

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Pick*, 2026 NSSC 17

Date: 20260116

Docket: Ken No. 544017

Registry: Kentville

Between:

His Majesty the King

v.

Arthur Malcolm Pick

Decision: Application under Section 10(a) and (b) of the *Charter*

Judge: The Honourable Justice Gail L. Gatchalian

Heard: November 7, 2025, in Kentville, Nova Scotia

Oral Decision: January 16, 2026

Counsel: Michael Taylor, for the Crown

David Hirtle, K.C., for the Defence

By the Court (orally):

Introduction

[1] Arthur Pick is charged by Indictment with possession of cocaine for the purpose of trafficking, contrary to s.5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c.19 and possession of a prohibited weapon (a butterfly knife) without being the holder of a license to possess it, contrary to s.91(2) of the *Criminal Code*.

[2] Mr. Pick was also charged with two firearms offences: careless storage of a firearm (three rifles), contrary to s.86(1) of the *Criminal Code* and possession of a firearm (12 rifles and shotguns) without being the holder of a license under which he may possess them, contrary to s.91(1) of the *Criminal Code*. The Crown chose not to proceed with those charges. They were dismissed for want of prosecution.

[3] During a search of Mr. Pick's residence pursuant to a *Controlled Drugs and Substances Act* warrant, the police seized 14.6 grams of cocaine, as well as numerous items containing cocaine residue, scales and packaging. Pursuant to a search of Mr. Pick's person incident to arrest, the police seized the butterfly knife and \$250 Cdn in cash from Mr. Pick's person, and pursuant to a search of the truck

incident to the arrest, the police seized \$55 from Mr. Pick's wallet, his cell phone and \$4,175 Cdn in the back seat.

[4] Mr. Pick applies under s.24(2) of the *Charter* to exclude the evidence seized pursuant to the search of his person, the vehicle and the residence. Mr. Pick does not challenge the validity of the searches. The basis for the application is an alleged breach of Mr. Pick's right to retain and instruct counsel without delay under s.10(b) of the *Charter*, a breach that is conceded by the Crown. Mr. Pick arrived at the residence ten minutes after the police began to execute the search warrant. He was placed under arrest for possession of cocaine for the purpose of trafficking. Mr. Pick was informed of his right to retain and instruct counsel without delay. Mr. Pick stated that he wanted to call a lawyer. Once at the police detachment, a police officer called Legal Aid, and when there was no answer, the officer left a voice mail message requesting a call back. That police officer went back to the residence to assist with the search. Mr. Pick was placed in a cell and remained there for approximately three hours until another police officer realized that he had not yet spoken to a lawyer. At that point, Mr. Pick chose not to speak to a lawyer, and he was released. The police did not attempt to question him.

[5] In addition to alleging a breach of Mr. Pick's right under s.10(b) to retain and instruct counsel without delay, the defence alleges two further *Charter*

breaches: (1) a breach of s.10(a) for failing to advise Mr. Pick of a change in jeopardy when the police seized 12 rifles and shotguns from the residence, and (2) a breach of s.10(b) for failing to provide Mr. Pick with the “*Prosper* warning” when he later opted not to speak to legal counsel.

Issues

[6] The issues for me to resolve are:

1. Whether the police breached Mr. Pick’s rights under s.10(a) and (b) of the Charter by failing to advise him of a change in his jeopardy and by failing to provide him with the *Prosper* warning.

The Crown’s position is that there was no change in jeopardy because Mr. Pick was already charged with possession of cocaine for the purpose of trafficking, which was a more serious charge than the firearms charges, and that there was no need for a *Prosper* warning because the police did not attempt to question Mr. Pick.

2. Whether the impugned evidence was “obtained in a manner” that infringed the Charter, within the meaning of s.24(2) of the Charter.

The Crown's position is that the evidence was not obtained in a manner that infringed the Charter because it says that there was no causal connection between the Charter breach or breaches and the evidence, which would have been discovered even if the breaches had not occurred.

3. If the evidence was obtained in a manner that infringed the Charter, whether the evidence should be excluded.

The Crown opposes exclusion of the evidence, relying heavily on the lack of a causal connection between the breach or breaches and the evidence, and the lack of deliberate conduct on the part of the police or any evidence of a systemic problem or practice on the part of the police.

Agreed Statement of Facts

[7] At the hearing of the *Charter* Application, the Crown and Defence entered into evidence an Agreed Statement of Facts signed by Crown counsel, Defence counsel and Mr. Pick. No witnesses were called.

[8] The Agreed Statement of Facts provides as follows:

1. On November 22, 2022, at 21:30, Cst. Josee Lagace, Cst. Jason Sehl and Cst. Andrew Waters executed a CDSA warrant at 1832 Deep Hollow Road in White Rock, Kings County, Nova Scotia, which was the place where Arthur Pick lived with his father Larry Pick. At the time of the execution of the search warrant, the only person at home was Larry Pick.

Police commenced the execution of the warrant. Some 10 minutes later, at 21:40, Arthur Pick arrived at the residence driving his father's pick up truck. Cst. Jason Sehl left the search of the house and went down to the end of the driveway where the truck was with Arthur Pick.

2. Cst. Sehl placed Arthur Pick under arrest for Possession for the Purpose of Trafficking. He read Arthur Pick his Charter Rights and Police Warning. Mr. Pick indicated that he wished to speak with counsel.
3. After this, Cst. Sehl was in the company of Arthur Pick for 10-15 minutes prior to him being transported to the detachment, during which time he was having a conversation with Arthur Pick about what was going to take place, whether or not he would be released and general chit chat as they were familiar with each other from Arthur Pick's previous employment doing security at several local businesses.
4. Arthur Pick was transported back to the detachment by Cst. Andrew Waters who did not read Arthur Pick the secondary warning or anything else from his cards. Cst. Jason Blanchard was also present in the patrol vehicle during this transport.
5. After arriving at the detachment, a call was placed to Legal Aid. There was no answer and Cst. Waters left a voicemail requesting a call back. Arthur Pick was then placed in a cell and Cst. Waters returned to the residence to assist in the search.
6. Cst. Waters did not specifically request that any of the officers at the detachment facilitate a call to Legal Aid for Arthur Pick, as they were present when he called and left the message for Legal Aid.
7. Cst. Josee Lagace who had been one of the officers searching the house, left the house at 00:24 and returned to the detachment. At 00:55 when she learned that Arthur Pick had not talked to a lawyer, she and Cst. Waters went to speak to Arthur Pick in the cell and ask if he wished to speak to a lawyer, at which time Arthur Pick indicated that he did not.
8. Cst. Lagace did not tell Arthur Pick that his jeopardy had changed as a result of the search of the residence and she did not re-arrest Arthur Pick or give him the [P]rosper warning. Cst. Lagace was present when Cst. Sehl released Arthur Pick and provided him with his release documents.
9. As a result of the search of the residence, vehicle and his person, as set out above, the items set out on the attached Exhibit Flow Sheet were seized. The items seized from the vehicle were seized incident to arrest.

10. ... [N]ine of the items or samples of seized items were sent to Health Canada for testing and eight tested positive for cocaine. The items which tested positive for cocaine were a Kent PRO card with residue (PE003), a Triton black digital scale (PE005), a measuring cup with white powder residue (PE006), white powder residue found on the top of the dresser in the upstairs bedroom (PE009), a sample of the 14.6 grams of white powder found in the upstairs bedroom (PE011), an Infyniti mini scale (PE014), a ziplock bag with residue (PE017) and a spoon with residue (PE020).

[9] The Agreed Statement of Facts does not say when Mr. Pick arrived at the detachment. However, the Crown states as follows in its brief:

9. It appears from the anticipated facts that the first reasonable opportunity for the applicant to speak to counsel would have been no later than approximately 10:00 pm, when he was booked in cells. It is expected that the evidence will show *some* explanation for the delay from arrest to booking. This still leaves a delay of approximately 3 hours until the applicant first spoke to counsel.

[10] The Crown and Defence agree that Mr. Pick arrived at the detachment at approximately 10:00 p.m. on the evening in question.

[11] A copy of the Exhibit Flow Sheet is attached to this decision. The Exhibit Flow Sheet includes the time at which the items were seized.

[12] Pursuant to the search of Mr. Pick incident to his arrest, the police seized cash (\$250 Cdn) and the butterfly knife. The entries on the Exhibit Flow Sheet indicate that the cash was seized at 23:14 and that the butterfly knife was seized at 23:17. These entries are not accurate, given that Mr. Pick was arrested shortly after he arrived at the residence at 21:40, and he was on his way to the detachment before 22:00.

[13] The police seized numerous items from the residence between 22:19 and 23:48. In addition to the items described in paragraph 11 of the Agreed Statement of Facts, the police seized the 12 rifles and shotguns at the residence. The rifles and shotguns were seized between 23:25 and 23:37.

[14] The following items were seized from the truck: Mr. Pick's wallet, containing \$55 Cdn (seized at 23:15), a cell phone (seized at 23:20), and \$4,175 Cdn in the back seat (no time entry).

The Rights Under Sections 10(a) and (b)

[15] Under s.10 of the *Charter*, everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore and (b) to retain and instruct counsel without delay and to be informed of that right.

[16] The duties imposed on police by s.10(b) have been well-established by the Supreme Court of Canada. In *R. v. Brunelle*, 2024 SCC 3, the Court stated as follows at paras.80-84:

[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 CanLII 64 (SCC), [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 CanLII 67 (SCC), [1987] 1 S.C.R. 1233, at pp. 1241-42; *R. v. Evans*, 1991 CanLII 98 (SCC), [1991] 1 S.C.R. 869, at p. 890; *R. v. Brydges*, 1990 CanLII 123 (SCC), [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 CanLII 25 (SCC), [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).

[emphasis added]

The Right to Retain and Instruct Counsel Without Delay

[17] The duty to facilitate access to a lawyer arises immediately upon the detainee's request to speak to counsel. The police are therefore under a constitutional duty to facilitate the requested access to a lawyer at the first reasonably available opportunity: *R. v. Taylor*, 2014 SCC 50 at paras.24-25.

[18] The Crown concedes that the delay of approximately three hours until Mr. Pick was re-offered the opportunity to speak to counsel is not justified and amounts to a violation of Mr. Pick's s.10(b) right to retain and instruct counsel without delay. I accept that concession. It was not reasonable for Cst. Waters to have made one failed attempt to call Legal Aid and for the police to have left Mr. Pick in a cell for approximately three hours without having taken further immediate and active steps to facilitate Mr. Pick's right to counsel. The delay in this case is unacceptable.

Change in Jeopardy and *Prosper* Warning

[19] A change in jeopardy may require the police to advise a suspect of his right to counsel. As stated by the Supreme Court of Canada in *R. v. Sinclair*, 2010 SCC 35:

[48] The general idea that underlies the cases where the Court has upheld a second right to consult with counsel is that changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether

to cooperate with the police investigation or not. The concern is that in the new or newly revealed circumstances, the initial advice may no longer be adequate.

[20] As stated by McLachlin J. as she then was in *R. v. Evans*, 1991 CanLII 98

(SCC):

48 I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. ***I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning.***

[emphasis added]

[21] In this case, Mr. Pick's circumstances changed significantly upon the police locating and seizing the rifles and shotguns at the residence, which became the subject of additional, distinct and serious charges (which Mr. Pick no longer faces). The seizure of multiple rifles and shotguns increased Mr. Pick's jeopardy because of the potential increase to his sentence should he be convicted of both the s.5(2) CDSA charge and the gun charges. The seizure of the rifles and shotguns was relevant to Mr. Pick's decision whether to consult with counsel when offered that right again by Cst. Lagace at 00:55.

[22] The police should have informed Mr. Pick of his change in jeopardy when the police returned to the detachment that evening, and they breached Mr. Pick's

s.10(b) right when they failed to do so: see *R. v. Arsenault*, 2024 NSCA 10 at para.38.

[23] When a detainee initially asserts a desire to exercise the right to retain and instruct counsel, but then has a change of mind, the police must “advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee”: *R. v. Prosper*, [1994] 3 SCR 236 at para.51. In this case, the police violated Mr. Pick’s right under s.10(b) by failing to give him the *Prosper* warning when he told Cst. Lagace that he no longer wished to speak to counsel.

[24] Although the police did not attempt to question Mr. Pick or obtain physical evidence from him and although he did not inadvertently inculcate himself before being released, these risks existed: see *Arsenault* at para.40. As the Supreme Court of Canada stated in *Taylor*:

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

Section 24(2): Obtained in a Manner?

[25] Under s.24(2) of the *Charter*, where a court concludes that evidence was obtained in a manner that infringed the *Charter*, the evidence must be excluded if it

is established that the admission of it in the proceedings would bring the administration of justice into disrepute.

[26] The threshold question is whether the evidence was “obtained in a manner” that violated the *Charter*.

[27] The courts take a “purposive and generous approach” to whether evidence was “obtained in a manner” that breached an accused’s *Charter* rights: *R. v. Tim*, 2022 SCC 12 at para.78. The “entire chain of events” involving the *Charter* breach and the impugned evidence should be examined...”: *Tim* at para.78. Evidence “will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct”: *Tim* at para.78. The connection between the *Charter* breach and the impugned evidence can be “temporal, contextual, causal or a combination of the three”: *Tim* at para.78. A causal connection is not required: *Tim* at para.78. A “remote or tenuous” connection between the *Charter* breach and the impugned evidence will not suffice to trigger s.24(2): *Tim* at para.78.

[28] In appropriate cases, the court may take into account *Charter* breaches that occurred after the discovery of the evidence: see *R. v. Pino*, 2016 ONCA 389 at paras.48 and 50-58.

[29] The Defence concedes that there is no causal connection between the *Charter* breaches in this case and the impugned evidence. However, the Defence asserts a temporal and contextual connection. The Crown disagrees.

[30] Taking a generous and purposive approach, and having regard to the entire chain of events, I find that there is both a temporal and a contextual connection between the evidence seized by the police during the search of Mr. Pick's person, the truck and the residence and the *Charter* breaches.

Temporal Connection Between Breach of Right to Retain and Instruct Counsel and Items Seized from Mr. Pick's Person

[31] When arrested at approximately 21:40, Mr. Pick was subjected to a search incident to his arrest, and he stated that he wished to speak to a lawyer. Within approximately 10 to 15 minutes, he was transported to the detachment, where there was one failed attempt to contact Legal Aid. The police were required to take further immediate active steps to facilitate his contact with a lawyer. The items were seized from Mr. Pick's person approximately 20 minutes before this breach of his s.10(b) *Charter* right. There is a close temporal link between the *Charter* breach and the evidence seized from Mr. Pick.

Temporal Connection Between Breach of Right to Retain and Instruct Counsel and Items Seized from Truck

[32] The police took Mr. Pick from the residence at approximately 21:50 or 21:55, leaving the truck there. According to the Exhibit Flow Sheet, the police seized items from the truck at 23:15 and 23:20. Mr. Pick had been sitting in a locked cell for over one hour at that point, during which time the police failed to facilitate his contact with legal counsel in breach of s.10(b) of the *Charter*. There is a close temporal link between the *Charter* breach and the evidence seized from the truck.

Temporal Connection Between Breach of Right to Retain and Instruct Counsel and Items Seized from Residence

[33] The police had only arrived at the residence approximately ten minutes before Mr. Pick arrived on scene. The police had commenced their search, but, according to the Exhibit Flow Sheet, they only started seizing items at 22:19, after Mr. Pick was taken to the detachment, after the one failed attempt to contact Legal Aid, and after the police failed to take immediate active steps to facilitate his contact with a lawyer. The seizure of evidence from the residence continued until 23:48, all the while Mr. Pick was sitting in a locked cell without access to legal advice. There is a close temporal connection between the *Charter* breach and the evidence seized from the residence.

Temporal Connection Between Failure to Inform Mr. Pick of Change in Jeopardy and Failure to Provide Prosper Warning and Evidence

[34] There is a close temporal connection between the failure of the police to inform Mr. Pick of the change in his jeopardy and the failure to provide him with the *Prosper* warning and the evidence. The seizure of items continued up until 23:48. Cst. Lagace returned to the detachment at 00:24. She spoke to Mr. Pick at approximately 00:55. The entire chain of events, from the commencement of the execution of the search to Mr. Pick's release, lasted approximately 3.5 hours.

Contextual Connection Between Charter Breaches and Evidence

[35] The three *Charter* breaches are also contextually linked to the evidence. The breaches and the discovery of the impugned evidence are part of the same transaction or course of conduct: see *Pino* at paras.54-55. The police commenced the execution of the search warrant at 21:30 on November 22, 2022, at the residence where Mr. Pick lived with his father. Some 10 minutes later, Mr. Pick arrived at the residence. He was placed under arrest shortly thereafter by Cst. Sehl, who had been participating in the execution of the search warrant. Mr. Pick was in the presence of Cst. Sehl for 10-15 minutes before he was transported to the detachment. Cst. Waters, who had been participating in the execution of the search warrant, transported Mr. Pick to the detachment. Cst. Waters left a voicemail for Legal Aid to call back. Cst. Waters returned to the residence to assist with the search. Cst. Lagace, who had also been participating in the search of the residence,

returned to the detachment and upon learning that Mr. Pick had not talked to a lawyer, spoke to Mr. Pick at approximately 00:55, asking him whether he wished to speak to a lawyer. Cst. Sehl, who had already participated in the search of the residence, released Mr. Pick, in the presence of Cst. Lagace. The above-noted events took place over the course of 3.5 hours. All of the above events took place in the context of an investigation into Mr. Pick for suspected possession of cocaine for the purpose of trafficking, which then, upon discovery of the firearms, expanded to include the firearms charges.

Conclusion re: “Obtained in a Manner”

[36] The search, seizures, arrest, the unbroken detention of Mr. Pick for approximately three hours and the *Charter* breaches occurred on the same night, within the span of 3.5 hours, as part of the same investigation and involving the same officers. These events “wove a single tapestry of investigative activity”: see *R. v. Thompson*, 2025 ONCA 500 at para.90. The temporal and contextual connection between the *Charter* breaches and the nguimpugned evidence is not too remote or tenuous. See also *R. v. Noel*, 2025 NSSC 310 per the Honourable Justice John Bodurtha.

[37] As stated by Laskin J.A. in *Pino* at para.56, “[a] generous approach to the ‘obtained in a manner’ requirement makes good sense because this requirement is just the gateway to the focus of s.24(2) – whether the admission of the evidence would bring the administration of justice into disrepute.”

[38] As required by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, I will now 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, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

Grant Factor #1: Seriousness of Misconduct

[39] The first line of inquiry under s.24(2) of the *Charter* considers whether the *Charter* breach is so serious that the court needs to dissociate itself from it: *R. v. Beaver*, 2022 SCC 54 at para.120. This inquiry requires the court to situate the *Charter* breach on a scale of culpability: *Beaver* at para.120.

[40] At the more serious end of the culpability scale are wilful or reckless disregard of *Charter* rights, a systemic pattern of *Charter*-infringing conduct, or a major departure from *Charter* standards: *Tim* at para.82. Courts should dissociate

themselves from such conduct because it risks bringing the administration of justice into disrepute: *Tim* at para.82.

[41] At the less serious end of the culpability scale are *Charter* breaches that are inadvertent, technical or minor, or which reflect an understandable mistake: *Tim* at para.82. Such circumstances minimally undermine public confidence in the rule of law, and thus dissociation is much less of a concern: *Tim* at para.82.

[42] Ignorance of *Charter* standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith: *R. v. Grant*, 2009 SCC 32 at para.75.

[43] 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...”: *R. v. Paterson*, 2017 SCC 15 at para.44.

[44] The reputation of the administration of justice requires that courts should dissociate themselves from evidence obtained as a result of police negligence in meeting *Charter* standards: *R. v. Le*, 2019 SCC 34 at para.143.

[45] In this case, the Crown conceded that the conduct of the police was negligent. I accept that concession. Specifically, it was negligent for the police to have made one failed call to Legal Aid, leave a message, and do nothing more for

three hours while Mr. Pick sat in a locked cell. While the conduct of the police in this case was not at the most serious end of the culpability scale, it was serious. The three-hour delay in providing Mr. Pick with the right to contact counsel was negligent, a clear violation of well-established rules. The first line of inquiry weighs strongly in favour of excluding the evidence.

[46] The *Charter* breaches flowing from the police failure to inform Mr. Pick of his change in jeopardy and from the failure to provide him with the *Prosper* warning when Cst. Lagace spoke with him at 00:55 were technical in nature, as the police did not attempt to interview or elicit information from Mr. Pick, and he was released. These later *Charter* violations were without consequences, as they did not compromise the interests underlying Mr. Pick's s.10(b) rights: see *Arsenault* at para.42. These later breaches do not point strongly towards exclusion.

[47] Overall, the first line of inquiry points strongly towards exclusion of the evidence due to the police violation of Mr. Pick's right to retain and instruct counsel without delay.

Grant Factor #2: Impact on Accused

[48] The second line of inquiry considers the impact of the breach on the accused's *Charter*-protected interests: *Tim* at para.90. It asks whether the breach

“actually undermined the interests protected by the right infringed”: *Tim* at para.90.

This involves identifying the interests protected by the relevant *Charter* rights and evaluating how seriously the breaches affected those interests: *Tim* at para.90.

[49] In considering the second line of inquiry, the court must situate the impact on the accused’s *Charter*-protected interests on a spectrum, ranging from impacts that are fleeting, technical, transient, or trivial, to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed: *Tim* at para.90.

[50] The greater the impact on *Charter*-protected interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute: *Tim* at para.90.

[51] If the impugned evidence could have been obtained without the breach, this lessens (but does not extinguish) the impact on the accused: *R. v. Mian*, 2014 SCC 54 at para.87, citing *Grant* at para.122.

[52] The *Charter*-infringing conduct in this case seriously compromised the interests underlying Mr. Pick’s s.10(b) rights. Mr. Pick was locked in a cell, incommunicado, for three hours, without the “psychological lifeline” afforded by counsel, who can not only provide legal advice but can reassure the detainee that

he is not entirely at the mercy of the police: see *R. v. Dussault*, 2022 SCC 16 at para.56.

[53] As stated by Pomerance J.A., writing for the Court in *Thompson*:

[43] Courts have increasingly recognized the psychological benefits that flow from a consultation with counsel. Detention is inherently coercive. It renders a person vulnerable to the exercise of state power and in a position of legal jeopardy. Consultation with an independent legal professional can assure the detainee that they are not isolated from the outside world. It can help mitigate the power imbalance inherent in police-citizen interactions by reducing the stress and uncertainty inherent in police detention.

[44] Courts have used the term “lifeline” to compendiously describe these psychological benefits of speaking to counsel. This term—coined by Doherty J.A. in *R. v. Rover*, 2018 ONCA 745, 366 C.C.C. (3d) 103—has been adopted in various authorities, including more recent Supreme Court decisions. For example, in *R. v. Dussault*, 2022 SCC 16, [2022] 1 S.C.R. 306, at para 56, the court approvingly quoted Doherty J.A.’s description of the right to counsel “as a lifeline 2025 ONCA 500 (CanLII) Page: 17 through which detained persons obtain legal advice and the sense that they are not entirely at the mercy of the police while detained”.

[45] In *R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, the court set out a more detailed exposition of how the right to counsel can help reduce the perception of vulnerability that detainees invariably experience. The court stressed the need for detained persons to receive “legal advice regarding the particular situation they are facing, conveyed in a manner that they understand”: *Lafrance*, at para. 76, quoting *Sinclair*, at para. 32 (emphases and brackets omitted). Brown J. described as “uncontroversial” the proposition that s. 10(b)’s purpose is “to mitigate the imbalance between the individual and the state”: para. 78. As he put it, the issue in *Sinclair* “was not whether s. 10(b)’s purpose is to cure that power imbalance, but how it does so”: *Lafrance*, at para. 78 (emphasis in original).

[46] This court has continued to recognize the psychological importance of counsel as a lifeline to detainees. As Paciocco J.A. put it, “informational rights are not provided solely as a means of enjoying implementational rights”: *Davis*, at para. 41. Instead, they provide detained persons with “the immediate assurance that they are not entirely at the mercy of the police”, and “are entitled to a lifeline to the outside world through which they can learn whether they are lawfully detained, and of their legal rights and obligations relating both to their liberty and the investigation”: *Davis*, at para. 41 (internal quotations omitted). Other appellate

2025 ONCA 500 (CanLII) Page: 18 courts have taken a similar approach: see, e.g., *R. v. Provencher*, 2025 QCCA 505, at paras. 112-13, per Cournoyer J.A.

[47] Finally, the right to counsel does not only benefit those who are detained by police. There is a broader societal interest in promoting the interests protected by s. 10(b). “Access to legal advice while detained is fundamental to individual liberty and personal autonomy in a society governed under the rule of law”: *R. v. McGuffie*, 2016 ONCA 365, 336 C.C.C. (3d) 486, at para. 80.

[54] The serious impact of the initial *Charter* breach on the interests of Mr. Pick, is lessened, although not extinguished, by the fact that there is no causal relationship between the s.10(b) breaches and the evidence. The impugned evidence could have been obtained without the breach.

[55] Although the later *Charter* breaches – the failure to advise Mr. Pick of the change in his jeopardy and the failure to give him the *Prosper* warning – did not result in the discovery of evidence, the impact of these several breaches must be considered cumulatively under this branch of the *Grant* test: see *Thompson* at para.109, citing *R. v. Zacharias*, 2023 SCC 30 at paras.56 and 114.

[56] The serious impact of the first *Charter* breach – the failure to implement Mr. Pick’s right to retain and instruct counsel without delay – along with the later albeit technical breaches, weighs in favour of exclusion, although not as strongly as the first line of inquiry. This second line of inquiry points moderately towards exclusion.

Grant Factor #3: Society’s Interest in Adjudication on the Merits

[57] The third branch of the *Grant* test favours admission of the evidence.

[58] In considering society's interest in a trial on the merits, I will consider: (a) the reliability of the evidence, (b) the importance of the evidence to the prosecution's case, and (c) the seriousness of the offence.

Highly Reliable

[59] In this case, the evidence seized is highly reliable. The evidence of the drugs, cash, scales, packaging and cell phone is real, physical, reliable, pre-existing evidence.

Impact on Crown's Case

[60] The evidence is crucial to the Crown's case.

Seriousness of the Offence

[61] The offences – possession of cocaine for the purpose of trafficking and possession of a prohibited weapon without a license – are serious. The possession for the purpose of trafficking charge carries with it a maximum penalty of imprisonment for life. The prohibited weapon charge carries a maximum penalty of five years imprisonment. While the seriousness of the offence has the potential

to “cut both ways,” the public has a heightened interest in seeing serious offences adjudicated on the merits: see *Beaver* at para.130.

Final Balancing

[62] The balancing exercise mandated by s.24(2) is a qualitative one, not capable of mathematical precision: *R. v Harrison*, 2009 SCC 34 at para.36. It is not just a question of whether the majority of the relevant factors favour exclusion: *Harrison* at para.36. The application judge must weigh each line of inquiry in the balance to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

[63] The first two *Grant* factors favour exclusion, the first more strongly than the second. But it is the cumulative weight of the first two lines of inquiry, not their average, that must be balanced against the third: *Thompson* at para.112, citing *Lafrance* at para.90. When the first two lines of inquiry, taken together, make a strong case for exclusion, the third will seldom tip the scale in favour of admissibility: *Thompson* at para.112, citing *Lafrance* at para.90 and *Beaver* at para.134.

[64] This rule is subject to exception. As Jamal J. acknowledged in *Beaver*, the cumulative weight of the first two lines of inquiry may be overwhelmed by a

compelling public interest in admitting the evidence: *Thompson* at para.114. In those circumstances, the administration of justice will not be brought into disrepute by its admission: *Thompson* at para.114.

[65] In assessing the public interest in the adjudication of criminal proceedings on their merits, it is important not to focus exclusively on the seriousness of the offence: *Thompson* at para.114. This factor cuts both ways: society has an interest in serious offences being prosecuted on their merits, but it also has an interest in police complying with constitutional standards when the stakes are at their highest: *Thompson* at para.114, citing *Grant* at para.84 and *Harrison* at para.34.

[66] On the one hand, the *Charter* violations, particularly the failure of the police to implement Mr. Pick's right to retain and instruct counsel without delay, were serious. While not deliberate or the product of systemic or institutional abuse, the breaches disclose an unacceptable ignorance of longstanding important constitutional principles: see *Thompson* at para.118. This applies not only to the officer who left the voicemail message for Legal Aid and who did not follow up, but also to the police officers who were present at the detachment when the message was left and did not follow up. The impact on Mr. Pick of being locked in a cell without a lifeline to the outside world for three hours cannot be overstated.

[67] On the other hand, the alleged offences are serious. Cocaine trafficking causes significant harm to our communities. Possession of cocaine for the purpose of trafficking carries a maximum penalty of life imprisonment. Society has a heightened interest in such offences being adjudicated on their merits.

[68] Although the police violated Mr. Pick's s.10 *Charter* rights, they also took active steps to comply with the *Charter*. They sought and received judicial authorization to seize the evidence from the residence. This is behaviour that should be encouraged: see *Thompson* at para.122. In addition, Cst. Waters made an initial call to Legal Aid at the first reasonably available opportunity. This distinguishes this case from *Noel*, where the accused was held for 7 hours while the police made no attempt to contact legal counsel.

[69] I must also consider the absence of a causal link between the violations and the discovery of the impugned evidence, although this is not dispositive: see *Thompson* at para.120. Courts have excluded evidence that was discovered prior to, and independently of, *Charter* violations: see *Thompson* at para.120, citing *Pino* at paras. 48, 771; see also *Noel*.

[70] Unlike the situation in *Pino, R. v. Samuels*, 2024 ONCA 786 and *R. v. Rover*, 2018 ONCA 745, where the Ontario Court of Appeal excluded evidence

where there was no causal link between the s.10(b) breaches and the discovery of the evidence, this case does not involve police misconduct (as in *Pino*), a deliberate attempt by the police to delay Mr. Pick's access to legal counsel (as in *Samuels*) or any systemic problem or pattern of abuse (as in *Rover*).

[71] But are the alleged offences in this case so serious, and the public interest in admitting the evidence so compelling, as to overcome the cumulative weight of the first two branches of the *Grant* test?

[72] I have considered the circumstances in *Thompson*, where Pomerance J.A., writing for a unanimous Court of Appeal, wrote that “this is one of the rare cases, alluded to in *Beaver*, where the public interest in admission outweighs the first two branches of the test.” The *Charter* violations in that case included an unauthorized strip search as well as a delay in advising the accused of his right to counsel. In that case, like this one, there was no causal link between the breaches and the evidence seized. The primary evidence in *Thompson* was a 331 gram package of heroin. As stated by Pomerance J.A., the offences were “serious offences involving the importation of dangerous and addictive substances into Canada.” In that case, although there was a delay in the police implementing the accused's right to counsel, it was mitigated by his consultation with duty counsel before speaking with police.

[73] I have also considered the circumstances in *R. v. Nguyen*, 2025 ONCA 609, where a unanimous Ontario Court of Appeal also upheld the decision of the application judge to admit the evidence despite the first two lines of inquiry favouring exclusion. Again, there was no causal link between the s.10(b) breaches and the evidence seized. In that case, the impugned evidence included 18 kg of cocaine, 7 kg of methamphetamine and \$219,000 in cash. George J.A., writing for the Court, stated that “[t]he application judge was clearly concerned about the substantial quantity of drugs seized, and the drugs that were seized are insidious in and of themselves”: at para.57.

[74] Like *Thompson* and *Nguyen*, there is no causal connection between the breaches in this case and the impugned evidence. Unlike *Thompson* and *Nguyen*, we are dealing with a much smaller quantity of drugs in this case, more indicative of a low level trafficker than a distributor or importer of dangerous drugs.

[75] In the final analysis, this is one of those cases in which the long-term reputational impact of the administration of justice requires the sacrifice of the short-term benefit of an adjudication on the merits. The violation of Mr. Pick’s right to retain and instruct counsel without delay was serious and points strongly toward exclusion. The negative impact of that violation on Mr. Pick’s constitutionally-protected rights, including the security of the person protected by s.10(b), also points to exclusion,

although less strongly. The seriousness of the violation and the impact of the violation on Mr. Pick are exacerbated by the length of time he was held incommunicado: three hours. This was not the result of the negligence of one officer, but of several. Such conduct on the part of the police brings the administration of justice into disrepute. The first two lines of inquiry under *Grant* together make a strong case for exclusion. The alleged offences in this case, while serious, must be considered in the context of the key impugned evidence: 14.6 grams of cocaine, \$4,480 in cash, and a butterfly knife. In these circumstances, society's interest in an adjudication on the merits does not tip the balance in favour of admissibility.

Conclusion

[76] Mr. Pick's Application under s.24(2) of the *Charter* to exclude the evidence seized by police on November 22, 2022 is granted.

Gatchalian, J.

Appendix "A"



EXHIBIT FLOW CHART

Project Name: Arthur Pick	Investigator: Cst. Jason Sehl
File Number: 2022-1659027	Exhibit Officer: Cst. Josée Lagacé
Warrant Number: KE22-289	Date of Arrest: 2022-11-22
Search Address: 1832 Deep Hollow road, White rock, NS	Date of Samples sent: 2022-11-25

Items #	Pros # (PE)	Date/Times Seized	Description of exhibit	Location of exhibit	Located by	Seized by
1	001	2022-11-22 22:19	Chef Elite Medium Ziploc bags (red box)	Upstairs bedroom #1: to the left corner on the grey rocking chair	Cst. Jason Sehl	Cst. Josée Lagacé
2	002	2022-11-22 22:22	2 cards with white powder residue (Kent PRO grey and yellow and a Tim's cards)	Upstairs bedroom #1: to the left corner on the grey rocking chair	Cst. Jason Sehl	Cst. Josée Lagacé
	003	2022-11-23 16:34	Card with white powder residue Kent PRO grey and yellow	Sample of PROS # PE002 Health Canada # D0356336	Cst. Josée Lagacé	Cst. Josée Lagacé
3	004	2022-11-22 22:28	Infiniti black digital scale (working) With white powder residue on it	Upstairs Hallway: In the closet	Cst. Josée Lagacé	Cst. Josée Lagacé
4	005	2022-11-22 22:30	Triton black digital scale (working) With white powder residue on it	Upstairs bedroom #1: On top of the brown dresser Health Canada # D035637	Cst. Jason Sehl	Cst. Josée Lagacé

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5	006	2022-11-22 22:30	Measuring cup with white powder residue in it	Upstairs bedroom #1: On top of the brown dresser	Cst. Jason Sehl	Cst. Josée Lagacé
6	007	2022-11-22 22:34	2 small baggies (packaging bag) with white residue in it. Packages have yellow on it with black poison logos	Upstairs bedroom #1: On top of the brown dresser Health Canada # D035638	Cst. Jason Sehl	Cst. Josée Lagacé
7	008	2022-11-22 22:36	1 card with white powder residue (Scene card)	Upstairs bedroom #1: On top of the brown dresser	Cst. Jason Sehl	Cst. Josée Lagacé
8	009	2022-11-22 22:36	0.1g White powder residue	Upstairs bedroom #1: On top of the brown dresser Health Canada # D035639	Cst. Jason Sehl	Cst. Josée Lagacé
9	010	2022-11-22 22:44	14.6 G White powder in a medium Ziploc bag	Upstairs bedroom #1: brown dresser/ first drawer	Cst. Jason Sehl	Cst. Josée Lagacé
	011	2022-11-23 16:50	1.1 G White powder residue (2.0 G with the exhibit sample bag)	Sample of PROS # PE010 Health Canada # D035640	Cst. Josée Lagacé	Cst. Josée Lagacé
10	012	2022-11-22 22:46	Toy-R-Us Ziploc bag with white powder residue in it And a small baggies (packaging bag) packages have yellow on it with black poison logos	Upstairs bedroom #1: brown dresser/ first drawer	Cst. Jason Sehl	Cst. Josée Lagacé
11	013	2022-11-22 22:49	Black airsoft handgun Austria, 17 Gen 4 with mag in it	Upstairs bedroom #1: brown-dresser/ first drawer	Cst. Jason Sehl	Cst. Josée Lagacé

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12	014	2022-11-22 22:50	Infyniti mini MN-100 black digital scale (working) With white powder residue on it	Upstairs bedroom #1: brown dresser/ first drawer Health Canada # D035644	Cst. Jason Sehl	Cst. Josée Lagacé
13	015	2022-11-22 22:55	Black and silver airsoft handgun Skeleton, 11174632, made in Taiwan	Upstairs bedroom #1: brown dresser/ second drawer	Cst. Jason Sehl	Cst. Josée Lagacé
14	016	2022-11-22 22:56	3 Ziploc bags with white residue in it	Upstairs bedroom #1: brown dresser/ third drawer	Cst. Jason Sehl	Cst. Josée Lagacé
	017	2022-11-23 16:54	1 Ziploc bag with white residue in it	Sample of PROS # PE016 Health Canada # D0356341	Cst. Josée Lagacé	Cst. Josée Lagacé
15	018	2022-11-22 23:03	18.1 G white powder in a Ziploc bag	Upstairs bedroom #2: On the bed in a grey/black/red lunchbox	Cst. Jason Sehl	Cst. Josée Lagacé
	019	2022-11-23 16:57	2.3 g white powder (3.2 G with the exhibit sample bag)	Sample of PROS # PE018 Health Canada # D0356342	Cst. Josée Lagacé	Cst. Josée Lagacé
16	020	2022-11-22 23:06	A big spoon with white powder residue on it	Upstairs bedroom #2: On top of the dresser located in the middle of the room Health Canada # D0356343	Cst. Jason Sehl	Cst. Josée Lagacé
17	021	2022-11-22 23:14	Canadian currency: \$250 \$100 x 1 = \$100 \$ 20 x 7 = \$140 \$ 10 x 1 = \$250	Arrest Arthur Pick: In Pick right front pants pocket	Cst. Jason Sehl	Cst. Josée Lagacé

18	022	2022-11-22 23:15	Canadian currency: \$55 \$50 x 1 = \$50 \$ 5 x 1 = \$5	Arrest Arthur Pick: In Pick's wallet Wallet in the dashboard of the grey Ford F150 truck	Cst. Jason Sehl	Cst. Josée Lagacé
19	023	2022-11-22 23:17	Pink gold Pocket knife	Arrest Arthur Pick: On Pick's belt	Cst. Jason Sehl	Cst. Josée Lagacé
20	024	2022-11-22 23:20	Black Samsung cellular phone	Arrest Arthur Pick: Cup holder of the grey Ford F150 truck	Cst. Jason Sehl	Cst. Josée Lagacé
21	026	2022-11-22 23:25	Brown .22 rifle Semi automatic action Winchester Coey 26B, S/N CA107061	Main floor: Hobby room back of the house In the corner	Cst. Jason Sehl	Cst. Josée Lagacé
22	027	2022-11-22 23:25	Brown .303 rifle Bolt action Interarms, LTD, S/N N22782A with black RIORAND scope	Main floor bedroom: In the corner close to the closet and leaning against the dresser/wall	Cst. Jason Sehl	Cst. Josée Lagacé
23	028	2022-11-22 23:34	Brown rifle Lever action Winchester 94-30W.C.F, S/N 1364032	Main floor bedroom: In the corner close to the gun cabinet and leaning against the cabinet/wall	Cst. Jason Sehl	Cst. Josée Lagacé
24	029	2022-11-22 23:37	Black 308 rifle Bolt action SAVAGE ARMS CORP., Axis S/N J486074 With black Bushehnell scope	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
25	030	2022-11-22 23:37	Brown .22 rifle Bolt action Winchester Coey 600, S/N CG068407 Black scope NCSTAR AX30	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé

26	031	2022-11-22 23:37	Dark brown .32 rifle Lever action Winchester 94, S/N 908892	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
27	032	2022-11-22 23:37	Brown .22 rifle Bolt action Winchester 67	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
28	033	2022-11-22 23:37	Brown 30-30 rifle Lever action Winchester 94, S/N 2938242 Black scope SVBONY scope	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
29	034	2022-11-22 23:37	Brown/Black 12 Pump action Winchester 1300, S/N L2426999	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
30	035	2022-11-22 23:37	Dark brown 0.22 rifle Bolt action Cooley 75	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
31	036	2022-11-22 23:37	Brown 20 Shotgun Break action Winchester 37A, S/N C699412	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
32	037	2022-11-22 23:37	Brown 410 Shotgun Break action Winchester 37A, S/N C861230	Main floor bedroom: In the gun cabinet	Cst. Jason Sehl	Cst. Josée Lagacé
33	038	2022-11-22 23:48	Different variety of ammunitions	Main floor bedroom: In a grey cabinet that was in the closet	Cst. Jason Sehl	Cst. Josée Lagacé
34	025	2022-11-22	Canadian currency: \$4, 175 \$100 x 12 = \$1, 200 \$ 50 x 4 = \$200 \$ 20 x 131 = \$2,620 \$ 10 x 8 = \$80 \$ 5 x 15 = \$75	In the grey Ford F-150 truck In the driver side back seat	Cst. Jason Sehl	Cst. Josée Lagacé