

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Simmonds*, 2020 NSSC 119

Date: 2020 05 26

Docket: CRH No. 474153

Registry: Halifax

Between:

Her Majesty the Queen

v.

Shancy Centel Simmonds

DECISION: Sections 8, 9, 10(b) and 24(2) of the *Charter*

Judge: The Honourable Justice Joshua M. Arnold

Heard: February 13 and 14, 2020, in Halifax, Nova Scotia

Counsel: Glen Scheuer, for the Crown
Trevor McGuigan, for the Defence

Introduction

[1] Shancy Simmonds is charged with drug trafficking offences. He raises several challenges under the *Canadian Charter of Rights and Freedoms*, including alleged violations of ss. 8, 9, and 10(b), and seeks to exclude evidence under s. 24(2).

Background

[2] Mr. Simmonds was arrested mainly on the basis of information provided by a single confidential informant. Upon his arrest, the police found on Mr. Simmonds' person 0.6 grams of crack cocaine, 4.2 grams of cannabis, a small scale and \$2,035 in cash. After receiving his *Charter* rights and police caution, Mr. Simmonds told the police on two occasions that he wanted to speak to his counsel of choice, Luke Craggs. The police were not able to immediately get in touch with Mr. Craggs and instead asked Mr. Simmonds if he wanted to speak with a lawyer from Nova Scotia Legal Aid. Mr. Simmonds agreed and spoke briefly to duty counsel provided by NSLA, not Mr. Craggs. The police then conducted a strip search of Mr. Simmonds during which he reached into his underwear and handed them a bag of crack cocaine weighing 56.8 grams.

[3] Mr. Simmonds was then charged with the following:

THAT on or about the 10th day of February, 2018, at or near Halifax, Province of Nova Scotia, he did unlawfully have possession for the purpose of trafficking, not in excess of three kilograms, Cannabis (marihuana), a substance included in Schedule II of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said *Act*;

AND FURTHER at the same time and place aforesaid, did unlawfully have in his possession for the purpose of trafficking, Cocaine, a substance included in Schedule I of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said *Act*.

[4] The trial on the drug charges was held on February 13 and 14, 2020. Counsel immediately asked the court to enter into a *voir dire* to determine the admissibility of the seized evidence. Counsel agreed that the evidence on the *voir dire* could be applied to the trial proper. Counsel further jointly advised the court that the decision on the *voir dire* would carry the day in relation to the trial, that is, if the evidence is excluded, the Crown has no other evidence against Mr. Simmonds, aside from an expert opinion, and will either stay or dismiss the charges. If the evidence is admitted, Mr. Simmonds will offer no defence to the

charges, but may require the remainder of the Crown evidence to be tendered in order to preserve his right of appeal. The matter proceeded on that basis.

[5] The Crown called five witnesses on the *voir dire*: Constable Jason Briggs, Constable Tim Sullivan, Constable Shannon Haines, Constable Isaac Tohme, and Constable Jordan Chestney. Mr. Simmonds called no evidence.

Constable Jason Briggs

[6] Constable Briggs was the exhibit officer. His evidence was that the following items were seized from Mr. Simmonds: (1) 56.8 grams of crack cocaine from a bag in his underwear; (2) 0.6 grams of crack cocaine in a baggie from his pants pocket; (3) 2.2 grams of cannabis in a Ziplock baggie from his pants pocket; (4) 2 grams of cannabis from his pants pocket; (5) a functioning black mini-scale with white residue on it from his pants pocket; and (6) \$2,035 in various denominations from his pockets.

Constable Tim Sullivan

[7] Constable Sullivan had been a Halifax Regional Police officer for four years when he testified on the *voir dire*, and for two years when Mr. Simmonds was arrested on February 10, 2018. That day, Constable Sullivan was working the Gottingen Street beat with Constable Shannon Haines, who told him that he had received a call from Detective Constable Mike Carter who, in turn, had told him the following:

- That Shancy Simmonds had crack cocaine within the past 24 hours;
- That Shancy Simmonds had sold crack cocaine within the past 24 hours; and
- That Shancy Simmonds had crack cocaine down his pants.

[8] Constable Sullivan was already familiar with Shancy Simmonds. He said that Constable Haines provided him with further information about Mr. Simmonds that originated with a police informant:

- That Constable Haines had received information that Source A had been in contact with a source handler since 2012;
- That the source handler had been in contact with Source A weekly;

- That Source A had provided the police with information that had been deemed not to be false;
- That Source A had provided the police with information that led to positive results on 20 previous occasions and had led to charges under the *Criminal Code* and the *CDSA*;
- That the source handler had personally relied on information provided by Source A that led to a positive search for crack cocaine;
- That Source A was financially motivated;
- That Source A associates with people involved in criminal activity;
- That Source A had direct knowledge that Shancy Simmonds was trafficking in crack cocaine; and
- That Source A had direct knowledge that Shancy Simmonds had trafficked in crack cocaine in the past 24 hours.

[9] The plan on February 10, 2018, was to arrest Mr. Simmonds on the basis of the source information, regardless of the police observations of Mr. Simmonds. Constables Sullivan and Haines went to Ahern Manor on February 10, and set up surveillance there for an hour watching for Mr. Simmonds. They eventually saw him at 5471 Heron Walk. According to Constable Sullivan, Mr. Simmonds was with three other men and went in and out of the premises at 5471 Heron Walk repeatedly. Constable Sullivan said that he knew the three other men who Mr. Simmonds was with and that the police had intelligence that all three were involved in trafficking crack cocaine. He said the police also had intelligence that 5471 Heron Walk was a cover spot for these men to conduct drug transactions as the back entrance is difficult for the police to observe. He said he had previously seen drug users and drug traffickers hanging around that location. He said the area is well-known to the police as a location for drug use and trafficking.

[10] Constable Sullivan said that he had seen Mr. Simmonds around 5471 Heron Walk a number of times prior to February 10, 2018, often at the rear of the premises. On February 10, 2018, he saw Mr. Simmonds enter and leave the front entrance quite a few times and formed the opinion that he was trafficking drugs. He saw some of the other men “sitting tight” outside 5471 Heron Walk, which he said indicated they were keeping watch for the police. He did not actually see Mr. Simmonds trafficking or making any hand to hand interactions.

[11] Constable Sullivan was aware that Constable Haines had arrested Mr. Simmonds in August 2017 in downtown Halifax with 20 grams of crack cocaine and a quantity of money, resulting in charges. He said he was receiving bi-weekly information from his own sources indicating that Mr. Simmonds was trafficking in crack cocaine. While he said 5471 Heron Walk was an area where a lot of drug users could be located, Constable Sullivan had never personally observed any drug transactions at that address.

[12] Constable Sullivan understood that Source A had direct knowledge of the information he had provided. Because Source A provided information that Mr. Simmonds was in possession of crack cocaine for re-sale in the past 24 hours, and had trafficked in crack cocaine in the past 24 hours, Constable Sullivan felt that this made the source information pertaining to Mr. Simmonds recent enough to act upon. Constable Haines told Constable Sullivan that Constable Carter told him that Source A had gained direct knowledge of this information within 24 hours of when Constable Carter spoke to Constable Haines on February 10.

[13] With regard to Source A having made direct observations of Mr. Simmonds, Constable Sullivan stated during re-direct examination:

Q. ... On direct, Officer, you had testified that you were aware that the source's knowledge of the information that was provided was direct and from Mr. Simmonds. On cross examination you were asked questions in relation to you having knowledge of how the source had learned that information and I just wish to confirm in my mind, when you were answering that question on cross examination were you referring to not having specific information about the circumstances surrounding observations or what was the nature of your response in that regard?

A. I didn't have specifics on quantity and that sort of thing, but I know the source had direct contact with Mr. Simmonds.

[14] Constable Sullivan did not say that Source A knew the following about Mr. Simmonds:

- How much crack cocaine he was in possession of;
- How the crack cocaine was packaged;
- Where or how Mr. Simmonds was selling crack cocaine;
- Where or how he saw Mr. Simmonds in possession of crack cocaine in the past 24 hours;

- Where or how he saw Mr. Simmonds selling crack cocaine in the past 24 hours;
- Where or how he saw Mr. Simmonds keeping crack cocaine down his pants;
- How the source identified Mr. Simmonds; or
- What Mr. Simmonds was wearing.

[15] Prior to receiving the information relayed by Constable Carter, Constable Sullivan had received other source information about Mr. Simmonds selling drugs. However, that source was unproven and Constable Sullivan wanted to conduct surveillance to confirm Mr. Simmonds' behaviour. He had not worked that surveillance into his schedule prior to February 10, 2018. Constable Sullivan said that through police computer investigation he was aware that the police had conducted other drug-related searches of Mr. Simmonds, but he was not aware of the details or the results.

[16] After a period of observation of the Heron Walk location, Constable Sullivan saw the four men walk south toward Ahern Manor. He and Constable Haines approached them and called out for Mr. Simmonds to stop. Mr. Simmonds turned and started walking away, and the three other men ran. Constable Sullivan again told Mr. Simmonds to stop, but he kept walking. Constable Sullivan then handcuffed and arrested him. He said that once Mr. Simmonds ignored the demand to stop and walked away, he believed he was in possession of crack cocaine.

[17] Mr. Simmonds was cooperative once he was handcuffed. The police took him to their vehicle and Constable Haines searched his person, finding cannabis, cocaine and money. At 1550 hours, Constable Sullivan arrested Mr. Simmonds and gave him his *Charter* warnings. He said, on direct examination:

A. At 1550 hours that's when I advised Mr. Simmonds he was under arrest for possession of cocaine and possession of marihuana. I provided him with his *Charter of Rights* and police caution. Shancy stated he understood and wished to speak with Luke Craggs at that time.

Q. Officer are you able to give an indication of what you would have read in terms of rights and caution to Mr. Simmonds?

A. Um, I, so I have it here at the front of my notebook if I may refer to that?

Q. Certainly.

A. Okay. So I'm arresting you for possession of cocaine and possession of marihuana. You have the right to retain and instruct a lawyer without delay. You also have the right to free and immediate legal advice from duty counsel by making telephone calls to 1-800-638-4889 or 902-420-8825 during business hours and 1-800-300-7772 or 902-420-6581 during non-business hours. Do you understand? Do you wish to call a lawyer? And then I would say you have the right to apply for legal assistance through the Provincial Legal Aid Program. Do you understand? And then, I wish to give you the following warning. You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence. Do you understand?

Q. Okay, and what were the responses in relation to those questions?

A. Verbally he stated yes he understood and he wanted to speak with Luke Craggs.

Q. Okay, and what happened at that point in time?

A. At that time, Constable Tohme and Constable Chestney were the officers who brought the patrol vehicle to the scene. Mr. Simmonds was in the back. It was a paddy wagon and Constable Haines and I actually got into the back of the paddy wagon with Shancy Simmonds and the reason why we did that is in the past it's been known for people in possession of drugs to try and hide the evidence or plant it in the patrol vehicle, so to preserve evidence and prevent it from being destroyed, Constable Haines and I actually sat in the back of the patrol wagon with Mr. Simmonds to ensure that the evidence was preserved. So, we did that and then were transported to the prisoner care facility.

Q. If I could stop you there, officer. Did anything of note occur during the transport to the prisoner care facility?

A. No.

[18] Mr. Simmonds was transported to HRP Headquarters in a police van. He was searched again and more cash was located. He was arrested for possession for the purpose of trafficking crack cocaine and cannabis. Constable Sullivan again read him his rights and *Charter* caution. He described the process of connecting Mr. Simmonds with a lawyer as follows on direct examination:

Q. Okay, and what happened at that point in time?

A. So at that time we brought Shancy up to the cubes area which is a secure area. There's individual rooms. We brought him up into that area for a more thorough search as at the time of arrest Shacon Clayton, Troy Clayton, a number of people in the community all came outside to see what was going on, so instead, we did our pat down search and we wanted to bring Mr. Simmonds up to the cubes area once we got back there for a more thorough search of him. So that's what we did at that time, brought him into a room for a more thorough search and at that time I

located twenty-seven twenty dollar bills, two ten dollar bills, excuse me, and eight five dollar bills in Mr. Simmonds left pants pocket and the money was folded in a certain order. There was 11 twenties first, then eight five dollar bills, then two ten dollar bills and then sixteen twenty dollar bills.

Q. What occurred at that point in time, officer?

A. Shortly after that time, at 1601 hours...

...

Q. Officer, so you've indicated, so what happened at that point in time, you had found this money, what occurred then?

A. So then I advised Mr. Simmonds that he was under arrest for possession for the purpose of trafficking crack cocaine and possession for the purpose of trafficking marihuana and I would have provided him with his Charter of Rights and police caution once again and he stated verbally that, yes, he understood and would like to speak to Luke Craggs.

Q. You've indicated you would provide the Charter rights and police caution again, would that have been the same wording obviously with different charges, but the same wording that you had read into the record previously?

A. Yes, it would.

Q. Okay. You indicated you received a response that Mr. Simmonds wanted to speak with Mr. Craggs?

A. Yes, that's correct.

Q. And what occurred at that point in time?

A. At that time I facilitated a phone call to Luke Craggs. I called his office. The number that I found on the internet. When I called that number it went to a voicemail. I left a message, you know, stating my name, I was looking a phone call back, there was no answer. At that time I advised Shancy that there was no answer with Mr. Craggs and that I left a message. At that time I asked him if he would like to speak with Legal Aid or if he wanted to wait for Mr. Craggs to call back. It was a Saturday around, you know, four o'clock in the afternoon. I wasn't sure even if, you know, the call or answering machine was forwarded to like a cell phone or an office, so I gave Mr. Simmonds that option if he would like to wait or call Legal Aid. At that time he said Legal Aid is fine and my common practice when I arrest someone is to get them in contact with a lawyer as soon as possible. So, shortly after we got back to the cubes area, when I re-arrested him for possession for the purpose, that's why I contacted Luke Craggs right away, left a message and there was no answer, so that's why I gave him that option and wanted to get him in contact with a lawyer as soon as possible.

Q. In relation to, you indicated that you contacted a phone number and received a message was played. Do you recall in general what the nature of that message would have been or?

A. I don't recall, I just believe it was like a generic kind of voicemail, you know, leave a message and we'll get back to you, and that's simply what I did.

Q. Okay. So you indicated that you asked Mr. Simmonds if he'd like to wait or have Legal Aid contacted and you indicated that he said Legal Aid is fine. What happened at that point?

A. I contacted Legal Aid and I spoke with Billy Sparks. I advised Sparks who I had in custody, what the charges were, and at that time Mr. Simmonds spoke with Billy Sparks.

Q. Are you able to give the court indication of the general timelines for any of these event occurring?

A. If I can refer to my notes I would be able to.

Defence: I have no objection to that.

Q. Officer, he could...

A. So at 1615 hours I tried calling Luke Craggs and there was no answer and that's when I left a message. At 1623 hours I phoned Legal Aid and spoke with Billy Sparks. At 1625 hours Shancy started speaking with Mr. Sparks, and at 1628 hours he, the phone call ended with Mr. Sparks.

Q. Okay. What occurred after that phone call ending?

A. After the phone call I provided Mr. Simmonds with a follow up water and then after that I conducted a strip search of Shancy Simmonds.

Q. At what point in time did the strip search commence?

A. I'd have to refer to my notes for that.

Q. If you could officer.

A. The strip search started at 1710 hours and that was in room 142, which is a secure room, the door closes, there's no cameras, and there was two other officers present with me, Constable Chestney and Constable Tohme when that started. I gave all the direction for Mr. Simmonds during the strip search to remove one piece of clothing at a time. He handed it to me, I searched it and then the other officers did a secondary search of that clothing. So that started at 1710 hours and the strip search was concluded at 1713 hours, so three minutes.

Q. Okay. Just to take you back a little bit to the time period after Mr. Simmonds had concluded his call with Legal Aid. Were you able to make any determination in terms of whether the call or the advice appeared satisfactory to Mr. Simmonds?

A. Yes. Typically I, you know, ask if they are satisfied with the phone call and he said yes he was.

Q. Were there any further requests from Mr. Simmonds at that point in time to speak with Mr. Craggs?

A. No. No further requests.

...

Q. Anything else of significance happen after that point in time officer?

A. No I don't believe so.

Q. How much longer after this time period were you on shift that day?

A. My shift would end at six o'clock, so after, I would have been on for roughly another hour, but I believe, you know, due to paperwork and the file certain things needed to be completed before I left, so I believe I was past six o'clock on that date, on February 10th.

Q. Okay. During that time period did you ever receive a call or notification that a call had come in from Mr. Craggs?

A. No, I did not. Typically, if I'm on shift the dispatcher will contact my cell phone or contact me over the radio advising that someone would like to speak with me or, if I'm not present during that time, I receive an email notification and I did not receive any notification that Mr. Craggs had called back and I was on day shift the next day which was a Sunday, and there was no email messages stating that Mr. Craggs had phoned me.

[19] Constable Sullivan was cross-examined on his evidence about providing Mr. Simmonds with duty counsel instead of his private lawyer of choice. During cross-examination it emerged that in addition to making handwritten notes on February 10, 2018, Constable Sullivan also made computer-generated notes around the time of Mr. Simmonds' arrest. That would be expected. However, he also testified that he prepared a new Can Say in 2020, about two years later, after speaking with the Crown to prepare for this trial. This was after Mr. Simmonds had filed his Notice of *Charter* Application and the Crown was made aware that the grounds for arrest were being challenged.

[20] The 2020 Can Say contains information that did not appear in Constable Sullivan's original notes, either handwritten or computer generated, including that 5471 Heron Walk was a location known to him to have drug activity. (In his original notes, Constable Sullivan did say that he saw the four men going in and out of that address on the date in question.) More significantly, Constable Sullivan said there were no original handwritten or computer-generated notes about giving Mr. Simmonds the option to wait to hear from Mr. Craggs. This only appeared in the 2020 Can Say. Constable Sullivan agreed on cross-examination that he had made many arrests in the subsequent two years, and that because he did not originally make notes about Mr. Simmonds exercising his right to counsel, he was relying on memory. He agreed that his memory had diminished, not improved, over time:

Q. Okay. So, Mr. Simmonds, two times, told you that he wished to speak to Mr. Craggs, right?

A. That's correct.

Q. Okay. Initially upon arrest and then a further arrest after more things are discovered at the police station?

A. Yes.

Q. Okay. And you understood, did you know who Luke Craggs was when he gave you that name?

A. I didn't at the time then when I Google searched Luke Craggs I learned that he was a lawyer.

Q. Okay, so you understood he was a lawyer at that point?

A. Yes.

Q. Okay. While you are interacting with Mr. Simmonds regarding his right to counsel, you had your notebook with you, right?

A. Yes.

Q. You took notes of what was taking place, right?

A. Yes.

Q. Okay. You referred to these notes earlier in relation to this portion of your testimony on direct examination and if you need to resort to them at any point let me know.

A. Okay.

Q. But you would agree with me that you noted in your notebook that after the second time Mr. Simmonds requested to speak with Luke Craggs you noted that, quote, I tried calling Luke Craggs, no answer, message was left, right?

A. Yes.

Q. Okay. That being at six, it's cut off on my page, but...

A. I can...

Q. Six, sixteen fifteen, does that make sense to you?

A. I can refer to my notes if you like?

Q. Sure.

A. To check. 1615 hours.

Q. Okay. The next notation you make is eight minutes later, 1623, in which you write, I phoned Legal Aid and spoke with Billy Sparks, right?

A. Yes.

Q. Okay. So, you provided testimony that after your effort to contact Mr. Craggs and leaving a message, you have a conversation with Mr. Simmonds...

A. Yes.

Q. In which you've testified that you give him an option...

A. Um hmm.

Q. To either wait for Mr. Craggs to call back or speak with Legal Aid?

A. Yes.

Q. And you testified that Mr. Simmonds said he was fine with Legal Aid?

A. Yes.

Q. And that's a quote you're giving from him, right? Those are the words he used?

A. Yes.

Q. Okay. You didn't write any of that down, that exchange, in your notes did you?

A. No, I did not.

Q. Okay. We talked earlier about the Drug IO that you prepared after the event, right?

A. Yes.

Q. And would you agree with me that you did not, in your Drug IO, make note of this exchange you have with Mr. Simmonds about giving him an option to wait for Mr. Craggs or contact Legal Aid and him saying he was fine with Legal Aid? You didn't note that in your Drug IO did you?

A. I can't recall.

Q. Okay. If I showed you a copy of your Drug IO, would that assist you in answering the question?

A. Yes, it would.

...

Q. Take your time, there's a few pages, but, that's the Drug IO that I referred to earlier?

A. Yes. ... No there's no mention of that in the Drug IO.

Q. First time you make note of that is in your Can Say of this year, the one you did a few weeks ago or a week ago or sometime in 2020?

A. Yes.

Q. Okay. When you wrote that Can Say, the 2020 Cay Say, and you describe this exchange that you testified to...

A. Yes.

Q. You're simply relying on your memory from two years ago and this back and forth you had with Mr. Simmonds?

A. Yes, I am.

Q. Okay. So you weren't able to rely on handwritten notes or typed notes from February 2018, because that exchange is not in those notes, right?

A. That's correct.

Q. Okay. So in the intervening two year period, you've been a police officer for that entire time, right?

A. Yes.

Q. You've arrested a number of people, I assume, during that time have you?

A. Yes, I have.

Q. Okay. You've dealt with them and getting them counsel at times, is that right?

A. Yes.

Q. Okay. So your memory of this specific question and specific answer that Mr. Simmonds gives to you from two years before, how was that you were able to sit down and recall exactly what he's saying to you and what you're saying to him?

A. Um, the reason why is this is a significant case for myself due to the quantity of crack cocaine, so, I remember the incident very clearly. I remember that it was a Saturday, in the afternoon. When I called Luke Craggs, there was no answer, possibly due to the time of day, the weekend, and my main goal, like I said, whenever I arrest someone is to get them in contact with a lawyer as soon as possible. So, due to it being the weekend, that time of day, that's when I stated to Shancy, there was no answer, I left a message, would you like to speak to Legal Aid or would you like to wait. That's when he said, Legal Aid's fine.

Q. Okay. So, at the time, you appreciate, that that interaction, you asking Mr. Simmonds that, telling him what his options are and his response to you, that's something that's important to the investigation, right?

A. Yes.

Q. Okay. And you agreed with me earlier that, in terms of note taking, that writing down important information is something you ought to do, right?

A. Yes.

Q. Okay. You had your notebook, right?

A. Yes.

Q. And no notes of that back and forth?

A. That's correct.

Q. Okay. You're prepared to acknowledge that it may not have happened exactly as you're testifying to right now?

A. I'm testifying to the best of my memory.

Q. Okay. So, two years go by and a number of other investigations, possible that the memory has diminished over time, right? That's reasonable?

A. It is possible, yes.

Q. Okay. So, in terms of exactly what you say to Mr. Simmonds, exactly what he says back to you, that you can't be certain of that given that you have no specific note of it at the time?

A. I can't be a hundred percent certain, but like I said, this is a significant case for my career and I remember, you know, his tone, it was very nonchalant, like yes, Legal Aid's fine, and that's what I recall to the best of my knowledge.

[21] Constable Sullivan said he believed drug traffickers would keep drugs down their pants to avoid detection by the police by a pat-down search. He said that the only way to find drugs hidden in a drug trafficker's pants is by a strip search. After speaking with counsel, Mr. Simmonds was taken to a small room and subjected to a three-minute strip search by Csts. Sullivan, Tohme, and Chestney. He was asked to remove one piece of clothing at a time. During the search Mr. Simmonds reached into his underwear and pulled out a large baggie containing a rock of crack cocaine.

Constable Shannon Haines

[22] Constable Haines had been a Halifax Regional Police officer for four years when he testified on the *voir dire*, and for two years as of February 10, 2018. That day he was working the Gottingen Street beat with Constable Sullivan. He received a call from Detective Constable Mike Carter who reported the following source information:

- That Shancy Simmonds had been in possession of crack cocaine within the past 24 hours;
- That Shancy Simmonds had sold crack cocaine within the past 24 hours; and
- That Shancy Simmonds kept the crack cocaine down his pants.

[23] Constable Haines said Detective Constable Carter told him the following about the source:

- Had been a police source since 2012;

- Is in contact with the police weekly or bi-weekly;
- Associates freely with individuals actively involved in crime;
- Had positive results on his information no less than 20 times;
- Had a number of positive results from information provided that has led to charges under the *Criminal Code* and *CDSA*;
- Was never found to be unreliable;
- Was financially motivated;
- Had information provided to the police confirmed by other means, in this case through other investigation reports and searches; and
- Made first hand observations directly with Mr. Simmonds and had conversations with Mr. Simmonds.

[24] With regard to Source A having made direct observations of Mr. Simmonds, Constable Haines stated the following during direct examination:

Yes, so, during my phone conversation with Carter that, when asking some details about the source that it was that of a person that involves himself freely with those involved in criminal activity, is also the source has provided information that tested positive no less than twenty occasions. The source also has not been deemed unreliable with any information he has provided. Financially motivated and the information, my understanding, the information the source provided was first hand and it was from direct observations or conversations that he, that they had with the accused.

[25] Constable Haines said he understood that the information provided by Constable Carter was very recent. Constable Carter told him that he had received this information on February 9, 2018, the previous day. He felt he had ample time to conduct the search on February 10, within a 24-hour window after the source reportedly saw Mr. Simmonds trafficking crack cocaine. During cross-examination, Constable Haines said:

Q. That conversation you have with Detective Constable Carter wherein he tells you his source has provided information regarding Mr. Simmonds possessing and trafficking crack cocaine within the past twenty-four hours.

A. Um hmm.

Q. Did the officer tell you when that information was provided to him?

A. Not exactly, but during our phone conversation I had to...

Crown: And if I could, just as a word of caution, obviously, the need to protect confidential informant privilege, certainly have no issue with the officer continuing to answer that question, but just need to be alive to that issue My Lord.

...

A. Absolutely. So, while talking to Constable Carter, it is my understanding he made it very apparent that the, what the recency, that the information could be acted on. When I spoke with him on February 10, there was no issues surrounding the twenty-four hour period. He assured me that the information provided was actionable.

...

A. And that's by me asking questions to him if this is, I work a twelve hour shift, and if I receive this, whatever point in the morning on February 10, I knew while speaking to Constable Carter that that could be acted on during my twelve hour shift.

Q. And you're belief that that could be acted on is because Detective Constable Carter specifically said you can act on this?

A. Yes, he said it while talking about the twenty-four period because it was on his person within the past twenty-four hours without identifying the source and really narrowing this down what time he received the information from the source, he made it apparent to me that it was actionable and there was no issues surrounding that.

...

A. If acted upon.

Q. So, in your mind at the time,

A. Yes.

Q. At that point you would have been a police officer, at least in Halifax Regional, for a couple of years.

A. Yep.

Q. The recency of the information you are receiving, that's obviously relevant to whether or not you can affect an arrest, right?

A. Yes.

Q. Okay. So, had the information been not quite as recent, so that sometime in the past, you know, couple of weeks Mr. Simmonds has sold crack cocaine. In that scenario I've just given you, would that...

A. Absolutely not...

Q. led you to believe...

A. I wouldn't be acting on that information.

Q. You couldn't have acted on that?

A. No.

Q. Okay. If the information related to well sometime in the past forty-eight hours as opposed to twenty-four hours, would that have had an effect on whether you thought that was actionable?

A. Yes, I wouldn't have acted on the forty-eight hours. If it was past, well past twenty-four hours, I wouldn't have acted on that information.

Q. Okay.

A. Because it's possible that he can sell and get rid of those drugs in that period of time.

Q. So during this conversation with Constable Carter, did he at any point tell you that the information coming from the source regarding Mr. Simmonds having drugs and having sold drugs within the past twenty-four hours, was actually told to him on February 9th, being the day before. Did he tell you that?

A. Correct.

Q. Okay. So when he tells you this information it's on the 10th, right? The next calendar day?

A. Yep.

Q. Okay. So, was it your understanding that the information coming from the source was that Shancy Simmonds is in possession of and has sold crack cocaine within the past twenty-four hours of when the source is telling that to Detective Constable Carter on the 9th.

A. No. The information, like I said, received by Carter, I know it was received on the 9th, he didn't exactly tell me the exact time cause he can't, and I'm not supposed to know. I know that within the twenty-four rule that I had more than enough ample time to action on his information during the 10th.

Q. Okay.

[26] Prior to February 10, 2018, Constable Haines had received source information that drugs were being sold at 5471 Heron Walk. He had previously seen drug users in that general area, and had seen drug users going around to the back entrance of 5471 Heron Walk for about 10 minutes on previous occasions. He had also seen Mr. Simmonds go to that address for both short and long periods of time. Constable Haines was also aware that a friend of Mr. Simmonds' sister lived at 5471 Heron Walk and that Mr. Simmonds could have been making social visits to that address.

[27] Constable Haines had previously received source information that the other men with Mr. Simmonds on February 10, 2018, were in the drug trade, but had not

acted on it. He had also received source information that Mr. Simmonds was in the drug trade, but had not acted on it. Constable Haines stated during direct examination that he had previously arrested Mr. Simmonds for possession of crack cocaine:

Q. Have you previously observed Mr. Simmonds in possession of crack cocaine?

A. Yes I have.

Q. And can you give the court an indication of the circumstances surrounding that?

A. Yes, six months prior to the offence I arrested the accused for trafficking in August 2017, where he had approximately 20 grams of crack cocaine on his person at the time.

Q. Okay, and you indicated that substance was on his person, where was that located?

A. I believe it is one of his pockets, his coat pocket or his pants pocket and it was in a ball form in a plastic bag.

[28] As a result of the information he received from Constable Carter, Constable Haines intended to arrest Mr. Simmonds if he located him on February 10. Like Constable Sullivan, he said the February 10 surveillance was irrelevant to that decision.

[29] Constable Haines testified that he set up surveillance at Ahern Manor with Constable Sullivan. He saw Mr. Simmonds and three other men approach 5471 Heron Walk, gather outside, then go inside for about 10 minutes. They then came out and gathered in front. He did not see Mr. Simmonds trafficking or make any hand-to-hand interactions. He did not see him conceal anything in his pants or adjust them. The four men then walked toward Ahern Manor. When he felt they were close enough Constable Haines told Mr. Simmonds that he was under arrest. The three other men ran away, and Mr. Simmonds turned and walked away. Constable Haines then put his hands on Mr. Simmonds' shoulder and told him he was under arrest. He took Mr. Simmonds behind Ahern Manor and searched him. He found crack cocaine, cannabis, a scale, an iPhone and cash in Mr. Simmonds' pockets. Mr. Simmonds was taken to HRP Headquarters in a police van. He was searched again at headquarters and more cash was located in various of his pockets.

Constable Isaac Tohme and Constable Jordan Chestney

[30] Constables Tohme and Chestney, both HRP officers, drove the police van that took Mr. Simmonds to headquarters. They observed him in the custody of Constables Sullivan and Haines. They confirmed that cocaine, cannabis, and cash were found on Mr. Simmonds' person.

[31] Constable Chestney saw Constable Sullivan read Mr. Simmonds the police caution and *Charter* rights at the scene of the arrest. He did not recall what Mr. Simmonds said in response to being read his rights.

[32] Constable Tohme said he was not present when Mr. Simmonds was read his rights and caution, and did not hear anyone read them to him.

[33] Both officers were present when Mr. Simmonds was strip searched at police headquarters, and saw him reach into his boxer shorts, take out a clear bag containing crack cocaine, and hand it to Constable Sullivan.

Issues

[34] The issues are as follows:

- Did the police have reasonable and probable grounds to arrest Shancy Simmonds?
- If not, were his ss. 8 or 9 *Charter* rights violated by the search?
- Was Mr. Simmonds given his proper s. 10(b) *Charter* right to counsel?
- Should any of the evidence be excluded in accordance with s. 24(2) of the *Charter*?

Legislation and Relevant *Charter* Provisions

[35] Sections 8, 9, 10(b), and 24(2) of the *Charter* state:

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

...

(b) to retain and instruct counsel without delay and to be informed of that right...

...

24 (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.

[36] Section 495 of the *Criminal Code* sets out the police power of warrantless arrest. It states, in part:

495. (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; [or]

(b) a person whom he finds committing a criminal offence...

[37] The section goes on to set out limits on the power to arrest without warrant (s. 495(2)) and to deem a peace officer acting under s. 495(1) to be acting lawfully and in the execution of his duty for purposes of proceedings under the *Criminal Code* or another act of Parliament (s. 495(3)(a)).

Issue One: Did the police have reasonable and probable grounds to arrest and search Shancy Simmonds, and if not, were his ss. 8 or s. 9 *Charter* rights violated by the search?

[38] The law in this area is long-settled. The starting point for analysis is the lawfulness of Mr. Simmonds' arrest. He was arrested without a warrant. Although an applicant generally bears the burden of proving a *Charter* violation on a balance of probabilities, when a s. 8 violation is alleged, and there has been a search without a warrant or prior judicial authorization, the burden shifts to the Crown to prove on a balance of probabilities that the search was authorized by law, that the law is reasonable, and the search was conducted in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265. If the arrest was unlawful, it violated s. 9. In that case the search would not be incidental to arrest, and would therefore violate s. 8. The first question is therefore whether the arrest was unlawful: *R. v. Loewen*, 2011 SCC 21, at para. 3.

The standard for lawful arrest

[39] The law regarding what constitutes a lawful arrest is also well-settled. Justice Cory made the following comments about reasonable and probable grounds for arrest in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-251:

Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest...

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest...

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view... On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest. [Emphasis added.]

[40] The police have the common-law power to search an individual incidental to arrest. However, in order for a such a search to be lawful, the arrest must have been lawful, as described in *Storrey*. Therefore, in this case, the police must have had both subjective and objective reasonable and probable grounds to arrest Mr. Simmonds for the search to have been lawful.

[41] The test for reasonable grounds for arrest has been described as “where credibly-based probability replaces suspicion” (*Hunter et al. v. Southam Inc.*,

[1984] 2 S.C.R. 145 at 167). In *R. v. Jir*, 2010 BCCA 497, Frankel J.A., for the majority, set out the law, relying, *inter alia*, on *R. v. Debot*, [1989] 2 SCR 1140:

27 As has been stated many times, the "reasonable grounds" standard is not only less than that required for conviction, but is also less than the civil standard of proof. Madam Justice Wilson put it this way in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "*prima facie* case". The phrase "reasonable belief" also approximates the requisite standard.

More recently, in *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, the Court stated (at para. 114):

... the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted].

Further, as Mr. Justice Hill noted in *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 367 (Ont. Ct. (G.D.)):

The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.

28 It is well established that a reasonable grounds determination involves a consideration of the "totality of the circumstances". When the police act on the basis of an anonymous tip, consideration must be given to a variety of factors, including the degree of detail provided by the tipster, information as to the tipster's source of knowledge, and indicia of the tipster's reliability, including confirmation of some of the information provided... Weakness in one area may be compensated for by strengths in other areas... As Mr. Justice Cumming succinctly stated in *R. v. Charlton* (1992), 15 B.C.A.C. 272 at para. 29:

The inability to assess the credibility of the informant may be compensated for by the quality of the information as well as by any corroborating or confirmatory evidence [Some citations omitted][Emphasis added.]

[42] In *R. v. Loewen*, 2010 ABCA 255, affirmed 2011 SCC 21, Slatter J.A. discussed that the requirement that the standard for evaluating the police decision to effect an arrest must be contextual. After referencing caselaw discussing "the difference between 'reasonable grounds' and 'reasonable and probable grounds'" (para. 15), Slatter J.A. continued:

16 Cases ... that relate to judicial officers, or quasi-judicial proceedings, do not necessarily set the standard of conduct expected of a police officer on the streets who must make decisions without the luxury of long reflection. As the Court said in *R. v. Golub* (1997), 34 O.R. (3d) 743, 117 C.C.C. (3d) 193 (C.A.) at p. 750:

... Both a justice and an arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

What is reasonable must be decided in context: *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15 at para. 26. [Emphasis added.]

Assessing the sufficiency of a confidential informer's tip

[43] In this case the police were not operating under exigent circumstances. However, the situation was at least somewhat dynamic. The police received a tip and felt they had to act while the information was still recent enough to rely upon. Whether they had reasonable grounds to arrest Mr. Simmonds rests in large part on the sufficiency of the tip. In *Debot*, at 1168, Wilson J. explained how to determine whether a warrantless search was justified:

In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.

[44] In determining whether the police had reasonable and probable grounds for arrest, a careful examination of the source information must be undertaken. In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, [1990] S.C.J. No. 115, the court examined confidential informer information used as the basis to obtain prior judicial authorization to intrude into someone's privacy. Although the sufficiency of a confidential tip was not being considered in the context of a warrantless search, the discussion by Sopinka J. is instructive:

64 In *R. v. Debot*, [1989] 2 S.C.R. 1140, police officers acting on the information of an informer stopped and detained the appellant's motor vehicle and conducted, without warrant, a search of the vehicle and the persons of the appellant and others. In assessing the weight to be given to the evidence relied on by the police officer, Wilson J. applied "the totality of the circumstances" standard which had been applied by Martin J.A. in the Court of Appeal. On this basis, Wilson J. found that there were reasonable and probable grounds to justify the search. This conclusion was concurred in by the other members of the Court.

65 In *R. v. Greffe*, [1990] 1 S.C.R. 755, the Crown conceded that in conducting a rectal search, there had been a violation of ss. 8 and 10 of the *Charter*. The parties differed, however, in characterizing the seriousness of the violation for the purpose of determining admissibility under s. 24(2). Lamer J. (as he then was) considered that "the core difference centres on whether the police had reasonable and probable grounds to believe that the appellant was in possession, and therefore trying to import into Canada, an illegal narcotic" (p. 788).

66 The only evidence on the record was testimony that on the basis of "confidential information received and background investigation" the officer had "grounds to believe ... that he [Greffe] was going to be in possession of an unknown amount of heroin". Lamer J. held that the trial judge erred in concluding that the police had confidential and reliable information by reason of the eventual recovery of the heroin. He wrote, at p. 790:

It was incumbent upon the Crown to establish at trial, if it could, the basis upon which the police claimed to have reasonable and probable grounds to believe that the appellant was in possession of the heroin. This would have been done through an inquiry into the source and reliability of the "confidential information" in the possession of the police.

...

What should have happened is that the police should have been asked at trial about the confidential information to determine if, in the totality of the circumstances, there existed reasonable and probable grounds to believe the accused was carrying the heroin. [Emphasis in original]

67 Lamer J. also referred with approval to the following passage from Martin J.A.'s judgment in *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), at pp. 218-19, as the test for assessing confidential informer's information:

I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search Highly relevant ... are whether the informer's "tip" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.

[45] Justice Sopinka went on in *Garofoli* to summarize the analysis when examining the reliability of a confidential source where the police have relied on that source in effecting a warrantless arrest:

68 Although *Greffe* concerns admissibility under s. 24(2), in my opinion the discussion has a bearing on the sort of information that must be put before a judge issuing an authorization for electronic surveillance. I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable grounds to justify a warrantless search (the issue in the cases cited by Lamer J.) and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* and *Greffe*.

(i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.

(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

- (a) the degree of detail of the "tip";
- (b) the informer's source of knowledge;
- (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.

(iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[46] Similarly, in *R. v. Plant*, [1993] 3 S.C.R. 281, [1993] S.C.J. No. 97, the court was dealing with a search warrant, not a warrantless search as in Mr. Simmonds' situation. However, the analysis regarding the reliability of the tip is of assistance. As Sopinka J. stated, for the majority:

The Anonymous Tip

28. In *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1168, this Court determined that the reliability of the tip of an informant depends on an assessment of the totality of the circumstances and specified three areas of concern:

First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search?

While that case related to the decision of the police to conduct a warrantless search pursuant to the tip of a known informant, the factors enunciated demonstrate principled concerns with the use of informants in general and are equally applicable to the anonymous tip in the case at bar. The information given by the anonymous informant was compelling in that it identified the location of the cultivation operation and located the appellant's house in a fairly specific geographic region, albeit without specifying an exact street address. It is impossible to determine whether the source was credible except by reference to the fact that the information was subsequently corroborated by a police reconnaissance which resulted in identification of the exact address of the residence described by the informant. The tip itself, therefore, was compelling enough in its specification of the place in which the offence was occurring for the police to readily locate the exact address of the appellant's residence and corroborate the report of the informant. I conclude that the anonymous tip, although made by an unknown informant, was sufficiently reliable to have formed part of the reasonable grounds asserted in the information to obtain the warrant. Therefore, I would not excise that piece of evidence from the warrant.

Analysis regarding the lawfulness of Mr. Simmonds' arrest

[47] Constable Haines and Constable Sullivan were both familiar with Shancy Simmonds prior to February 10, 2018. They had both previously received untested source information that Mr. Simmonds was involved in trafficking crack cocaine. Constable Haines had arrested Mr. Simmonds six months earlier and found crack cocaine on his person, leading to a charge of possession for the purpose of trafficking. They both testified that they believed 5471 Heron Walk was an area frequented by drug users, where they suspected drug trafficking occurred.

[48] On February 10, 2018, Constable Haines spoke to Constable Carter and received recent source information. The source had direct knowledge that within the past 24 hours Mr. Simmonds had possession of crack cocaine, had trafficked in crack cocaine, and was keeping the crack cocaine down his pants.

(a) the degree of detail of the "tip"

[49] Applying the analysis from *Garofoli* would first involve an examination of the degree of detail of the tip. In Mr. Simmonds' case, the informant claimed to have direct knowledge that Mr. Simmonds had possession of cocaine, had trafficked in cocaine in the past 24 hours, and that he was keeping the cocaine down his pants. This tip does not contain a significant amount of detail.

(b) the informer's source of knowledge

[50] According to Constable Haines, the informer in this case told Constable Carter that he had direct knowledge of the information about Mr. Simmonds.

(c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources

[51] According to Constable Haines, he was advised by Constable Carter that the informer was reliable based on past performance. He had provided accurate information that led to positive results on multiple occasions prior to this arrest.

Was the information corroborated by police investigation prior to making the decision to conduct the search?

[52] Both Constable Sullivan and Constable Haines testified that based on the information received from Constable Carter they were going to arrest Mr. Simmonds on February 10. If the police had simply arrested Mr. Simmonds without the additional observations made on February 10, as was their stated plan, then the legality of the arrest would have been less justified. However, they made further observations of him on that date that corroborated the confidential informant's tip.

[53] The police were familiar with Mr. Simmonds. He was in the company of other men who uncorroborated source information suggested might be drug traffickers. He was in an area they believed was frequented by drug users and traffickers. He went in and out of 5471 Heron Walk on the date in question several times. The men Mr. Simmonds was with appeared to be keeping watch outside the residence. The police believed the area behind that address to be a prime location for drug trafficking as it was difficult for the police to observe the rear entrance area. Constable Haines had arrested Mr. Simmonds and found him in possession of crack cocaine six months prior to the incident in question. The police had received other source information alleging Mr. Simmonds' involvement in drug trafficking that they had not corroborated. The police did not see him conducting a

drug transaction or making any sort of hand-to-hand transactions, nor did they see him doing anything unusual with his pants, prior to his arrest. There was some evidence corroborating Mr. Simmonds possible involvement in drug trafficking on the date in question. On its own, this corroborative evidence would have given the police justification to suspect Mr. Simmonds' involvement in drug trafficking, but would not have risen to the standard of reasonable grounds.

[54] The police were aware of, and observed, a variety of circumstantial evidence to corroborate the tip that Mr. Simmonds was in possession of cocaine for the purposes of trafficking. Of greatest significance were the police observations of Mr. Simmonds and the men who were with him engaged in behaviour consistent with drug trafficking, including the coming and going from 5471 Heron Walk, and the apparent posting of lookouts. By comparison, in *Plant*, the police received an anonymous tip of no past proven reliability that production was going on at a described location. In *Plant* the only usable corroborating evidence consisted of: (1) confirmation that premises meeting the tipster's description existed in the area described; and (2) the results of an electricity consumption check. Substantively, only the electricity consumption was actually corroborative of the offence since it was consistent with cultivation. Mr. Simmonds' case is similar: after receiving the tip, the police observed something purely circumstantial that tended to corroborate the tip. While there could have been other explanations for Mr. Simmonds' behaviour, such as social visits to Heron Walk, the police are not held to a reasonable doubt standard when assessing grounds for arrest.

The results of the search cannot, ex post facto, provide evidence of reliability of the information

[55] The results of the search, that is finding cocaine, cannabis and cash in Mr. Simmonds' pockets and more cocaine in his underwear, is irrelevant to this analysis since results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

Conclusion on the legality of the search

[56] Constable Sullivan and Constable Haines subjectively believed that they had reasonable and probable grounds to arrest Mr. Simmonds. Whether or not there were objective grounds for such a belief depends on an examination of the totality of the circumstances. Prior to receiving the source information the police merely had a suspicion that Mr. Simmonds might be involved in drug trafficking. That would not have been enough to make their grounds for arrest reasonable. Then

they received the source information. The degree of detail in the tip was sparse. However, the source information was direct, recent and reliable. There was some corroboration both before and after the receipt of the source information that Mr. Simmonds might be involved in drug trafficking activity. The police had received intelligence about Mr. Simmonds and had made observations of him prior to receiving the source information as well as making observations of him after receiving the source information on the day of his arrest. The source information, along with the corroborative observations, was enough to convert mere suspicion on the part of the police that Mr. Simmonds might be involved in drug trafficking to a credibly-based probability that he was involved in drug trafficking. As such, they had reasonable grounds to arrest Mr. Simmonds. The arrest was lawful. There was no s. 8 or s. 9 *Charter* violation.

Issue Two: Was Mr. Simmonds given his proper s. 10(b) *Charter* right to counsel?

[57] Section 10(b) of the *Charter* guarantees an accused person's right to counsel. The question of how far the right to counsel of choice extends has been considered in numerous cases. In *R. v. LeClair and Ross*, [1989] 1 S.C.R. 3, at 10, Lamer J. (as he then was), for the majority, confirmed that s. 10(b) of the *Charter* imposes certain duties on the police. He said:

11. The appellants were obviously detained and that they had the right to retain and instruct counsel is not in dispute. Moreover, the police complied initially with s. 10(b) and advised Ross and Leclair of their right to retain and instruct counsel without delay. As this Court held in *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233, s. 10(b) imposes at least two duties on the police in addition to the duty to inform detainees of their rights. The first is that the police must give the accused or detained person who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay. The second is that the police must refrain from attempting to elicit evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel. I am of the view that in this case the police fulfilled neither duty. [Emphasis in original.]

[58] Justice Lamer explained that once an accused person has expressed an interest in speaking to counsel of choice, and has taken reasonable steps to accomplish this, the police must give the accused person a reasonable opportunity to do so. He stated:

12. Having been informed of their right to counsel and having clearly indicated their desire to assert that right, both appellants were permitted to telephone

lawyers of their choice but were unable to make contact with them. This is hardly surprising since the calls were made at approximately 2:00 a.m. In the circumstances, it was highly unlikely that they would be able to contact their counsel before normal office opening hours.

13. At this juncture, I would underline the fact that the appellant Leclair was asked if he wanted to call another lawyer and his answer was "no". The Crown's submission was that by giving this answer Leclair waived his right to counsel. I do not agree. Leclair had clearly indicated that he wished to contact his lawyer. The mere fact that he did not want to call another lawyer cannot fairly be viewed as a waiver of his right to retain counsel. Quite the contrary, he merely asserted his right to counsel and to counsel of his choice. 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 CanLII 28 (SCC), [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. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly. 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.

14. Moreover, once the appellant asserted his right to instruct counsel, and absent a clear indication that he had changed his mind, it was unreasonable for the police to proceed as if Leclair had waived his right to counsel. As a majority of this court held in *Clarkson v. The Queen*, 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383, at pp. 394-95:

Given the concern for fair treatment of an accused person which underlies such constitutional civil liberties as the right to counsel in s. 10(b) of the *Charter*, it is evident that any alleged waiver of this right by an accused must be carefully considered and that the accused's awareness of the consequences of what he or she was saying is crucial. Indeed, this Court stated with respect to the waiver of statutory procedural guarantees in *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41, at p. 49, that any waiver ". . . is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process" (emphasis in original).

Since the evidence reveals that Leclair asserted his right to counsel, the burden of establishing an unequivocal waiver is on the Crown. Here, the Crown has failed to discharge the onus.

15. In the case of the appellant Ross, there is no evidence that the police even asked whether he wanted to call another lawyer. Once Ross had tried and failed to reach his lawyer, it would appear that the police assumed their obligation to provide a reasonable opportunity to retain counsel was at an end. One can reasonably infer that they also misconstrued the nature of their obligation as concerned the appellant Leclair. Obviously, there was no urgency or other reason justifying that the police proceed forthwith and it cannot be said that the appellants had a real opportunity to retain and instruct counsel. This therefore leads us to consider the second duty.

[59] Justice Lamer went on to discuss the second duty of the policy in the circumstances, that being to hold off attempting to elicit evidence from the accused, and explained:

17. ... As this Court held in *Manninen*, the police have, at least, a duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. In my view, the right to counsel also means that, once an accused or detained person has asserted that right, the police cannot, in any way, compel the detainee or accused person to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right. In the case at bar, it cannot be said that the appellants had a real opportunity to retain and instruct counsel before the line-up was held. Nor can it be said that there was any urgency or other compelling reason which justified proceeding with the line-up so precipitously.

[60] In considering the issue of counsel of choice in *R. v. McCrimmon*, 2010 SCC 36, the court discussed the duties of the police and the accused, where an accused person is in custody and has requested specific counsel. Chief Justice McLachlin and Charron J., for the majority, outlined the relevant facts:

[7] At the outset, Cst. Laurel Mathew advised Mr. McCrimmon of the reasons for his arrest, his right to retain and instruct counsel, and his right to remain silent. She told him that he could call any lawyer he wanted, and that he had a right to contact a Legal Aid lawyer through a 24-hour telephone service. Mr. McCrimmon stated that he wished to speak to a lawyer. Cst. Mathew escorted him to the RCMP detachment in Chilliwack where Mr. McCrimmon provided the name of a Vancouver lawyer, John Cheevers, with whom he wished to speak. Cst. Mathew called Mr. Cheevers' office, but was unable to reach him and left a message on the answering machine. She did not attempt to find Mr. Cheevers' home telephone number, nor did Mr. McCrimmon ask her to do so. He said to

Cst. Mathew: “I don’t know if I’ll hear back from him. . . . Like I said I only used him once He’s the only guy I know. I’ve never really dealt with a lawyer before.” Cst. Mathew asked Mr. McCrimmon if he would like to call a Legal Aid lawyer, to which he replied: “Well yes definitely but [I] prefer Mr. Cheevers.” Mr. McCrimmon then spoke privately with duty counsel for approximately five minutes. At the end of his conversation, Mr. McCrimmon confirmed that he was satisfied with the consultation and that he understood the advice provided by duty counsel.

[61] In holding that there was no breach of s. 10(b) in respect of the accused’s opportunity to speak to his counsel of choice, the majority said:

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. Ross*, [1989] 1 S.C.R. 3; *R. v. Black*, [1989] 2 S.C.R. 138.

18 What amounts to a reasonable period of time depends on the circumstances as a whole, including factors such as the seriousness of the charge and the urgency of the investigation. It is also informed by the purpose of the guarantee. The right to counsel upon arrest or detention is intended to provide detainees with immediate legal advice on his or her rights and obligations under the law, mainly regarding the right to remain silent. As Lamer J. (as he then was) aptly noted in *R. v. Brydges*, [1990] 1 S.C.R. 190, at p. 206:

It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial, if there is one. Rather, one of the important reasons for retaining legal advice without delay upon being detained is linked to the protection of the right against self-incrimination. This is precisely the reason that there is a duty on the police to cease questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel.

It is also because of this immediate need to consult counsel that information about the existence and availability of duty counsel and Legal Aid plans must be part of the standard s. 10(b) caution upon arrest or detention (*Brydges*). In turn, the detained person, faced with this immediate need for legal advice, must exercise reasonable diligence accordingly (*Ross*, at pp. 10-11).

19 In this case, we agree with the courts below in rejecting Mr. McCrimmon's contention that he was denied the right to counsel of choice in a manner that contravened his rights under s. 10(b). While Mr. McCrimmon expressed a preference for speaking with Mr. Cheevers, the police rightly inquired whether he wanted to contact Legal Aid instead when Mr. Cheevers was not immediately available. Mr. McCrimmon agreed, exercised his right to counsel before the interview began, and expressed satisfaction with the consultation. He also indicated an awareness of his rights at the commencement of the interview. In these circumstances, there was no further obligation on the police to hold off the interrogation until such time as Mr. Cheevers became available. [Emphasis added]

[62] Similarly, in *R. v. Willier*, 2010 SCC 37, a companion case to *McCrimmon*, the same majority summarized the facts relevant to the issue of counsel of choice:

[2] The appellant, Stanley Willier, alleges that the police violated the *Charter* by depriving him of his right to counsel. His allegation arises out of the following circumstances: following Mr. Willier's arrest for murder, the police informed him of his right to counsel and facilitated a brief telephone conversation with Legal Aid. Offered another opportunity to speak to counsel the next day, he made an unsuccessful attempt to call a specific lawyer and left a message on his answering machine. When asked if he wished to speak with another lawyer, Mr. Willier stated his preference to wait to hear back from his chosen counsel. However, when informed that his preferred lawyer was unlikely to call back before his office reopened the next day and reminded of the immediate availability of free Legal Aid, Mr. Willier opted to speak with duty counsel a second time. Shortly thereafter, the police commenced an investigative interview, prefacing the questioning with an open-ended invitation to contact counsel at any point during the exchange. Mr. Willier expressed satisfaction with the advice he had received from Legal Aid, and did not attempt to contact counsel again before providing a statement to the police.

[63] The majority explained at various points how the right to counsel incorporates an accused's request for counsel of choice:

[24] As indicated at the outset, the focal point in this appeal is the right to counsel of choice under s. 10(b) of the *Charter* and the corresponding obligations on the police to facilitate that choice. While the right to choose counsel is certainly one facet of the guarantee under s. 10(b), the *Charter* does not guarantee detainees an absolute right to retain and instruct a particular counsel at the initial investigative stage regardless of the circumstances. What the right to counsel of choice entails must be understood having regard to the purpose of the guarantee.

...

[26] While s. 10(b)'s text remains the starting point in its interpretation, an understanding of its animating purposes is essential to a full understanding of its

content. This is especially true in this case, as the text of s. 10(b) makes no explicit mention of the right to counsel of choice.

[27] As we describe in *Sinclair*, the right to silence in s. 7 and the right to counsel in s. 10(b) work together “to ensure that a suspect is able to make a choice to speak to the police investigators that is both free and informed” (para. 25). Section 10(b) aims to realize this purpose by ensuring that detainees have an opportunity to be informed of their rights and obligations under the law and to obtain advice on how to exercise those rights and perform those obligations. As Lamer C.J. wrote in *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191:

This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is “detained” within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty... Under s. 10(b), a detainee is entitled as of right to seek such legal advice “without delay” and upon request. As this Court suggested in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process. [Emphasis deleted in *Willier*.][Some citations omitted.]

[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.

...

[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. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation... If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended... As Lamer J. emphasized in *Ross*, diligence must also accompany a detainee’s exercise of the right to counsel of choice...

[64] The majority concluded that the police had not violated Willier’s right to counsel in relation to counsel of choice, and went on to hold that there is no duty

on police to monitor the quality of the legal advice given, concluding that “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” (paras. 40-42). They concluded:

[43] Considering the circumstances of this case as a whole, the majority of the Court of Appeal correctly found that Mr. Willier did not suffer a violation of his s. 10(b) right to counsel. In no way did the police interfere with Mr. Willier’s right to a reasonable opportunity to consult with counsel of choice by simply reminding him of the immediate availability of free Legal Aid after his unsuccessful attempt to call Mr. Royal. When Mr. Willier stated his preference to wait, Cst. Lahaie reasonably informed him that it was unlikely that Mr. Royal would be quick to return his call given that it was a Sunday, and reminded him of the immediate availability of duty counsel. Mr. Willier was not told that he could not wait to hear back from Mr. Royal, or that Legal Aid was his only recourse. There is no indication that his choice to call duty counsel was the product of coercion. The police had an informational duty to ensure that Mr. Willier was aware of the availability of Legal Aid, and compliance with that duty did not interfere with his right to a reasonable opportunity to contact counsel of choice. Mr. Willier was properly presented with another route by which to obtain legal advice, an option he voluntarily chose to exercise.

[44] Further, the brief interval between Mr. Willier’s attempt to contact Mr. Royal and the start of the investigative interview did not deprive him of a reasonable opportunity to contact counsel of choice. The brevity of the interval must be viewed in light of all the circumstances prior to the commencement of the interview. After speaking with Legal Aid, Mr. Willier expressed satisfaction with that advice prior to being questioned. He did not pursue any further opportunity to contact Mr. Royal, though he was offered an open-ended invitation to contact counsel prior to and throughout the interview. If Mr. Willier maintained any continuing desire to speak with Mr. Royal, or wait for him to call back, he was not diligent in exercising that right. There is little more that the police could have done in these circumstances to afford Mr. Willier a reasonable opportunity to exercise his rights under s. 10(b). There was therefore no violation of Mr. Willier’s right to counsel.

Analysis of alleged s. 10(b) violation

[65] The burden of proving a violation of s. 10(b) of the *Charter* is on Mr. Simmonds, the applicant, on a balance of probabilities. The burden plays a significant role in the disposition of this issue.

[66] The evidence in relation to the issue of the right to counsel of choice comes exclusively from the police. Constable Sullivan said that upon his arrest at the scene he read Mr. Simmonds his *Charter* rights and Mr. Simmonds requested to speak with Luke Craggs, his counsel of choice. Once back at the police station he was re-arrested, his rights were again read to him and Mr. Simmonds again asked to speak to Luke Craggs. Constable Sullivan said that he looked up the number for Luke Craggs' office. February 10, 2018, was a Saturday. It was highly unlikely that anyone would be answering the phone at Mr. Craggs' office on the weekend. Constable Sullivan says he left a message. He then asked Mr. Simmonds if he wanted to speak to Duty Counsel through Nova Scotia Legal Aid instead. According to Constable Sullivan, Mr. Simmonds said "Legal Aid's fine" and that call was made. The conversation between Mr. Simmonds and Duty Counsel was three minutes. Constable Sullivan says that he then asked Mr. Simmonds if he was satisfied with the phone call. He says Mr. Simmonds said he was satisfied with the call to Duty Counsel.

[67] Mr. Simmonds did not testify on this *voir dire*. I am, therefore, left only with Constable Sullivan's description of the facts related to the s. 10(b) issue. Based on those facts, according to the direction from the Supreme Court of Canada in *Wittier* and *McCrimmon*, Mr. Simmonds' right to counsel was not violated. He asked for counsel of choice. When counsel of choice was not immediately available he was asked if he wanted to speak to Duty Counsel. He spoke to Duty Counsel. He indicated he was satisfied with that legal advice. He never told the police that he wanted to wait for Mr. Craggs. He never told the police he was unhappy with the advice he received from Duty Counsel. Mr. Simmonds has not met the burden of proving a s. 10(b) violation on a balance of probabilities.

[68] That said, some comment must be made about several areas of concern raised by Constable Sullivan's evidence. According to the evidence on the *voir dire*, Constable Sullivan provided a Can Say that provides new and specific information two years after the event, and after defence had notified the Crown of the alleged s. 10(b) violation regarding counsel of choice. That new Can Say contains information that negatives the s. 10(b) complaint. The timing and content of the Can Say is curious in the context of the overall application.

[69] Additionally, Constable Sullivan testified that despite an accused's request for counsel of choice, he tries to get them in touch with Duty Counsel as quickly as possible. This may give rise to situations in the future where an accused has a proven complaint regarding a violation of s. 10(b). Constable Sullivan left a voicemail at an office on a Saturday. He made no effort to try and contact counsel

of choice at home. He did not wait or explore other methods of getting in touch with Mr. Craggs before suggesting Duty Counsel as an alternative. Nonetheless, he says that Mr. Simmonds indicated satisfaction with the implementation of his right to counsel and Mr. Simmonds did not testify otherwise.

[70] Assisting an accused person who is under the complete and direct control of the state to effect their right to counsel of choice is a serious and significant endeavour. Duty Counsel is a legitimate option for a person who has expressed a desire to speak to counsel of choice once they have had a reasonable opportunity to contact counsel of choice and have failed. *Pro-forma* efforts to assist an accused in contacting counsel of choice will not suffice. In non-urgent situations the police must provide an accused person with a reasonable opportunity to contact their counsel of choice.

[71] Finally, although not raised as an issue in this case, the unrefuted evidence is that once connected with Duty Counsel, Mr. Simmonds actually consulted with that person for a total of three minutes. He was under arrest for possession for the purpose of trafficking in cocaine. This is a very serious charge. Although no complaint was raised by Mr. Simmonds in this specific case, none of the details of the circumstances of the call were raised during the *voir dire*, and Duty Counsel did not have an opportunity to address the specifics, three minutes on the telephone sounds like an uncomfortably meager length of time for counsel to be briefed by an individual in custody about his or her circumstances and to then provide meaningful and considered legal advice.

Issue Three: Should any of the evidence be excluded in accordance with s. 24(2) of the *Charter*?

[72] There was no s. 8, s. 9, or s. 10(b) *Charter* violation and, therefore, s. 24(2) of the *Charter* is not a relevant issue.

Conclusion

[73] The police had reasonable grounds to arrest Mr. Simmonds on the basis of the information provided by the single confidential informant. Although Mr. Simmonds did not speak to his counsel of choice, he was offered Duty Counsel, accepted this offer and later indicated his satisfaction with that legal advice. There was no violation of Mr. Simmonds's s. 8, 9, or 10(b) *Charter* rights, and thus there is no need for a s. 24(2) analysis.

[74] As agreed upon with counsel during a telephone conference on May 25, 2020, within two weeks of the release of this decision the court will convene a telephone conference to discuss the process for the next date scheduled for trial, that being July 23, 2020.

Arnold J.