SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Noel*, 2025 NSSC 310

Date: 20250908
Docket: CRH No. 523843
Registry: Halifax

Between:

His Majesty the King

v.

Patrice Jean Noel

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	May 21 and 22, June 26, and July 21, 2025, in Halifax, Nova Scotia
Oral Decision:	September 8, 2025
Written Decision:	September 24, 2025
Counsel:	Leonard MacKay and Angnakuluk Friesen, for the Crown Stanley MacDonald, KC, for Patrice Jean Noel

By the Court (Orally):

Introduction

[1] The Crown concedes that Mr. Jean-Noel's rights under s. 10(b) *Canadian Charter of Rights and Freedoms* ("*Charter*") were breached by the police not implementing his right to counsel until over seven hours after his initial detention. Whether the evidence should be excluded pursuant to s. 24(2) of the *Charter* depends on the application to the facts of the three-part *Grant* test (*R. v. Grant,* 2009 SCC 32).

[2] The Applicant, Mr. Jean-Noel, was arrested and searched prior to a search warrant being executed at his residence and in his motor vehicle. He was then transported to the police station, processed and placed in a cell. The Applicant was not provided with access to counsel until approximately seven hours later. No evidence was obtained from the Applicant during this delay.

Facts

[3] The material facts to the s. 10(b) *Charter* application are undisputed, and most are contained in the Agreed Statement of Facts, which reads as follows:

> The parties agree that the following admissions of fact shall be recorded for the consideration of the judge presiding at the trial of Patrice Jean-Noel, pursuant to s. 655 of the Criminal Code, R.S.C., 1985, c. C-46.
>
> 1. An investigation was initiated into Patrice Jean-Noel on January 31, 2022, as a result of information received by police.
> 2. A search warrant was authorized on February 8, 2022, to search a residence and outbuildings located at 125 Sherwood Street, Cole Harbour, Nova Scotia, along with a vehicle, a 2014 white Honda Civic with NSLP# GXH042.
> 3. Mr. Jean-Noel was arrested in his vehicle after he parked in the driveway at 125 Sherwood Street on February 9, 2022, at 10:05 a.m. After a brief struggle, Mr. Jean-Noel was detained and searched, and the following items were seized:
>   a. A glass jar holding 9 plastic baggies each with 0.8g of cocaine - jacket front right pocket; **[Police Exhibit #5]**
>   i. $4,000 cash from front centre hoodie pocket- loose bundles of $20x10 and $100x30, credit cards and $100x5, $50x2 and $20x10 **[Exhibit #1]**

ii. $55 cash from rear left jeans pocket - $10x2 and $5x7 **[Exhibit #2]**

iii. $1200 cash that blew onto the ground - $100x12 **[Exhibit #3]**

iv. $95 cash from right rear jeans pocket - $20x4 and $5x3 **[Exhibit #4]**

b. Black Samsung cell phone;

c. Baggie with a small piece of crack cocaine in cannabis container under passenger's seat.

4. The search warrant was executed at 125 Sherwood Street on February 9, 2022, beginning at 10:24 am. Following the search, the residence was secured and cleared by Cst. Howe and Cst. Hueston at 11:47 am. The following items were seized during the search of the residence:

a. Numerous baggies of cocaine totaling approx. 394 grams:

i. 5 ziplock bags of approx. 50g each located in a reusable bag in BR3 closet; **[Exhibit #7]**

ii. 5 ziplock bags each holding smaller baggies with crack cocaine - a total of 81 baggies containing approx. 94g located in BR3 closet; **[Exhibit #8]**

iii. 1 ziplock bag holding approx. 50g located in a safe in BR3 closet. **[Exhibit #13]**

b. Two functioning digital scales each testing positive for cocaine. One scale located in the nightstand in BR3 and the other in a bag next to the bed in BR3. **[Exhibits #10 and #11]**

c. Unused baggies located in a paper bag in nightstand in BR3**. [Exhibit #12]**

5. The photographs taken by D/Cst. Mike Anderson during the search and during the processing of the drug exhibits, together with the Photograph Exhibit Log, fairly and accurately depict the places and items shown.

I, Patrice Jean-Noel, have reviewed the above Agreed Statement of Facts with my counsel, Stan MacDonald, and accept them as being admitted for the purpose of dispensing with proof thereof.

Dated this 21st day of May, 2025.

[4] The following are additional relevant facts:

[5] Cst. Howe read him his rights from memory at 10:08 a.m. Mr. Jean-Noel requested that Cst. Howe get his cell phone from his vehicle in order to get his lawyer, Ian Hutchison’s, phone number. Cst. Howe obtained Mr. Jean-Noel’s

phone password for the purpose of getting the phone number. He passed on the phone number to Cst. Rodgers, who made note of it at 10:14 a.m. Cst. Maye, the primary arresting officer, also made note of the phone number. Cst. Rodgers read Mr. Jean-Noel his *Charter* and caution again when he was seated in the police cruiser. He advised again that he wished to speak with his lawyer.

[6] Cst. Maye transported Mr. Jean-Noel to the Halifax Regional Police ("HRP") Prisoner Care Facility on Gottingen Street at 10:38 a.m., arriving at 11:04 a.m. They waited for approximately 20 minutes, which Cst. Maye believed to be due to either back log or for someone to complete the COVID screening.

[7] When they entered the facility, the duty counsel phone room was occupied and there were a few people in the queue. Cst. Maye provided Mr. Hutchison's phone number to the booking officer (whose name he could not recall) for them to facilitate the call, when the room became available. The booking officer advised that once the room was free Mr. Jean-Noel would be provided access to the secure room.

[8] There are other rooms at HRP HQ called "cubes", where calls can be facilitated. Cst. Maye was not aware of this at the time.

[9] The booking officer processed Mr. Jean-Noel. Cst. Maye then booked him into cells at 11:40 a.m. and left the station. Mr. Jean-Noel still had not had an opportunity to call his lawyer.

[10] It was not until 5:10 pm (approximately seven hours later) that Mr. Jean-Noel was able to speak to his lawyer, Mr. Hutchinson, for the first time since his arrest.

Issues

[11] The Applicant raises several *Charter* breaches. I will address the section 10(b) allegation as this in my view is dispositive of the matter before me. The issues on the s. 10(b) allegation are as follows:

1. Were Mr. Jean-Noel's s. 10(b) *Charter* rights breached?
2. If so, should the evidence against him be excluded pursuant to s. 24(2) of the *Charter?*

Law

Purpose and general principles of Charter s. 10(b)

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

> **10** Everyone has the right on arrest or detention
>
> […]
>
> (b) to retain and instruct counsel without delay and to be informed of that right

[13] The constitutionally enshrined right to contact counsel is not simply the right to call them sometime after the arrest, but rather, to call counsel without delay.

[14] The Supreme Court of Canada in *R. v. Dussault,* 2022 SCC 16, wrote: "simply put, the purpose of s. 10(b) is to provide the detainee with an opportunity to obtain legal advice relevant to their legal situation" (para. 45). The court in *Dussault* adopted Doherty J.A.'s description of the right to counsel as a "lifeline" through which detained persons obtain legal advice and "the sense that they are not entirely at the mercy of the police while detained" (para. 56). In *R. v. Lafrance,* 2022 SCC 32, the court explained that this purpose must be tied to a broader objective of "mitigat[ing] the power imbalance between a detainee and the state…" (para. 77).

[15] Section 10(b) imposes two broad obligations on the police: (1) informational; and (2) implementational, that is, the obligation to "hold off" questioning until the counsel call has occurred (if the accused is exercising their s. 10(b) *Charter* right).

[16] Mr. Jean-Noel argues that the police breached their implementational duties to him under s. 10(b) by not facilitating his access to a counsel call until more than seven hours after his initial detention. Mr. Jean-Noel does not argue that the police failed to discharge their informational duty: he was informed of his right to counsel immediately upon arrest, following which he indicated he wished to exercise his right and provided the police with the name of his lawyer of choice, Ian Hutchison. He even asked police to get his cell phone and unlock it to bring up Mr. Hutchison's number.

[17] The accused bears the burden of establishing on a balance of probabilities that their *Charter* right was breached. In this case, the Crown has reasonably

conceded, and I agree, that the delay was not justified and amounts to a violation of the Applicant's s. 10(b) rights.

[18] The Supreme Court of Canada in *R. v. Brunelle,* 2024 SCC 3, wrote on the police's duty in a s. 10(b) context:

> 80 Section 10(b) of the *Charter* provides that everyone has the right on arrest or detention "to retain and instruct counsel without delay and to be informed of that right". In *R. v. Bartle*, [1994] 3 S.C.R. 173, Lamer C.J. summarized the three duties that this provision imposes on 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).
>
> (p. 192, citing *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1241-42; *R. v. Evans*, [1991] 1 S.C.R. 869, at p. 890; *R. v. Brydges*, [1990] 1 S.C.R. 190, at pp. 203-4.)
>
> 81 The purpose of these three duties is to protect any person whose detention puts them in a situation of vulnerability relative to the state (*R. v. Suberu* 2009 SCC 33, [2009] 2 S.C.R. 460, at paras. 2 and 40-41). While under the control of the police, the person suffers a deprivation of liberty and is at risk of involuntary self-incrimination (*R. v. Taylor* 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 22, citing *Bartle*, at p. 191).
>
> 82 Although the first duty is triggered immediately upon detention (*Suberu*, at para. 41), the second and third duties arise only if the detainee indicates a desire to exercise their right to counsel. Where this is the case, the police are under a constitutional obligation to facilitate access to counsel at the first reasonably available opportunity and to refrain from eliciting evidence from the detainee until that time (*Manninen*, at pp. 1241-42; *Taylor*, at paras. 24 and 26).
>
> 83 Whether the delay between the time a detainee indicates a desire to exercise their right and the time the detainee exercises it is reasonable is a factual and highly contextual inquiry (*Taylor*, at para. 24). Barriers to access or "exceptional circumstances" that justify briefly suspending the exercise of the right cannot be assumed; they must be proved (para. 33; *R. v. Mian* 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 74; *R. v. Strachan*, [1988] 2 S.C.R. 980, at pp. 998-99). The burden is always on the Crown to prove the circumstances, exceptional or not, that make the delay reasonable (*Taylor*, at para. 24).

> 84 Before applying these principles to the facts, I think it necessary to reiterate that the law does not as yet impose a specific duty on police officers to provide their own telephones to detainees or to have inexpensive devices on hand so that detainees can exercise their right to retain and instruct counsel without delay (*Taylor*, at paras. 27-28).

Implementational obligation: Facilitate access at the first reasonably available opportunity

[19] The Supreme Court of Canada in *R. v. Suberu,* 2009 SCC 33, clarified what "without delay" means with respect to s. 10(b) *Charter* rights:

> [42] **In our view, the words "without delay" mean "immediately" for the purposes of s. 10(*b*).** Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a **duty to facilitate that right immediately upon detention**.
>
> [Emphasis added]

[20] What constitutes the first reasonably available opportunity to consult with counsel depends on the circumstances, it depends on the factual context: *Brunelle,* at para. 83. The court in *Brunelle* noted, at para. 95:

> [95] This Court has already recognized that, as a general rule, the police may not assume in advance that it will be impracticable for them to facilitate access to counsel. On the contrary, **they must be mindful of the particular circumstances of the detention and take proactive steps to turn the right to counsel into access to counsel** (*Taylor*, at para. 33). This is the case because the detainee's ability to exercise their right depends entirely on the police (para. 25).
>
> [Emphasis added]

[21] Phone access is a relevant factor when assessing whether the police could have reasonably facilitated a detainee's access to counsel. If an arrest occurs at a place with a readily available and working phone, then the police must consider whether they can facilitate access to counsel on that phone: *R. v. Fan,* 2017 BCCA 99, at paras. 63-65.

Applicant's position

[22] Mr. Jean-Noel requests that the court find his s. 10(b) *Charter* rights were violated and that the evidence be excluded pursuant to s. 24(2). He argues that the impugned evidence was "causally, temporally, and contextually connected to the s.

10(b) *Charter* violation". He says the *Charter*-infringing state conduct was serious and favours the exclusion of the evidence. He argues that the state misconduct was serious and that the breach was neither trivial nor technical, and that the evidence was "obtained in a manner" that violated his *Charter* rights, regardless of whether the breach was causally linked to the discovery of the evidence.

Crown's position

[23] The Crown concedes that the seven-hour delay from Mr. Jean-Noel's initial arrest until his lawyer call was indeed a breach of his s. 10(b) *Charter* rights. However, it argues that the exclusion analysis under s. 24(2) is not engaged because the breach is not sufficiently connected to the seizure of the incriminating evidence against Mr. Jean-Noel during the execution of the search warrant.

[24] The Crown highlights that the strength of the connection between the breach and the evidence obtained is a question of fact: *R. v. Goldhart,* [1996] 2 SCR 463, at para. 40. It highlights that the breach played no role in obtaining the evidence: the search of Mr. Jean-Noel's residence was conducted by a different group of officers than those that transported him to the police station. It says the connection between the breach and the seizure of evidence is not strong. It also argues that in cases where evidence has been excluded in the absence of a causal connection, there was serious police misconduct, which was not present in this case.

Analysis

Section 24(2): Applying the Grant test

[25] Section 24 of the *Charter* sets out the remedy for *Charter* breaches:

> Enforcement of guaranteed rights and freedoms
>
> **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.
>
> Exclusion of evidence bringing administration of justice into disrepute
>
> **24 (2)** Where, in proceedings under section (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 circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Threshold inquiry: was evidence "obtained in a manner" that infringed or denied a Charter right or freedom

[26] The Supreme Court of Canada in *R. v. Beaver,* 2022 SCC 54, affirmed the threshold requirement to the s. 24(2) *Charter* analysis:

> (2) The "Obtained in a Manner" Threshold Requirement
>
> [94] There are two components to determining whether evidence must be excluded under s. 24(2). The first component — the *threshold requirement* — asks whether the evidence was "obtained in a manner" that infringed or denied a *Charter* right or freedom. If the threshold requirement is met, the second component — the *evaluative component* — asks whether, having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute…
>
> [95] Section 24(2) of the *Charter* is engaged only when the accused first establishes that evidence was "obtained in a manner" that breached the *Charter*. The threshold requirement "insists that there be a nexus" between the *Charter* breach and the evidence, absent which "s. 24(2) has no application" (*R. v. Manchulenko*, 2013 ONCA 543, 116 O.R. (3d) 721, at para. 71, per Watt J.A.). **Determining whether evidence was "obtained in a manner" that infringed the *Charter* involves a case-specific factual inquiry into the existence and sufficiency of the connection between the *Charter* breach and the evidence obtained. There is "no hard and fast rule"** (*Strachan*, at p. 1006; *Tim*, at para. 78).
>
> [96] The general principles governing the application of the threshold requirement were helpfully summarized by Moldaver J. in *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38:
>
> > Whether evidence was "obtained in a manner" that infringed an accused's rights under the *Charter* depends on the nature of the connection between the *Charter* violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. **Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct**. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned evidence will not suffice (*Wittwer*, at para. 21).
>
> [Emphasis added]

[27] The Applicant argues that the evidence was obtained in a manner that violated his *Charter* rights. He relies on *R. v. Pino,* 2016 ONCA 389, where the Ontario Court of Appeal permitted the exclusion of evidence that was seized prior

to the *Charter* violation. The police had seized over 50 marijuana plants from the applicant's car. After doing so and arresting her, the police failed to properly inform her of her right to counsel and failed to implement her right to counsel until 5.5 hours after her arrest. The court found that both *Charter* breaches occurred after the seizure of the plants, but that the seizure of the plants and the *Charter* breaches were part of the same "transaction" of her arrest. Laskin J.A., writing for the Ontario Court of Appeal, provided the following instruction for the court's approach to the threshold inquiry:

> [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 connections;**
> - but the connection cannot be too tenuous or too remote.
>
> [Emphasis added]

[28] The Applicant highlighted the Ontario Court of Appeal's treatment of the causality issue in *R. v. Rover,* 2018 ONCA 745, which it says is highly relevant to the facts in this case:

> [35] While there was no causal connection between the discovery of the drugs and the s. 10(b) breach, there was a close temporal connection. The parties acknowledge that the connection is sufficient to engage s. 24(2) …

[29] The Supreme Court of Canada in *R. v. Mian,* 2014 SCC 54, addressed the same issue:

> [83] The Crown further submits that the breach was not serious because there was a lack of a *causal* connection between the breach and the discovery of the evidence. **However, a *causal* connection or lack thereof is not determinative. This Court has confirmed that a *causal* connection is not necessary in order to engage s. 24(2) of the *Charter***... indeed, the Crown concedes that a *temporal* connection is in theory sufficient to engage s. 24(2)
>
> [Emphasis added]

[30] The Crown argues that s. 24(2) is not engaged in the case at bar because the evidence was not "obtained in a manner" that infringed the applicant's rights or freedoms: namely, that the evidence against Mr. Jean-Noel was seized prior to any alleged violation of his s. 10(b) rights. It says the "police made no attempt prior to the applicant speaking to counsel to elicit information from him. There is, as a result, no **causative** relationship between the Crown evidence gathered in this matter and any potential violation of the applicant's section 10(b) *Charter* rights."

[31] Based on the factors listed in *Pino,* and the Supreme Court of Canada's decision in *Beaver,* I am of the view that the evidence seized under the search warrant was "obtained in a manner" that violated the Applicant's *Charter* rights and freedoms. The Crown argues that the lack of causality between the collection of physical evidence in the execution of the search warrant, and the delay in the applicant exercising his right to counsel, means the threshold inquiry is not met. I disagree. The authorities are clear that causality is not required for the "obtained in a manner" bar to be met, and that the *Charter*-breaching conduct can trigger s. 24(2) if it is part of the same "transaction" of the arrest.

Evaluative inquiry: the application of the three-part *Grant* test

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

> … 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. …

[33] The Court elaborated on the *Grant* analysis in *R. v. Côté*, 2011 SCC 46:

> 47 The first line of inquiry involves an evaluation of the seriousness of the state conduct. The more serious the state conduct constituting the *Charter* breach, the greater the need for courts to distance themselves from that conduct by excluding evidence linked to the conduct. The second line of inquiry deals with the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused. The impact may range from that resulting from a minor

> technical breach to that following a profoundly intrusive violation. The more serious the impact on the accused's constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute. The third line of inquiry is concerned with society's interest in an adjudication on the merits. It asks whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. The reliability of the evidence and its importance to the prosecution's case are key factors. Admitting unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective. The importance of the evidence to the Crown's case is corollary to the inquiry into reliability. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution's case but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to "gut" the prosecution's case.
>
> 48 After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination. There is no "overarching rule" that governs how a court must strike this balance (*Grant*, at para. 86). Rather, "[t]he evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute" (*Harrison*, at para. 36). No one consideration should be permitted to consistently trump other considerations. For instance, as this Court explained in *Harrison*, the seriousness of the offence and the reliability of the evidence should not be permitted to "overwhelm" the s. 24(2) analysis because this "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'" (para. 40, citing 2008 ONCA 85, 89 O.R. (3d) 161 (Ont. C.A.), at para. 150, *per* Cronk J.A., dissenting). In all cases, courts must assess the long-term repute of the administration of justice.

Seriousness of the Charter-infringing state conduct

[34] The Supreme Court of Canada in *R. v. Harrison,* 2009 SCC 34, wrote on the first stage of the *Grant* inquiry:

> [22] At this stage the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant. **On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern**.

[Emphasis added]

[35] The Supreme Court of Canada more recently in *Beaver* applied the first stage:

> [120] The first line of inquiry under s. 24(2) considers whether the *Charter*-infringing state conduct is so serious that the court needs to dissociate itself from it. This inquiry requires the court to situate the *Charter*-infringing conduct on a scale of culpability. At one end of the scale is conduct that constitutes a wilful or reckless disregard of *Charter* rights, a systemic pattern of *Charter*-infringing conduct, or a major departure from *Charter* standards. At the other end of the scale are less serious *Charter* breaches, including breaches that are inadvertent, technical, or minor or those that reflect an understandable mistake. The more severe the state's *Charter*-infringing conduct, the greater the need for courts to disassociate themselves from it (see *Grant*, at paras. 72-74; *Le*, at para. 143; *Harrison*, at para. 22; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 47; *Tim*, at para. 82; *Lafrance*, at para. 93).

[36] The Applicant argues that the *Charter*-infringing conduct of the police was serious and that it favours exclusion of the evidence. He relies on a decision from this court, *R. v. Finbow,* 2017 NSSC 291, in which the court found that the police violated the accused's right to counsel by failing to provide access to counsel in private, and by delaying the implementation for one hour and 20 minutes. Duncan J. (as he then was) excluded the evidence (the accused's statement to the police) and held that a failure to do so is serious: "the police are expected to know their obligations under the *Charter* and to fulfill them. In this case that included the duty to ensure that the accused had immediate access to counsel…" (para. 137).

[37] *Charter*-infringing conduct has been found by courts to be less serious where the area of law is unsettled, for example, "where the police act on a mistaken understanding of the law where the law is unsettled, their *Charter*-infringing conduct is considered to be less serious" (*R. v. Saeed,* 2016 SCC 24, at para. 126). This cannot be said to be the state of the law on s. 10(b) of the *Charter.* The Ontario Court of Appeal in *R. v. Thompson,* 2020 ONCA 264, cited its own earlier decision stating that "the law around s. 10(b) is clear and long settled. It is not difficult for the police to understand their obligations and carry them out" (para. 90). The applicant also relied on *R. v. Peterson,* 2017 SCC 15, regarding the breaching officers' lack of overt bad faith:

> [44] …while "'[g]ood faith' on the part of the police will…reduce the need for the court to disassociate itself from the police conduct"…good faith errors must be *reasonable*...This court has cautioned that negligence in meeting *Charter*

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

[38] In my view, this passage is particularly relevant to Mr. Jean-Noel's case because the Crown is arguing the police conduct is not serious because of the absence of bad faith. However, I am not persuaded that the good faith error on behalf of the police was "reasonable".

[39] The Applicant also provided in supplemental written submissions the two cases of *R. v. Rover,* 2018 ONCA 745, and *R. v. Samuels,* 2024 ONCA 786. In *Rover,* the accused was arrested, and the police obtained a search warrant for his residence. He was informed of his right to counsel but was not allowed to exercise it for six hours. The police caused the delay because they did not want the accused to be able to contact anyone before they obtained a warrant and executed the search. The court noted that the state misconduct was very serious because it involved a "police practice that routinely held detained individuals *incommunicado* while the police go about obtaining and executing a search warrant…" (para. 42). The court found that over time, this kind of practice would bring the administration of justice into disrepute. The Court of Appeal wrote on the relationship between the negative impact on the accused's *Charter* right and the lack of casual connection:

> [47] I would hold that the s. 10(b) breach had a significant negative impact on the appellant's *Charter*-protected rights. While that impact was certainly not as serious as it would have been had there been a causal connection between the breach and the obtaining of the evidence, it was nonetheless significant.

[40] In *Samuels,* the accused was arrested and not permitted to speak with his lawyer for approximately nine hours. The court found that the accused's s. 10(b) rights were violated and held:

> [5] …even if the Thunder Bay police do not commonly commit similar s. 10(b) violations, the breach of the appellant's rights cannot be characterized as merely "an isolated act of a single misguided police officer"…Rather, it was a predictable outcome of a deliberately chosen operational plan, approved by senior officers, that treated the appellant's s. 10(b) *Charter* rights as unimportant.

[41] Both *Samuel* and *Rover* are persuasive when considering Mr. Jean-Noel's case.

[42] The Crown argues that the breach was not serious and falls on the "technical" end of the scale as described in *Beaver*: it says the police were not abusive, there was no bad faith, and it was not egregious. It says there was no causal connection between the breach and the evidence obtained. It says the applicant was provided with his informational rights upon arrest and he was not interrogated prior to speaking with counsel.

[43] The Crown relies on *R. v. Arsenault,* 2024 NSCA 10, which discusses the seriousness of a *Charter* breach that is "technical" in nature: "a merely technical breach goes to the issue of seriousness of the *Charter*-infringing state conduct and is much less likely to pull toward the exclusion of the evidence" (para. 42).

[44] *Arsenault* is factually distinguishable from the case at bar. In *Arsenault,* the applicant argued that his s. 10(b) *Charter* rights were breached. He was arrested initially at 3:43 a.m. for impaired operation of a motor vehicle and refusing to provide a breath sample. He was informed of these charges and advised of his right to consult counsel. He was transported to police headquarters and spoke with duty counsel. The police subsequently found what appeared to be a handgun in the glove box when conducting a standard protocol inventory search of the vehicle at 5:25 a.m. The applicant was not advised of his change in jeopardy (resulting from the handgun being seized) until 8:52 a.m. when his lawyer called the police. The trial judge found that the delay of two hours and 27 minutes before the applicant was given the opportunity to consult with legal counsel was reasonable. The Nova Scotia Court of Appeal upheld Justice Norton's decision that the applicant's s. 10(b) *Charter* rights were not violated, and the police's failure to inform the applicant immediately about his change in jeopardy was a technical, and not a serious, breach of his *Charter* rights.

[45] In my view, the facts in the case at bar are not analogous to *Arsenault.* In that case, the accused had been arrested, provided his right to counsel on the initial charges, spoke with duty counsel, and his counsel of choice contacted the police regarding release, all in the time frame that Mr. Jean-Noel was waiting to have his initial counsel call.

[46] I also note that the police holding off from questioning the applicant is a bare minimum obligation of the police and does not, in my view, make the police's extreme delay in facilitating the applicant's counsel call less serious.

Impact on the Charter-protected interests of the accused

[47] The Applicant submits the police's conduct had a negative impact on his *Charter*-protected rights. The Applicant highlights the section of *Rover* that deals directly with this prong of the *Grant* test with respect to the s. 10(b) breach. Doherty J.A. wrote, for the Ontario Court of Appeal:

> [43] The trial judge described the negative impact of the breach on the appellant's right to access counsel as "moderate". That description was based largely on his finding that the delay of about one hour and 20 minutes in allowing the appellant to access counsel had no causal connection to the obtaining of the evidence discovered in the search of the appellant's residence, and that the police had refrained from questioning the appellant during that time. The trial judge was correct in considering the absence of any causal connection between the s. 10(*b*) breach and the obtaining of the evidence as a factor mitigating the impact of the breach on the appellant's *Charter*-protected interests: *Grant*, at para. 122.
>
> [44] For the reasons set out above, I calculate the unconstitutional delay in allowing the appellant to speak to his lawyer at almost six hours (10:41 p.m. to 4:20 a.m.). A delay of that length, even when the police do not attempt to question the arrested person, has a significant impact on the arrested person's rights.
>
> [45] The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.
>
> [46] In this case, instead of providing the appellant with the lifeline to counsel when he requested it, the police put him in the cells. The appellant was held for several hours without any explanation for the police refusal of access to counsel, and without any indication of when he might be allowed to speak to someone. His right to security of the person was clearly compromised. The significant psychological pressure brought to bear on the appellant by holding him without explanation and access to counsel for hours must be considered in evaluating the harm done to his *Charter*-protected interests.
>
> [47] Having regard to the security of the person interest protected by s. 10(*b*), and the risk posed by the police practice to the maintaining of the appellant's right against self-incrimination, I would hold that the s. 10(*b*) breach had a significant negative impact on the appellant's *Charter*-protected rights. **While that impact was certainly not as serious as it would have been had there been a causal connection between the breach and the obtaining of the evidence, it was nonetheless significant**.
>
> [48] The final consideration identified in *Grant*, the impact of excluding the evidence on society's interest in a trial on the merits, clearly favours admitting this

> evidence. The evidence of the seized drugs is reliable and crucial to the prosecution of serious crimes. To exclude the evidence is to allow a guilty person to go free.
>
> **[49] In my view, however, this is one of those cases in which the long-term repute of the administration of justice requires the sacrifice of the short-term benefit of an adjudication on the merits of this case. The seriousness of the police misconduct points very strongly toward exclusion. The negative impact of the breach on the appellant's constitutionally protected rights also points, although less strongly, to exclusion. The two together make a strong case for exclusion. Society's interests in an adjudication on the merits does not tip the balance in favour of admissibility: *McGuffie*, at paras. 61-64. I would exclude the evidence.**
>
> [Emphasis added]

[48] *R. v. Moyles,* 2019 SKCA 72, discussed the second prong of the *Grant* test in a s. 10(b) *Charter* application:

> [81] The s. 10(b) right is not the right to counsel. It is the right to counsel without delay. Time matters. That is so regardless of whether the accused is treated "respectfully" and whether any evidence is elicited before the right to counsel is implemented. In my view, this breach had a serious impact on the interests protected by s. 10(b).

[49] The Applicant in its brief argued:

> [56] In this case, Mr. Jean-Noel would submit it is irrelevant whether or not any evidence was elicited from [sic] while in the custody of police, the seriousness of the impact on Mr. Jean-Noel's rights was none the less serious. Mr. Jean-Noel was arrested at his home, he was handcuffed, and detained for 7 hours without a lifeline to the outside world. The delay was significant. Mr. Jean-Noel did not have a chance to exercise his rights, nor have someone assist him in navigating this undoubtedly stressful time.
>
> [57] The serious nature of the impact upon Mr. Jean-Noel's rights favours exclusion of the impugned evidence.

[50] The Crown submits that the arrest was conducted in a respectful manner and Mr. Jean-Noel was immediately provided with his rights and caution. The Crown submits that the lack of causal connection between the s. 10(b) breach and the seizure of the evidence can be considered at this stage and that it weighs in favour of admission. It cites *Mian* at para. 87 and *Grant* at para. 122. In my view, neither passage explicitly says that the lack of causality weighs in favour of admission, but they acknowledge that it is appropriate to consider causal connection at this stage of the *Grant* test.

[51] However, when considering the authorities I agree with the Applicant's position and find that there was a serious impact on Mr. Jean-Noel's *Charter* rights.

Society's interest in the adjudication on the merits

[52] The final *Grant* inquiry is whether society's interest in the trial on its merits will favour the admission of the evidence. The Supreme Court of Canada in *Grant* commented on society's interest in admitting the evidence if it is physical:

> [126] The third inquiry is determining whether admission of the derivative evidence would bring the administration into disrepute relates to society's interest in having the case adjudicated on its merits. Since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence. **Thus, the public interest in having a trial adjudicated on its merits will usually favour admission of derivative evidence.**
>
> [Emphasis added]

[53] Both the Crown and Mr. Jean-Noel acknowledge that the evidence against him is physical in nature and that it is reliable (i.e., as opposed to a statement). The Applicant acknowledges that the charges before the court are serious and that if the evidence is excluded, then the Crown will not have evidence to proceed. However, he says the state should not benefit from the police cutting corners during their investigation. He says there was a total disregard for straightforward *Charter* protections in this case and that society's interests are better served by excluding the evidence.

[54] At this stage of the *Grant* inquiry, the court considers factors such as the reliability of the evidence and its importance to the Crown's case (*Harrison* at para. 33). The Supreme Court of Canada in *Harrison* also noted:

> [34] The evidence of the drugs obtained as a consequence of the *Charter* breaches was highly reliable. It was critical evidence, virtually conclusive of guilt on the offence charged. The evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial. While the charged offence is serious, this factor must not take on disproportionate significance. **As noted in *Grant*, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high**. With that caveat in mind, the third line of inquiry under the s. 24(2) analysis favours the admission of the evidence as to do so would promote the public's interest in having the case adjudicated on its merits.

[Emphasis added]

[55] This last factor comes before the balancing exercise of all three factors in the *Grant* analysis but also requires a balancing exercise of its own, as seen in *Côté*, at paras. 47 and 53:

> 47 … It asks whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. The reliability of the evidence and its importance to the prosecution's case are key factors. Admitting unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective. The importance of the evidence to the Crown's case is corollary to the inquiry into reliability. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution's case but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to "gut" the prosecution's case.
>
> …
>
> 53 … Under this branch, relevant, reliable evidence that is crucial to the prosecution's case will often point towards admission, though these considerations will have to be balanced against other relevant factors. …

[56] The Crown says that the drugs and cash seized are reliable evidence, and they are essential to the determination on the merits (*Grant* at para. 139). It says that the "suppression of reliable and essential evidence is contrary to society's interest in seeking the truth and having criminal allegations adjudicated on the merits."

[57] In my view, the third factor of the *Grant* analysis favours the admission of the evidence.

Balancing the factors

[58] The final stage involves balancing the *Grant* factors. The Supreme Court of Canada in *Harrison* wrote:

> [36] The **balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision.** It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the

> administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. **In all cases, it is the long-term repute of the administration of justice that must be assessed**.
>
> [Emphasis added]

[59] Duncan J. (as he then was) in *R. v. Finbow,* 2017 NSSC 291, wrote the following on the final balancing stage of the *Grant* analysis:

> [190] The question to be answered is whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that conduct.

[60] The Applicant argues that the final balancing exercise favours the exclusion of all the evidence due to the seriousness of the *Charter*-infringing state conduct and the impact on his *Charter*-protected interests.

[61] The Crown argues that the long-term administration of justice would be damaged by excluding the evidence in this case. It says *Grant* stands for the proposition that reliable evidence that is necessary to support a conviction will not be excluded pursuant to s. 24(2) where the evidence does not show that the police deliberately, wilfully, or flagrantly violated the applicants' *Charter* rights. It relies on the Supreme Court of Canada in *Grant:*

> [127] The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision**. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2).** On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.
>
> [Emphasis added]

Conclusion

[62] Mr. Jean-Noel's s. 10(b) *Charter* rights were breached. The question is whether the evidence against him should be excluded pursuant to s. 24(2). There was no evidence that the police officers wilfully set out to violate Mr. Jean-Noel's

Charter rights on the day of his arrest. The police informed him of his *Charter* rights and cautioned him shortly after his arrest, as they were required to do, and obtained Mr. Hutchison's phone number. They complied with the informational component required of them pursuant to s. 10(b).

[63] The police did not provide him with his counsel call before they arrived at the HRP Headquarters. The police did not provide him with their personal or work phone to complete his call, nor are they required to do so. The officer that was assigned to ensure he got his counsel call, Cst. Maye, did not remain at HRP Headquarters until Mr. Jean-Noel received a counsel call. Cst. Maye passed on Mr. Hutchison's phone number to the booking officer. The officer advised that once the room was free, Mr. Jean-Noel would be provided access to the secure room. Cst. Maye left to continue with his workday. He did not follow-up with the booking officer later in the day to ensure Mr. Jean-Noel had received his counsel call. Cst. Maye testified that he was not familiar with the HRP Headquarters on Gottingen Street and did not know at the time that there were other rooms, called "cubes", where calls could be made to facilitate the counsel call if the phones downstairs were occupied.

[64] After considering the various authorities and balancing all the factors in the *Grant* analysis, in my view, the evidence should be excluded. I note that the police conduct was not on the extreme end of the spectrum of flagrant or abusive breaches. There was no evidence of outward malice or bad faith with respect to the police conduct in this case. The seriousness of the *Charter* breach and the impact on his *Charter* rights (*Grant* steps one and two) favour exclusion of the evidence. The law is clear; one's section 10(b) *Charter* right to instruct counsel is to occur without delay. The time component is essential to this right. To say that there was truly little urgency on the part of both the arresting officers and booking officers for Mr. Jean-Noel to implement his constitutional right would be an understatement.

[65] The law on s. 10(b) rights is well-settled and there should be little confusion from the officers on what their role is in ensuring this. The absence of explicit "bad faith" does not excuse police conduct that violates *Charter* rights when they are obliged to know their obligations in upholding them. There is not enough evidence before me to find this is a systemic problem with the HRP, but if the approach taken in Mr. Jean-Noel's case is their standard approach, it risks breaching more individuals' s. 10(b) rights, and consequently not having serious crimes be tried on their merits.

[66] I do note that the search warrant was obtained the day before the arrest of Mr. Jean-Noel, and that there was a plan in place to arrest and investigate him, with officers assigned specific roles, including one officer, Cst. Maye, tasked with ensuring Mr. Jean-Noel received his s. 10(b) right. It cannot be said to be a spontaneous or dynamic arrest – the operation was planned and went according to plan. A seven-hour delay before being able to instruct counsel is bad enough for a spontaneous or dynamic arrest, but in this case, it is even worse. This was a planned investigation where the police specifically identified an individual who was tasked with ensuring that Mr. Jean-Noel exercised his section 10(b) *Charter* right. For approximately seven hours the police failed at completing this task.

[67] The third *Grant* factor, society's interest in the adjudication on the merits, favours the admission of the evidence. If the *Charter* application fails, there is the potential that Mr. Jean-Noel would be convicted on the drug charges and possibly receive a penitentiary sentence. Mr. Jean-Noel faces serious charges, and a significant amount of cocaine was seized pursuant to the warrant.

[68] In the final balance, exclusion of the evidence is justified based on the courts need to distance themselves from serious *Charter* infringing conduct. The lack of causal connection between the breach and the evidence gathered is not determinative of this issue, contrary to the Crown's suggestion. There is a sufficient connection between the breach and the evidence obtained in the transaction of Mr. Jean-Noel's arrest that the evidence was obtained in a manner that breached his rights. Despite the lack of evidence of bad faith on the part of the officers, the seven-hour delay is nonetheless unacceptable. If this magnitude of a breach is condoned by the courts, it could erode confidence in the administration of justice over time. To reiterate and use the words of Justice Duncan in *Finbow*, I believe that admitting this evidence would:

> [190] …bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that conduct.

[69] The Supreme Court of Canada in *Harrison* instructs that it is the long-term repute of the administration of justice which must be assessed in each case, and that the balancing is not capable of mathematical precision (para. 127). In my view, the breach in Mr. Jean-Noel's case constitutes conduct that the court should wish to distance itself from (*Harrison* at para. 22). Taking into account all the caselaw presented by both parties and the general law on s. 10(b) and s. 24(2), I

find that the first factor, the seriousness of the *Charter*-infringing state conduct, favours exclusion of the evidence; the second factor, impact on the *Charter*-protected interests of the accused, favours exclusion of the evidence; and, the third factor, society's interest in the adjudication on the merits, favours inclusion of the evidence. Finally, in my view, the balancing favours the exclusion of the evidence. Section 10(b) rights ensure that accused individuals are provided with a "lifeline" during their detention in order to mitigate the power imbalance between the state and the individual. The police should have known their obligations and failed to uphold them during Mr. Jean-Noel's detention, contrary to his rights. The police conduct is serious, unreasonable, and not justified.

[70] Despite the police conduct not being egregious or malicious or explicitly in bad faith, it was still a serious breach, and the length of delay was unreasonable and unjustifiable. The constitutional right enshrined by s. 10(b) is the right to counsel without delay, and the police in this case did not uphold their obligations. The lack of "causal" link between the evidence seized and the breach of Mr. Jean-Noel's rights is not determinative because the evidence was still "obtained in a manner" that breached his rights, in the transaction that was his arrest and subsequent detention.

[71] I find that Mr. Jean-Noel's s. 10(b) *Charter* rights were breached, and his application is granted. All the evidence obtained because of this breach is excluded pursuant to section 24(2) of the *Charter*.

[72] The charges against Mr. Noel are dismissed.

Bodurtha, J.