Appeal in ***Pino, supra*** summarized the considerations to guide the court’s approach to “obtained in a manner” as follows:

> 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.

[103] I find the s.10(b) breach meets the “obtained in a manner” requirement in s. 24(2). As noted above, on the totality of the evidence, I am satisfied that the cause of the delay in facilitating the telephone call to Mr. Cater’s counsel of choice was the execution of the search warrant. The police had decided Mr. Cater would not be given an opportunity to speak with Mr. Manning until the search at the Lynch Street property was completed. This decision resulted in a delay of one hour and 42 minutes in facilitating Mr. Cater’s requested telephone call with Mr. Manning.

[104] When I examine the chain of events on April 12, 2018, that began with Mr. Cater’s arrest and culminated in the seizure of the evidence, there is no doubt the s. 10(b) breach was part of the ‘same transaction or course of conduct.’ There is a

common link between the delay in implementation of Mr. Cater's right to counsel and the evidence seized, that being the execution of the search warrant. The police decided to delay implementing Mr. Cater's right to counsel until the search was completed. The delay began at approximately 12:28 pm and continued until a call was placed to Mr. Manning's office at 2:10 pm. The evidence was located at the Lynch Street property between 12:50 and approximately 1:01 pm.

[105] I agree the connection between the evidence and the breach is temporal and contextual. I do not believe there is a causal link. The evidence seized at the Lynch Street property was not directly obtained as a result of the breach of Mr. Cater's 10 (b) rights. This is not a situation where the discovery of the evidence was only possible due to the infringement of Mr. Cater's s. 10(b) *Charter* rights. A lawful search warrant was issued and executed at the Lynch Street property resulting in the seizure of cocaine, weapons, ammunition and cash. The police did deliberately decide to delay implementing Mr. Cater's right to counsel for the duration of the execution of the search warrant. This delay was caused because the police wished to complete the search of the Lynch Street property before providing Mr. Cater with an opportunity to speak with his counsel of choice, Mr. Manning. However, the evidence was not directly obtained as a result of this breach. The search

warrant was lawful and is not being challenged. The police would have obtained the evidence regardless of the s. 10(b) breach.

[106] I find the connection to be temporal. I am cognizant that a mere connection in time is not sufficient - the temporal connection must be one of substance. Here the connection is temporal and of substance because the delay in implementing Mr. Cater's right to counsel and the execution of the warrant were directly connected and cover the same timeline. The *Charter* violation was contemporaneous, occurring at the same time as the search. Mr. Cater was under arrest and being denied his s 10(b) rights while, and because, the search was being undertaken.

[107] There is also a contextual connection because the one hour and 42 minute delay arose in the context of executing the warrant. D/C Parent intentionally and explicitly linked the two by associating the breach of the 10(b) right with the search of the Lynch Street property. As his "Can Say" report states: "Cater was advised that Mr. Manning could be contacted once the search of his residence was complete." The fact that the search was happening was the reason for denying Mr. Cater's right to counsel. The connection is neither too tenuous nor too remote. It is direct and obvious. I conclude that the evidence seized at the Lynch Street property was "obtained in a manner" that breached Mr. Cater's s.10(b) right to counsel.

Will the Admission of the Evidence Bring the Administration of Justice into Disrepute?

[108] The Supreme Court of Canada in ***R. v. Grant,*** 2009 SCC 32, set out the analysis the Court must follow in assessing the second requirement under s. 24(2), being whether the admission of evidence would bring the administration of justice into disrepute. At para. 71 the majority stated:

> 71 A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under 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. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.
>
> [Emphasis added]

[109] In the ten years since ***Grant, supra,*** the Supreme Court of Canada has had a number of occasions to comment on the analysis. In its recent decision in ***R. v. Le***, 2019 SCC 34, the Court noted the focus must be on the impact of state misconduct on the administration of justice. The Court said at paragraph 140:

> 140 Where the state seeks to benefit from the evidentiary fruits of *Charter*-offending conduct, our focus must be directed not to the impact of state misconduct upon *the criminal trial*, but upon *the administration of justice*. Courts must also bear in mind that the fact of a *Charter* breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice. What courts are mandated by s. 24(2) to consider is whether the admission of evidence risks doing further damage by diminishing *the reputation* of the administration of justice — such that, for example, reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously. We endorse this Court's caution in *Grant*, at para. 68, that, while the exclusion of evidence "may provoke immediate criticism", our focus is on "the overall repute of the justice system, viewed in the long term" by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights.
>
> [Emphasis added]

[110] In ***R. v. Le***, ***supra,*** the majority discussed the three lines of inquiry guiding the Court's consideration as to whether the admission of evidence tainted by a *Charter* breach would bring the administration of justice into disrepute. Brown and Martin, J.J. stated:

> 141 In *Grant*, the Court identified three lines of inquiry guiding the consideration of whether the admission of evidence tainted by a *Charter* breach would bring the administration of justice into disrepute: (1) the seriousness of the *Charter* infringing conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. While the first two lines of inquiry typically work in tandem in the sense that both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion. More particularly, it is not necessary that *both* of these first two lines of inquiry support exclusion in order for a court to determine that admission would bring the administration of justice into disrepute. Of course, the more serious the infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the case for exclusion (*R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643 (Ont. C.A.), at para. 62). But it is also possible that serious *Charter*-infringing conduct, even when coupled with a weak impact on the *Charter*-protected interest, will *on its own* support a finding that admission of tainted evidence would bring the administration of justice into disrepute. It is the sum, and not the average, of those first two lines of inquiry that determines the pull towards exclusion.

> 142 The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction — that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 (S.C.C.), at paras. 33-34), we emphasize that the third line of inquiry cannot turn into a rubber stamp where *all* evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favor of admissibility (*Paterson*, at para. 56). Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence

[111] In applying the ***Grant*** analysis, I must take account of and balance the following three factors: the seriousness of the *Charter*-infringing state conduct; the impact of the breach on the *Charter*-protected interests of the accused; and society's interest in the adjudication of the case on its merits.

The Seriousness of the Charter-Infringing State Conduct

[112] The Police are under an obligation to immediately implement the right to counsel when it is invoked by an arrestee. This is not new law. The suspension of this right for one hour and 42 minutes was serious and was deliberate. The evidence taken in its totality indicates the police made a conscious and deliberate decision not to allow Mr. Cater's requested telephone call with his lawyer of choice until after the search of his home was complete.

[113] There was no evidence to suggest that delaying the implementation of the right to counsel of choice may have caused the destruction of evidence or put officer safety at risk. There was no concern about preserving evidence as the house had been cleared by police by approximately 12:10 pm. The violation could have easily been avoided.

[114] In addition, I find the evidence provided by D/C Parent concerning the delay to have been self-serving and lacking in credibility. Despite his contemporaneous notes and "Can Say" Statement and later, his preliminary inquiry evidence, D/C Parent raised for the first time, in his evidence at the *voir dire*, an alleged agreement between he and Mr. Cater to delay implementation of the telephone call to counsel of choice until after the search was completed at the Lynch Street property.

[115] Further, his attempt to qualify his previous preliminary inquiry evidence that Mr. Cater on conclusion of the call with duty counsel asked to speak to Mr. Manning by suggesting on reflection he considered the question to be a two-part question and he had responded "yes" solely to the second part of the question, being that he had told Mr. Cater that he could only speak to Mr. Manning after the search of the residence was completed, is an explanation lacking in credibility. There is no reasonable explanation as to why Mr. Cater would provide Mr.

Manning's name and number to the officer and why the officer would advise he could speak with Mr. Manning after the search, if Mr. Cater did not indicate a desire to speak with Mr. Manning.

[116] In cross-examination a number of questions and answers from his preliminary inquiry evidence which centred around the reason D/C Parent was delaying Mr. Cater's right to counsel were put to him. Rather than indicating there was no delay, he responded that, at that point, the police did not understand all of the charges and, once the search was completed, they would know if there were new charges. When the following statement was put to D/C Parent: "I fail to understand here the clarity of your thoughts in terms of why you're not allowing Mr. Cater to contact Mr. Manning", he replied, "I can't answer that" and confirmed he meant that he could not remember why. Again there was no mention of an agreement with Mr. Cater to delay the call. In the face of all of this, to also steadfastly assert that Mr. Cater did not ask to speak with Mr. Manning lacks credibility.

[117] The police officer's attempt to mislead the Court is relevant to the first ***Grant*** factor. As the Ontario Court of Appeal said in ***R. v. Pino***, supra at paragraph 102:

> 102 Second, the police's dishonest testimony about the arrest, though not an element of the *Charter* breach itself, is relevant to the first *Grant* factor. In my view, the trial judge understated its impact. The Supreme Court's decision in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 (S.C.C.), is directly on point. In that case, at para. 26, the Supreme Court endorsed the observation of my colleague Cronk J.A. in her dissenting reasons in this court:
>
>> The integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the *Charter*. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority.
>>
>> [Emphasis added]

[118] The legal principle of the duty of police to facilitate access to counsel of choice when the right is invoked, which Mr. Cater did by requesting a telephone call to Mr. Manning, is not new. D/C Parent is an experienced police officer with 21 years policing service. He gave evidence of his understanding of the right to counsel, and that included in the right to counsel was an implementation obligation on the police whereby, if a detained or arrested person was diligent in requesting access to counsel, he had a duty to immediately implement that right. Despite this knowledge he decided that the implementation of Mr. Cater’s right to speak to counsel of choice would be delayed for an hour and 42 minutes until the search of the Lynch Street property was completed. The experienced officer was aware of his obligations under the *Charter*.

[119] The majority in ***R. v. Le***, ***supra,*** said the authority of police to detain individuals is governed by settled jurisprudence and police are expected to know what the law is:

> 149 The circumstances of Mr. Le's detention did not take the police into uncharted legal waters or otherwise raise a novel issue about the constitutionality of their actions. Indeed, the authority of police to detain individuals is governed by settled jurisprudence from this Court, as is the (in)capacity of police to enter a private residence without prior judicial authorization or some exigent circumstance. And, as this Court has previously cautioned, "[w]hile police are not expected to engage in judicial refection on conflicting precedents, they are rightly expected to know what the law is" (*Grant*, at para. 133). We see no good reason to dilute the force of these authorities where the police have disregarded them in the course of effecting an unconstitutional detention.
>
> 150 We, therefore, agree with Lauwers J.A. (at para. 156) that "[t]his was serious police misconduct". This Court, in considering similar police misconduct in *Grant*, could not have been clearer (at para. 133): "the Court's decision in this case will be to render similar conduct less justifiable going forward". We are compelled, then, to conclude that this *Charter*-infringing conduct weighs heavily in favor of a finding that admission of the resulting evidence would bring the administration of justice into disrepute.

[120] The s. 10(b) breach was not merely a minor, technical or trivial violation. The *Charter* violation was serious. It was a significant and deliberate violation, the effect of which is exacerbated by the officer providing misleading and self serving evidence about what occurred during the implementation phase of the s. 10(b) right to counsel. The justice system cannot condone this conduct and the court must dissociate itself from such conduct. I find that this first ***Grant*** factor favors exclusion of the evidence.

The Impact of the Breach on the Charter-Protected Interests of the Accused

[121] As the Supreme Court of Canada said in ***R. v Willier***, ***supra***, at para. 28 the purpose of s. 10(b) is “to provide detainees with an opportunity to contact counsel in circumstances where they are deprived of their liberty and in control of the

State, and thus vulnerable to the exercise of its power and imposition of legal jeopardy. The purpose of s. 10 (b) is to provide detainees an opportunity to mitigate this legal disadvantage." The police failure to immediately facilitate Mr. Cater's access to counsel of choice is unacceptable. On the evidence I find the breach to be serious and deliberate. However, the police made no effort to interview Mr. Cater in this timeframe or attempt to obtain inculpatory statements. The police did not breach their obligation not to elicit information from Mr. Cater before he was able to speak with his lawyer. Taking this factor into account, I still find that the delay in implementing Mr. Cater's right to counsel for one hour and 42 minutes had a significant impact on his *Charter*-protected interests. The delay undermined Mr. Cater's ability to consult with counsel of choice without delay and, thus, his opportunity to mitigate the legal disadvantage of being detained was lost. The second ***Grant*** factor favors exclusion of the evidence.

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

[122] The Supreme Court of Canada has commented on several occasions that this third line of inquiry under ***Grant*** usually pulls toward inclusion of the evidence on the basis that its admission would not bring the administration of justice into disrepute (for example, ***R v. Le***, ***supra***, at para. 158). The charges against Mr. Cater are serious. They involve charges relating to possession of cocaine for the purpose

of trafficking and various weapons charges. While there is no firearms exception requiring guns obtained in breach of *Charter* rights be admitted into evidence, the distinctive feature of handguns used to kill or threaten people does merit recognition (***R. v. Omar,*** 2018 ONCA 975, as endorsed by majority of the Supreme Court in ***R. v. Omar***, 2019 SCC 32). As the Crown argued, the residents of Halifax are concerned about gun violence in this city. The evidence seized at the Lynch Street property is highly reliable. It is evidence that is critical to the Crown's case. Exclusion of the evidence is likely to gut the prosecutions case. Admitting the evidence would promote society's interest in an adjudication of this case on its merits. This third ***Grant*** factor favors the admission of the evidence.

Balancing the Factors

[123] The police conduct in delaying implementation of Mr. Cater's right to counsel of choice for one hour and 42 minutes is serious and was deliberate. Added to this is the aggravating factor of the officers' self-serving and misleading attempt to manufacture an agreement between Mr. Cater and himself in order to explain the delay in implementation of the right to counsel. Plus there is the officers attempt to change his preliminary inquiry evidence in the face of his own documentary evidence suggesting Mr. Cater asked to call Mr. Manning on termination of the call with duty counsel. The s. 10(b) *Charter* infringement had a significant impact on

the *Charter*-protected interests of Mr. Cater. These first two ***Grant*** factors favor exclusion. The third factor favors admission, as the drugs, cash, and weapons seized represent highly-reliable evidence.

[124] I am cognizant that it is important not to allow the third ***Grant*** factor of society's interest in adjudicating a case on its merits to trump all other considerations (***R. v. Paterson***, 2017 SCC 15, para. 56). The breach was serious and deliberate and it is important to ensure such conduct is not condoned. I am of the view that admission of this evidence would effectively condone the deliberate and serious state conduct that led to the violation. The Court must disassociate itself from the police conduct, otherwise, society will question whether our courts take individual rights seriously. As the majority said in ***Grant***:

> 68 … Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s.24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long-term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and values underlying the charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.
>
> [Emphasis added]

[125] The balancing of the three Grant factors is qualitative and each case must be assessed on his own facts. In this balancing exercise, I am guided by the words of the Supreme Court of Canada in ***R v. Harrison***, 2009 SCC 34:

> 39 …To appear to condone wilful and flagrant *Charter* breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.
>
> 42 In summary, the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards. That being the case, the admission of the cocaine into evidence would bring the administration of justice into disrepute. It should have been excluded.

[126] Having considered each of the three ***Grant*** factors separately, and then balancing them together, I conclude that the evidence obtained as a result of the search warrant executed at Lynch Street property should be excluded. Admission of the evidence in light of the serious breach and the police officer's attempt to mislead the Court could signal that such conduct is condoned by the justice system. Its admission would bring the administration of justice into disrepute.

[127] Although not necessary to the above analysis because I have concluded the s.10(b) breach alone warrants exclusion of the evidence, I wish to comment on the s. 8 breach in the context of the s. 24(2) analysis. The cases of ***R. v. Bohn,*** 2000 BCCA 239 and ***R. v. Lauriente*****,** 2010 BCCA 72, indicate that the impact of multiple *Charter* breaches on the long-term administration of justice is a factor for consideration under the second part of the s. 24(2) inquiry. The Court in these cases indicated there must be a connection or nexus between each of the breaches

and the evidence the accused is seeking to exclude. Without such a connection, a pattern of breaches is not relevant to the s. 24(2) analysis.

[128] Here, there is an argument the s. 8 breach was part of a single chain of events that occurred during a relatively brief period of time on April 12, 2018, that the strip search was part of the same “transaction or course of conduct” beginning with the arrest and culminating with the seizure of evidence. While there is no causal connection, there is a temporal connection. However, there is no need for me to determine whether the temporal connection was of sufficient substance in this case or whether there was other sufficient nexus. Again while not necessary to my analysis, the additional *Charter* breach, the s. 8 breach, could have been included as part of the s. 24 (2) analysis. Madame Justice Ryan for the majority in ***Bohn, supra***, stated:

> 45 In addition to the failure to bring the warrant and to produce it upon request, the trial judge found that the police infringed the right of the appellant to consult counsel within a reasonable time. The s. 10(b) breach was serious because, in conjunction with the s. 8 breach it is demonstrative of the inattention of the police to the rights of the appellant. To use the words of Dickson C.J.C. in *Strachan*, *supra*, at p. 1007, it was " a part of a larger pattern of disregard for *Charter* rights."

Conclusion

[129] I find Mr. Cater has established a breach of his s. 8 *Charter* rights. In the circumstances of this matter, I find that this is not one of the rare and exceptional

cases where a stay of proceedings under s. 24(1) is warranted. Stays are reserved for the “ clearest of cases”. This is not such a case.

[130] I find Mr. Cater has established a breach of his s. 10(b) *Charter* right. After careful consideration of the ***Grant*** factors, I find that the balancing of all factors favors the exclusion of the evidence seized at Mr. Cater’s residence on Lynch Street.

Jamieson, J.