SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2018 NSSC 81

Date: 2018-04-06
Docket: Ken No. 467684
Registry: Kentville

Between:

Her Majesty the Queen

v.

David Joseph MacDonald

Judge:	The Honourable Justice Gregory M. Warner
Heard:	March 19 and 20, 2018, in Kentville, Nova Scotia
Counsel:	Ian Hutchison, counsel for the applicant/accused David Joseph MacDonald Rachel Furey, Crown attorney

By the Court:

Introduction

[1] David Joseph MacDonald (the "accused") is charged with possession for the purpose of trafficking large quantities of drugs as a result of a warrantless roadside arrest and search incidental to arrest arising from a tip of a confidential informant. He seeks to exclude the evidence of the drugs based on breaches of his Section 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[2] Specifically, the accused is charged with:

- possession for the purpose of trafficking about 700 pounds of cannabis marihuana and 3.19 pounds of psilocybin, a Schedule I drug, found in crates under a tarp on a flat bed trailer attached to the accused's tractor;

- possession for the purpose of trafficking, methamphetamine, a Schedule I drug, totalling about 9 grams in powder form, together with 47 methamphetamine pills, found in tractor's cab; and,

- simple possession of 1.3 grams of cocaine also found in the tractor's cab.

The prohibited substances were found as a result of a warrantless arrest and search of the tractor trailer, incidental to the arrest of the accused, travelling west on Highway 14 (Rawdon Road) near Brooklyn, Nova Scotia, at about 4:23 p.m. on September 30, 2015.

[3] The decision to arrest the accused and search his vehicle was made by Detective-Constable Wagg of the Halifax Integrated Drug Enforcement Unit ("IDEU"), based on information received from a confidential informant.

[4] By this *Charter* application, the accused seeks to exclude the evidence found as a result of the search of his tractor trailer, pursuant to s. 24(2) of the *Charter* on two grounds:

1. That the police did not have reasonable grounds to arrest the accused and search his vehicle incidental to his arrest, contrary to ss. 8 and 9 of the *Charter*.

2. The police advised the accused of his right to counsel; however, the police did not immediately provide the accused with a reasonable opportunity to exercise that right, contrary to s. 10(b) of the *Charter*.

[5] At the *Charter voir dire*, the evidence that was tendered included an Agreed Statement of Facts as to the nature, location and quantities of the drug seized, together with oral evidence from Detective-Constable Wagg ("Wagg"), Constable Simmonds ("Simmonds"), Constable Brown ("Brown") and the accused.

The Evidence

[6] Detective-Constable Wagg has been a member of the Halifax Regional Police officer for over 15 years. On September 30, 2015, he had been assigned to the IDEU, consisting of members of the Halifax Regional Police ("HRP") and the RCMP working at Halifax.

[7] He has handled nine confidential informants since 2010.

[8] He has known this confidential informant – Source A, for no less than five years before September 30, 2015. He met with Source A on a regular basis. Source A had been paid in the past and was paid on this occasion for information. The informant has not acted as an agent for the police and will not testify in court.

[9] Wagg testified that the informant did not have a criminal record for any deceit related offences, including: perjury, fraud or false pretenses. On no less than 12 prior occasions before September 30, 2015, Source A's information had proven to be positive information. By "positive information", Wagg meant that the Source A's information was corroborated by the end result. Source A's positive tips had led to successful arrests and the laying of charges under the *Criminal Code* and the *CDSA*. Source A had never provided information in the past that was false; that is, that did not result in a successful search. Based on past performance, Wagg considered Source A to be very reliable.

[10] Less than six months before September 30, 2015, Source A had provided Wagg with confidential information about the accused. The information was first hand; that is, from personal observations and/or conversations with the accused. Source A's information was:

1. David MacDonald delivers marihuana.

2. David MacDonald goes out west to pick up marihuana.

3. David MacDonald is in his 30s.

4. David MacDonald owns his own trucking company, David MacDonald Trucking.

5. David MacDonald lives in Antigonish.

6. David MacDonald's trailer is an open flatbed trailer, with crates on the back that are tarped.

7. That his truck has a chrome visor.

8. David MacDonald drives a Peterbilt truck.

9. On the tractor are the words "Hag Fan".

[11] When Wagg first received this information, he conducted a Google search to check it out. He located a website for "David MacDonald Truckin". It described the types of trailers associated with his trucking business. It permitted the user of the website to request a quote for services. On the website, under the name "David MacDonald Truckin" was the phrase "Hag Fan".

[12] While on duty on the day shift on September 30, 2015, Wagg received the following information from Source A that he could disclose without disclosing Source A's identity:

1. David MacDonald is driving a black Peterbilt truck.

2. David MacDonald is in Nova Scotia today.

3. David MacDonald has a load of marihuana on his truck.

4. The words: "Hag Fan" are on the back of the truck.

5. The truck is hauling an open flatbed trailer with crates on the back under dark tarps.

6. On the side of the truck is the name "David MacDonald Truckin".

7. The license plate on the front of the truck is a Nova Scotia plate.

8. The license plate on the back of the trailer is an Alberta plate.

9. On the front of the tractor is a chrome wind visor.

10. Because of the size of the wind visor, only a very small part of the windshield is visible.

[13] Source A's information was first hand; that is, either by personal observation and/or conversation with the accused.

[14] Wagg considered Source A to be reliable. Based on his overall view of Source A, Wagg believed on September 30, 2015, that he had reasonable grounds to stop the vehicle described by Source A and to arrest the accused for possession of marihuana for the purpose of trafficking.

[15] Based on the Source A information of September 30, 2015, Wagg quickly summonsed at least nine members of the IDEU. "On the fly", he conducted a very short briefing and sent these officers on the highways to various locations to look for the accused's vehicle. He too went on the road.

[16] He arrived at the location near Brooklyn, Hants County, shortly after Simmonds had effected the traffic stop of the accused's truck and at about the same time as other members were arriving. He stayed until the crates were searched, the accused was secured and taken to Halifax, and a tow truck had been arranged to pick up the tractor trailer. He saw the accused in the company of Osmond and Brown, but had no direct or indirect contact with any of them.

[17] On cross-examination, Wagg confirmed that he arrived at the scene about 4:23 p.m. His role was only as an observer. He did not pay attention to Osmond or Brown and did not know how long they stayed before transporting the accused to Halifax.

[18] He acknowledged that he had experience in obtaining information for the prepara.tion for ITOs for search warrants and production orders. He acknowledged receiving special training in the drafting of ITOs and search warrants. His training included consideration of the credibility and reliability of source information. Police make efforts to corroborate source information, "when able".

[19] He acknowledged preparing the Report to the Crown ("CB3") that included the details that could be disclosed to the accused respecting Source A's information. He received training as a source handler before September 30, 2015, with respect to what he could and could not disclose. He acknowledged that it was "an important

detail" to consider the possibility that a paid confidential informant may give false information. This was not something he learned through formal training so much as "over time, experience with sources is a better way to learn what facts could be relied upon".

[20] He received training on when information received crystallized to the point of providing reasonable grounds to arrest. In most instances, he agreed that he is able to make efforts to corroborate source information, but "in some circumstances, you can't because of the need to act quickly."

[21] He agreed that each of the nine confidential informants that he handled in the past were unique persons and treated differently.

[22] When questioned about the CB3 report he prepared, he denied that it was a "cut and paste" disclosure report, using software such as Versadex. There was no software program available for the prepara.tion of the CB3 report. He acknowledged two typos in his report but denied they were the result of "cut and pasting".

[23] He did not keep or print a copy of his Google search of the accused's website, nor verify when it was posted or by whom.

[24] He acknowledges that "David MacDonald" was a common name, especially in Antigonish. After receiving the first information from Source A about the accused, he did not check with the Registry of Motor Vehicles respecting the ownership of the Peterbilt tractor or the accused's Antigonish address, nor make any inquiries through JEIN or CPIC.

[25] When asked if he used Source A's exact words, he said that the words he used reflected accurately Source A's details, but he used different words to protect Source A's identity.

[26] He acknowledged that many of the details provided by Source A, both on the first occasion and on September 30th, were details readily available to anyone who may have seen the truck driving by on the highway.

[27] No arrest plan had been arranged on September 30, 2015, (presumably because of the requirement to act quickly). There was no discussion on how the accused's right to counsel would be implemented as he did not know where the accused might be located.

[28] Constable Simmonds has been a member of the RCMP for a little over 10 years. On September 30, 2015, he was stationed at Rawdon. He received a phone call from the Windsor detachment to be on the look out for a described vehicle suspected of travelling on Highway 14. He left the detachment and parked his vehicle near the Rawdon Community Centre. He was looking out for a black tractor trailer with the name "David MacDonald" on the side and crates or something covered with dark tarps on the back of a flatbed trailer. He was told to contact an officer at the IDEU at Halifax if he saw the vehicle.

[29] At about 15:39 (3:39 p.m.), he saw the vehicle pass by, travelling in a westerly direction towards Windsor. He contacted the IDEU. It was requested that he follow the vehicle, while the IDEU officers got into position, then they instructed him to do a "regular" police stop. He followed the vehicle and pulled it over on Highway 14 by the Department of Transportation depot at Brooklyn. This was at 16:23.

[30] He approached the vehicle then asked the driver to turn the engine off and to produce his license and registration. By this time, two other police officers approached the vehicle so he stepped back as they opened the driver's door.

[31] Constable Brown has been an RCMP officer for 14 years. He arrived in Halifax from Newfoundland and joined the IDEU in June 2015. He was on duty on September 30, 2015 when, near the end of the shift, Wagg advised of a truck with a large quantity of marihuana coming into the area. He and others headed out onto the highway to look for the truck.

[32] He and Osmond were in an unmarked grey minivan. Wagg provided more details about the vehicle as they were leaving the IDEU. He and Osmond were on Highway 101, close to Highway 14, when the report was received that the vehicle had been spotted. It was travelling in their direction. They were at the scene when Simmonds pulled the truck over.

[33] They were only a few feet away when the truck stopped. They observed Simmonds walk up to the truck at the same time that they did. Brown opened the door. There was one occupant. He arrested the accused on the basis of Wagg's belief they had reasonable grounds to arrest him.

[34] The accused was handcuffed by Osmond, who handed Brown the accused's identification. Brown retrieved his notebook with the *Charter* card, and read the accused his *Charter* rights and right to counsel verbatim. He arrested the accused for possession of marihuana for the purpose of trafficking.

[35] When told of the reason for his arrest pursuant to s. 10(a), the accused said he understood. When read his s. 10(b) rights, the accused said he understood. He was advised that if he wished, he could speak to a lawyer roadside. He said that he wanted to, but did not recall the name of his lawyer. He believed that her name was in his cell phone.

[36] Osmond retrieved the accused's cell phone. He uncuffed the accused and the accused was given as much time as he needed to find his counsel's name and number. The accused spent some time going through his contacts, but was unable to find the name and phone number. He could not recall the name of his lawyer. This occurred while he was sitting in the back of the minivan.

[37] At the same time, other officers started to search the accused's tractor trailer. Brown and Osmond decided to head back to the Halifax detachment with the accused to take a statement. They eventually took a video statement from the accused. (the Crown does not seek to have the statement given admitted at trial.) They left the scene after at least one of the crates had been opened, revealing large quantities of marihuana. They left Brooklyn at 17:12. Because he had only been in Nova Scotia for three months, Brown was not familiar with the local area, and not sure of the various routes back to Halifax. He travelled to Halifax via Highway 101.

[38] While *en route*, and about 15 minutes from the detachment, the accused said that his girlfriend Ashley had the name and phone number of the lawyer at home. They arrived at the Halifax detachment, located on Gottingen Street, at 18:10. As soon as they arrived, Brown attempted to contact Ashley. He got no answer. He waited five minutes and called again.

[39] He then contacted her at work and advised of the situation as well as the need for the phone number. She said she would go home and get it. She provided them with a name and a phone number with area code "250" at 18:46. Brown immediately called that number and left a message on the voice mail when no one answered. He waited 15 minutes and called back at 19:03, again getting no answer.

[40] At that point, Brown advised the accused he could wait or speak to a Legal Aid lawyer immediately. The accused asked to speak to a Legal Aid lawyer. At about 19:38, Legal Aid returned the call; at about 20:00, the accused ended his private conversation with the lawyer.

[41] The accused testified. Early in his direct testimony, Crown counsel objected to defence counsel asking leading questions of the accused.

[42] The primary difference between the evidence of the Crown witnesses and the accused is that he testified that it was not when he was three-quarters of the way to Halifax that he told the police that his girlfriend would have the lawyer's telephone number, but rather while he was still at Brooklyn. Defence counsel submits that this factual dispute, as well as the court's determination of credibility on this point, is central to its submission that the accused's s. 10(b) implementation right was violated.

[43] On cross-examination, the accused was not sure when he gave to the police the phone number to call Ashley – whether at the side of the road or at the police station. He was not sure what the officer's response was when he told them about Ashley.

[44] He acknowledged that the officers treated him with respect, and did not ask him any questions about, nor discuss, the offence during the drive to Halifax, as far as he could recall.

[45] On redirect, he was asked whether he gave the police Ashley's phone number at Brooklyn or whether the police asked him for her phone number at Brooklyn. His answer to both questions was that he was not sure.

[46] Photographs of the accused's tractor trailer and the contents (taken at Brooklyn) were tendered by both the Crown and accused, marked as exhibits and identified by the witnesses. The photographs confirm Source A's description of the accused's tractor trailer in every detail.

[47] The tractor was a black Peterbilt tractor. On the sides of the tractor, was the name "David MacDonald Truckin, Antigonish, Nova Scotia". On the top rear of the cab, in white letters, were the words "Hag Fan". Exhibit VD2, photograph 6 of the front of the tractor, shows the Nova Scotia license plate and next to it another plate with the words "Hag Fan". Exhibit VD2, photograph 1, shows the license plate in the rear of the trailer as an Alberta license plate. The tractor is hauling a long open flatbed trailer. On the back of the flatbed trailer are several crates covered in black tarps.

[48] The court notes that the name "David MacDonald Truckin" on the side of the tractor is the same spelling as referred to by Wagg in his description of what he saw on the website during his Google search.

First Issue: Sections 8 and 9 of the *Charter*

[49] The burden of proof lies on the applicant to satisfy the court on a balance of probabilities that there has been a *Charter* infringement that merits a remedy under s. 24(2) of the *Charter*.

[50] In the case of a warrantless search, the Crown bears the burden of proving, on a balance of probabilities, that the search was reasonable. The Crown must establish a lawful arrest on both subjective and objective grounds. If a person is lawfully arrested, there is no s. 9 breach.

[51] The applicant must satisfy the court on a balance of probabilities "having regards to all the circumstances" that the admission of the evidence would bring the administration of justice into disrepute.

[52] The police may arrest without a warrant in the circumstances outlined in s. 495 of the *Criminal Code*. An officer may arrest a person if, based on reasonable grounds, the officer holds the subjective belief that the person to be arrested has committed an indictable offence or is found committing a criminal offence. The subjective belief must be reasonable. *R v Storrey*, [1990] 1 SCR 241 (SCC) ("*Storrey"*), at para. 17, reads:

> In summary, then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.

(See also: *R v Loewen*, 2011 SCC 21)

[53] The existence of reasonable and probable grounds must be assessed considering the circumstances, including hearsay information such as that obtained from a confidential informant. The officer may consider all the information available to him in the formulation of his grounds for arrest. (*R v MacDonald*, 2015 NSSC 297 ("*MacDonald*"))

[54] In situations where the reasonable grounds for arrest are derived in part or in whole from confidential informant information, resort is made to the test for assessing reasonableness set out in *R v Debot*, 1989 CarswellOnt 966 (SCC)

("*Debot*"), a decision involving a warrantless arrest and search, confirmed and applied by the Supreme Court of Canada in *R v Garofoli*, [1990] 2 SCR 1421 ("*Garofoli*"), in the context of the sufficiency of an information to obtain (ITO) for a search warrant.

[55] Several Nova Scotia decisions, similar to this case, have applied the *Debot-Garofoli* analysis. They include, in addition to *MacDonald*, *R v Chisholm*, 2015 NSSC 414 ("*Chisholm*"), *R v Goodwin*, 2016 NSSC 283 ("*Goodwin*"), and this court's decision (but in the context of a search pursuant to a telewarrant) in *R v Woodworth*, 2006 NSSC 22 ("*Woodworth"*), at paras. 29 to 42.

[56] In *Debot*, the court summarized the analysis at para. 53 as:

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

[57] In *Garofoli*, the court summarized the analysis at paras. 80 to 86 as:

> Although *Greffe* concerns admissibility under s. 24(2), in my opinion the discussion has a bearing on the sort of information that must be put before a judge issuing an authorization for electronic surveillance. I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable grounds to justify a warrantless search (the issue in the cases cited by Lamer J.) and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* and *Greffe*.
>
> (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
>
> (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

> (a) the degree of detail of the "tip";
>
> (b) the informer's source of knowledge;
>
> (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
>
> (iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[58] The two lists of considerations are not identical, but they do overlap. The first *Debot* concern – the compelling nature of the information, appears to relate generally to the first two *Garofoli* factors – the degree of detail of the tip and the informer's source of knowledge. The second *Debot* concern - the credibility of the informant, appears to relate somewhat to past performance of the tipster (part of the third *Garofoli* factor). The third *Debot* concern – corroboration of the tip, clearly relates to the second part of the third *Garofoli* factor.

[59] The analysis of whether the tip formed a sufficient basis for the warrantless search is not affected by the different descriptions of the factors. The determination is based on the totality of the circumstances. Weakness in or even absence of evidence in any factor is not fatal to the assessment of whether the police had grounds to believe sufficient to justify a warrantless arrest and search.

The *Debot* - *Garofoli* Analysis

[60] The arrest and warrantless search of the vehicle was lawful if the evidence of the confidential informant was sufficiently reliable to establish reasonable and probable grounds to arrest and search in "the totality of the circumstances".

<u>The degree of detail of the tip</u>

[61] The September 30, 2015, tip described the type of drug (marihuana) and the fact that there was at that time "a load of marihuana" in Nova Scotia on the accused's tractor trailer. Combined with the information provided of Source A's first tip about the accused, it identified the origin of the marihuana. The details of the tractor trailer were extensive and particular.

[62] While a mischievous or even innocent by-stander on the street could describe many features of the tractor and the trailer, other details are more obscure and would

require focus and more than speculation. For example, a by-stander seeing the accused's vehicle on September 30, 2015, might have noticed that the accused's truck was a black Peterbilt tractor with the name "David MacDonald Truckin" on the side, hauling a flatbed trailer with something covered by dark tarps. An observant by-stander with enough time might even have noticed the words: "Hag Fan" on the back of the cab and the Nova Scotia and Alberta license plates and the particulars of the large chrome wind visor covering most of the front windshield, but he or she would not have known that there were crates under the dark tarps or a "load of marihuana".

[63] The totality of details about the truck, combined with the statement, similar to the tip provided earlier, that the truck was hauling a load of marihuana is compelling.

[64] The previous and current source information were remarkably consistent in their details. Furthermore, it is not essential that all of the details that make the tip compelling be details relating to the illegal activity.

[65] Source A's information consisted of more than simple conclusory statements.

Source of knowledge

[66] The second *Garofoli* factor is the source of the knowledge. While the Crown has a duty to protect the identity of the informant, which limits the details respecting the informant that it is permitted to disclose, there was no basis in the evidence at the *voir dire* to doubt Wagg's statement that both the first and second tip about the accused's activities were based upon personal observations of Source A and/or conversations by Source A with the accused. The information was first hand. The information was not hearsay on top of hearsay.

Informant's reliability – past proven reliability and/or corroboration

[67] The third *Garofoli* factor, the indicia of the informant's reliability, has two distinct elements: his or her past performance and independent corroboration.

[68] Past proven reliability was a "significant distinguishing factor" relied upon by Justice Hunt in *Goodwin*. In contrast, the absence of any details or past proven reliability was a negative factor that impacted Justice Arnold's decision in *MacDonald*.

[69] The past proven reliability of Source A in this case is a particularly strong factor supporting Wagg's formulation of a belief that he had reasonable and probable

grounds to arrest the accused and search his vehicle if he found him in time – on both a subjective and objective basis.

[70] On no less than 12 prior occasions, Source A's information led to successful arrests and positive results. On no occasions did his tips lead to a negative result. In the sports vernacular, going "12 for 12" is very impressive. This is an unusually high degree of past proven reliability.

[71] This far outweighs the fact that the informant is a paid. The fact that the informant has no criminal record for deceit-related criminal offences, such as perjury, fraud or false pretences, supports his or her reliability.

Corroboration

[72] There was no time on September 30, 2015, to seek corroboration of Source A's tip. The accused and his vehicle was reported to be in Nova Scotia with a load of marihuana. Corroboration is not essential to find reasonable and probable grounds. The corroboration on September 30, 2015, consisted of Simmonds' confirmation of the details of the vehicle he saw on Highway 14 before he stopped the vehicle and Brown and Osmond arrested him. Simmonds' confirmation was of a black truck with "David MacDonald Truckin" on the side hauling an open flatbed trailer with "what appeared to be crates or something" on the back, covered in black tarps.

[73] Source A's tip is also corroborated by the Google search of the accused's business website, carried out after receiving the first tip less than six months before. His search confirmed the existence of "David MacDonald Truckin" as a business of a "David MacDonald". It was significant that Wagg noted the unusual term "Hag Fan" under the name "David MacDonald Truckin" on the website - consistent with Source A's information of the same term appearing on the accused's Peterbilt tractor in both tips.

[74] I agree with the Crown's submission, based on *R v Goodine*, 2006 NBCA 109, that corroborated "neutral" data can lead a reasonable and dispassionate person to infer that the tipster is both closely acquainted to the target and privy to the criminal activity being reported.

[75] In *R v Whalen*, 2015 NLCA 7, at para. 43, the court held that hearsay statements from an informant alone may be the basis for reasonable grounds to justify a search, provided an assessment of the totality of the circumstances enables

the issuing authority to conclude a credibly based probability exists that evidence with respect to the offence will be found in the place to be searched.

[76] In this case, the two tips from Source A were detailed and included information that would not generally be known to the public. Source A's knowledge was first hand. Source A had a substantial history of providing reliable information. Source A's information was current. Wagg's subjective belief that he had reasonable and probable grounds to believe that the accused was committing the criminal offence of possessing marihuana for the purpose of trafficking was reasonable.

[77] The accused's arrest was lawful, and the warrantless search of his vehicle was justified.

[78] The Section 8 and 9 *Charter* challenges are dismissed.

Second Issue: Section 10(b) *Charter* challenge – Failure to immediately implement the accused's right to counsel

[79] Section 10 of the *Charter* reads:

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

[80] The police advised the accused of the reason for his arrest immediately. They fulfilled the accused's s. 10(a) right.

[81] Brown testified that when he and Osmond walked up to the driver's door (at about the same time as Simmonds), he opened the door and told the accused he was under the arrest for possession of marihuana for the purpose of trafficking. He did not complete his warnings until the accused tightened the belt on his pants, got down out of the cab, moved out of the middle of the highway to the front of his truck, and he had retrieved his notebook with the printed notices, and gave him verbatim his

entire rights from the printed card – including his *Charter* right and his right to silence. Brown gave the time line from when he first told the accused he was under arrest (at about 16:21) until he completed giving him his *Charter* and other rights (at 16:26), which is about five minutes.

[82] The accused testified that Brown did not tell him he was under arrest for possession of marihuana for the purpose of trafficking until they had assisted him out of the truck, he had tightened his belt and they had moved in front of his tractor.

[83] In either event, the accused was informed promptly of the fact that he was under arrest for possession of marihuana for the purpose of trafficking as soon as it was safe to advise him.

[84] The accused understood the extent of his jeopardy sufficient to make informed choices about whether to exercise his right to counsel and his right to remain silent.

[85] Section 10(b) imposes three duties on the police. The first and third are not seriously in issue.

[86] First, the police must have advised the accused of his right to counsel without delay. This means immediately. (*R v Suberu*, 2009 SCC 31 ("*Suberu*"), at para. 31)

[87] I find, and it is not seriously contested, that the accused was advised of this right to counsel without delay; that is, within five minutes of his arrest and when it was safe to do so.

[88] The remainder of the s. 10(b) rights are triggered if and when the accused indicates his desire to exercise his right to counsel. (*R v Baig* [1987], 2 SCR 537, at para. 6)

[89] The second and third duties are implementation duties.

[90] The third duty is that the police must refrain from questioning or eliciting evidence until an accused has been allowed to exercise the reasonable opportunity. (*R v Manninen* [1987], 1 SCR 1233 ("*Manninen*"))

[91] It is not seriously contested, and clear from the evidence of both Brown and the accused, that the police refrained from questioning or eliciting evidence from the time the accused was given his *Charter* rights and right to remain silent until after he had spoken to a lawyer at the Halifax detachment and advised the officers that he was satisfied with the legal advice he had received.

[92] The second duty is that the police must provide the accused with a reasonable opportunity to exercise the right to counsel. This is the primary contested issue in this *voir dire*. It involves factual findings and their application to the legal principles.

[93] In *R v Taylor*, 2015 SCC 50 ("*Taylor*"), the Supreme Court had the opportunity to consolidate and interpret existing principles applicable to the implementation aspect of s. 10(b), beginning at para. 20. The court wrote in part:

> [21] The purpose of the s. 10 (*b*) right is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *Manninen*, at pp. 1242-43. The right to retain and instruct counsel is also "meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination": *R. v. Suberu*, [2009] 2 S.C.R. 460, at para. 40. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police investigators that is both free and informed": *R. v. Sinclair*, [2010] 2 S.C.R. 310, at para. 25.
>
> [22] In *R. v. Bartle*, [1994] 3 S.C.R. 173, Lamer C.J. explained why the right to counsel must be facilitated "without delay":
>
> This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the *Charter* is in *immediate need of legal advice* in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty . . . . Under s. 10(*b*), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. . . . [T]he right to counsel protected by s. 10 (*b*) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process. [Emphasis added; p. 191.]
>
> [23] He also confirmed the three corresponding duties set out in *Manninen* which are imposed on police who arrest or detain an individual:
>
> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

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

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

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

…

[28] But the police nonetheless have both a duty to provide phone access as soon as practicable to reduce the possibility of accidental self-incrimination and to refrain from eliciting evidence from the individual before access to counsel has been facilitated. While s. 10(*b*) does not create a "right" to use a specific phone, it *does* guarantee that the individual will have access to a phone to exercise his right to counsel at the *first* reasonable opportunity.

…

[33] Not everything that happens in an emergency ward is necessarily a medical emergency of such proportions that communication between a lawyer and an accused is not reasonably possible. Constitutional rights cannot be displaced by *assumptions* of impracticality. Barriers to access must be proven, not assumed, and proactive steps are required to turn the *right* to counsel into *access* to counsel.

[94] The text by James A. Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 10th ed. (Toronto: LexisNexis, 2017), c. 24 (in particular pp. 1417 to 1424), summarizes *Taylor* and other decisions respecting the effect of *Charter* breaches of s. 8 combined with s.10(b). I have relied on their analysis.

[95] As stated in para. 24 of *Taylor*, the burden is on the Crown to show that any delay was reasonable in the circumstances. The question of whether the delay in facilitating access is reasonable is a factual inquiry.

[96] On the facts in *Taylor*, the Supreme Court of Canada found that the officers dealing with the accused did not turn their minds at any time that night to the obligation to provide the accused access to counsel.

The Evidence

[97] The accused's tractor trailer was pulled over in front of the Department of Transportation's Depot at Brooklyn at either 16:23 (Simmonds) or about 16:20 (Brown). Brown says that after he opened the truck door about 16:21, he advised the accused for the first time that he was under arrest for the possession of marihuana for the purpose of trafficking. The accused got down from the truck, tightened his belt and moved out of the centre of the highway to the front of truck, where Brown's grey minivan was parked. Osmond cuffed him, searched him and handed Brown the accused's driver ID. When Brown was satisfied it matched the ID of the accused, Brown got his notebook from the minivan and retrieved his *Charter* card. He read the accused his *Charter* rights and right to silent verbatim from the card.

[98] In direct examination, Brown said that when he told the accused that he was under arrest for the possession of marihuana for the purpose of trafficking and asked if the accused understood, that the accused said: "Okay. Sure.". He told the accused that he had a right to retain counsel without a delay and asked if he understood, to which the accused said: "Yes". He asked if the accused wished to call a lawyer. The accused said he had his own lawyer. He asked if the accused wished to speak to the lawyer road side and he said he did; however, he did not recall either the lawyer's name or phone number. Brown and Osmond intended to seize the accused's cell phone as part of their investigation but, in order to assist the accused in contacting his counsel, Osmond retrieved his cell phone from the tractor trailer.

[99] Osmond returned with the phone, uncuffed the accused. While the accused sat in the van with the police watching closely to make sure that he did not delete anything, Brown testified that he told the accused to take as much time as he needed. In the end, the accused was unable to find the lawyer's name or number. The police took his cell phone back.

[100] Brown said that the accused was sitting in the back of the minivan, with the door open during this time. Brown said there was nothing they could do at the scene

to help him contact his lawyer of choice without the lawyer's name or some contact information. The accused said he would keep thinking about who his lawyer was.

[101] During this time, other officers involved in this operation had already started to search the tractor and flatbed trailer. When Brown saw that a crate on the back of the flatbed had been popped open and contained a substantial quantity of marihuana, he decided not to wait until the search was complete, but to drive the accused to the Halifax detachment to continue the investigation. Brown and Osmond, with the accused, left Brooklyn in the minivan at 17:12.

[102] Brown said that while *en route* to and almost at the Halifax detachment, the accused said that his girlfriend Ashley may have the lawyer's name and number at home in Antigonish. At this point they were three-quarters of the way to the detachment, about 10 to 15 minutes away. They arrived at the detachment at 18:10 and, as soon as they arrived, went to the interview rooms where Brown immediately called Ashley.

[103] On the first call, he got no answer. Five minutes later he called her again. She was at work. He advised her of the accused's need for Ashley to find the phone number for his Alberta lawyer. She said she would leave work and go home to get it. At 18:46, Ashley called back with the lawyer's name and number. At 18:49, Brown called the number but got not answer, but left a message for lawyer Kelly Kristensen. At 19:03 he called again and still got no answer. He explained this to the accused and told him that if Ms. Kristensen called back at any time, no matter how late, that he would be allowed to talk to her.

[104] In the meantime, Brown reminded the accused about his right to get advice from Legal Aid. The accused asked for Legal Aid advice. A minute later, Brown called Legal Aid and left a message. A Legal Aid lawyer called back at 19:37. Brown put the accused on a secure phone in a private room, and closed the door so the accused could have a private conversation. At 20:00, the accused knocked on the door and said he was satisfied with the phone call. The police then proceeded to take a video statement from the accused. The Crown does not seek to have the video statement entered into evidence at trial.

[105] Brown was cross-examined. He agreed that the arrest of the accused arose solely from the grounds formulated by Wagg. He would have ended the arrest at Brooklyn if there had been no "product" (marihuana) in the crates. He repeated that he initially told the accused that he was under arrest while the accused was still sitting in the tractor, but repeated the fact that he was under arrest and the reason

when he read him the rest of his *Charter* rights and police caution after he got down out the vehicle and moved in front of the vehicle.

[106] Brown agreed that when the search for the accused and his vehicle began, there was no plan as to who would affect the arrest, who would transport the accused or how they would provide the accused with a reasonable opportunity to exercise the right to counsel. This was because they did not know if or where the IDEU officers would find the accused or who would be the closest when he was found. They did keep in radio communication with each other.

[107] When the accused was seen driving westerly on Highway 14 by Simmonds, Brown and Osmond were driving a grey unmarked minivan and were the closest to the accused. They coordinated by radio that they would stop at the Department of Transportation site at Brooklyn and that Simmonds would follow the accused's vehicle and pull it over in front of the building. Brown and Osmond were parked at the entrance to the Department of Transportation site when Simmonds activated his lights and siren to pull the accused over. They and Simmonds walked up to the driver's door at about the same time.

[108] He repeated that he first told the accused that he was under arrest and the reason for the arrest while he was in the truck. He repeated that he opened the door to the truck, that the accused's belt was undone and that he tightened it when he was exiting the truck. He did not take steps to identify the accused positively before putting him under arrest for safety reasons; that is, the accused was elevated up in the truck and the officer did not have a good view of him or his hands.

[109] He repeated that he waited for other officers to open at least one of the crates to confirm that there as marihuana in the truck before leaving for Halifax with the accused to continue the investigation. He did not remain at Brooklyn because he knew the other officers would be continuing the search for a long time.

[110] He disagreed with counsel's suggestion that the arrest occurred at 16:20. He said that was when the stop was activated; it took a minute or so to get up to the door of the truck and tell the accused that he was under arrest. Counsel asked Brown why it took until 16:26 for the accused to be *Chartered* and cautioned. Brown answered that it took this amount of time for them to get to the driver's door, open the driver's door, arrest him, let him tighten his belt to get out of the truck, and move from the middle of the road, for safety reasons, to the front of the tractor trailer, where the minivan was situated.

[111] When the accused said he wanted to contact his lawyer, Brown was prepared to allow the accused to contact a lawyer while they were still roadside. That is why he let the accused spend some time searching his cell phone for her name and number. He would have been prepared to let the accused use his work phone to contact the lawyer; he did advise the accused that, because of the absence of a secure, private place at that location, the accused may not have the same degree of privacy at the road side that he would have at the detachment. This was even though, in fact, the accused was unable to remember the name or number of his lawyer.

[112] Brown was asked why the delay from 16:26 to 17:12 before leaving for the Halifax detachment with the accused. Brown said that it took 10 to 15 minutes for the accused to try to find the name and number of his lawyer before they gave up; the accused had a conversation with someone about how to arrange safely for the towing of his tractor; and Brown wanted to wait until the search of at least some of the crates in the back of the flatbed revealed the load of marihuana. If no marihuana had been found, it was his intention to terminate the arrest roadside.

[113] Brown did not consider taking the accused to a closer rural detachment. Firstly, he was not familiar with where closer locations, such as Rawdon, Windsor, Kentville or Mount Uniacke, may be, and he questioned whether they would have had the facilities to continue the interrogation, including interview rooms and a manned lock up. He said it was quicker to take the "straight run" into Halifax on Highway 101, where he knew there were the needed facilities.

[114] Brown denied the suggestion that the reason he stayed roadside for about 40 minutes was because he and Osmond had not thought about how to implement the accused's right to counsel in a timely manner. Brown's reply was "just the opposite"; he went, in his view, above and beyond to try to assist the accused in getting access to his counsel of choice at roadside. He knew, based on his many years of experience, that he could not use anything the accused told him until he had facilitated his right to counsel.

[115] Brown was asked why he did not record in his notebook that the accused told him that his girlfriend Ashley may have the number when he was three-quarters back to the police station, 10 or 15 minutes away. Brown replied that he could not because he was driving but, as soon as he arrived at the station, his first note was to "call Ashley".

[116] Brown gave a definitive "no" to defence counsel's suggestion that the accused told him and Osmond, while sitting the van before leaving Brooklyn for Halifax, that

his girlfriend Ashley may have the lawyer's number. He said that if the accused had said anything like that, he would have called her from Brooklyn before leaving.

[117] At 18:46, Ashley called Brown with the lawyer's name and number. At 18:49, Brown called the lawyer, got no answer and left a voice mail. At 19:03, he called the lawyer a second time and got no answer. He told the accused he could not get a hold of her, but if she called back, no matter when, he could speak to her.

[118] When asked whether he knew that the accused had the right to counsel immediately, Brown replied that he had a duty to provide counsel as soon as practicable, which he defined "as soon as resources were available".

[119] The accused testified that he opened the door when Simmonds asked for his driver papers and, when he retrieved them and looked back, there were two other cops (Brown and Osmond) at the door. They told him to come down out of the truck and guided him out of the driver's seat. He tightened his blue jeans belt, was handcuffed and moved out of the road to the front of the tractor.

[120] On more than one occasion, Crown counsel objected to defence counsel leading the accused through his direct evidence.

[121] The accused disagreed with Brown that he was first told he was under arrest when he was in the truck. He was not sure where he was when he was first given his right to counsel. He did tell the police that he wanted to speak to his lawyer right away. He did not recall call her (his lawyer's) name or number, but thought it was in his cell phone. One of the officers sat in the minivan with him while he searched his cell phone. He only searched his cell phone for a few minutes. Other officers were opening crates on the back and looking inside the cab at this time.

[122] He testified that he told both officers, while sitting in the van, that his girlfriend probably had the number. He disagreed with Brown's evidence that he told the officer about Ashley for the first time when they were about three-quarters of the way back to the Halifax detachment.

[123] He said that Brown took the wrong turn to get from Highway 14 to Highway 101, but he could not say exactly what route that was.

[124] He acknowledged Brown's evidence about Brown's calls to his girlfriend and the Alberta lawyer when they arrived at the police station, and that he spoke to a Legal Aid lawyer before giving a video statement to the police.

[125] He was cross-examined. He acknowledged that he was nervous when the police pulled him over. He acknowledged that there were aspects of the arrest that he could not recall. While he spent more time living in his tractor on the road than at home [in Antigonish], he acknowledged that the Department of Transportation had the right to, and sometimes did, stop him to search his vehicle to ensure that he did follow the rules governing his business.

[126] When Crown counsel suggested that he was put under arrest when he was still in the truck he responded: "It's possible. I'm not sure" and he was unsure when the police told him he was under arrest.

[127] He did recall that the police had not hurried or rushed him in his search of his cell phone for his lawyer's name or number, but he did not believe that he had all day.

[128] He stated that when he told the cops that Ashley may have had the lawyer's number: "They were still in the van. They said they would try to get a hold of her." He added that there was a lot of coming and going on at that moment.

[129] When asked if he gave his girlfriend's phone number right away, he answered that he was not sure. He did not know it was an option to call his girlfriend.

[130] Later, in answer to counsel's question or statement: "You are not sure what the response was when you told them about Ashley?" He replied that that he was not 100% sure what their response was – he could not say for sure.

[131] He acknowledged that the officers treated him with respect throughout this event.

[132] In redirect, the accused was asked whether he gave the police Ashley's number at the scene. He said he did not recall. He was asked if the police asked him for her number and he replied that he was not sure if they asked him then or there.

Analysis

[133] The most significant factual dispute is whether the first time that the accused stated to Brown or Osmond that his girlfriend may have his lawyer's phone number was whether he was sitting in the minivan in Brooklyn before departing for Halifax or while *en route* to Halifax in the minivan as they were approaching Halifax.

[134] This court has written about useful tools to assessing reliability and credibility. They include: *Re: Novak Estate*, 2008 NSSC 283, at paras. 36 and 37; *Bocaneala v Liberatore*, 2013 NSSC 372, at paras. 31 to 34; and, *R v J*, 2013 NSSC 107. A useful guide is found in Final Instruction #14 in David Watt, *Watt's Manual of Criminal Jury Instruction*, 2nd Edition (Toronto: Carswell, 2015).

[135] I do not accept the accused's evidence that he told the officers in the van at Brooklyn before departure for Halifax, that his girlfriend probably had the telephone number for the Alberta lawyer.

[136] In contrast to his direct evidence, on cross-examination he unsure of many of the relevant and important facts stated in direct evidence, including crucial statements as to whether he had offered the police his girlfriend's phone number for the first time at the scene as opposed to at the Halifax detachment.

[137] His evidence is inconsistent with what he acknowledged – that Brown gave him whatever time he needed to find his lawyer's name or number on his cell phone.

[138] I accept Brown's evidence that he was intent on giving the accused every opportunity to recall and/or find his lawyer's name and phone number while at the scene of the arrest at Brooklyn. The accused did not challenge Brown's evidence that he was going "above and beyond" to assist the accused in contacting his lawyer of choice. Brown's conduct was not just a perfunctory reading of the right to counsel.

[139] The accused's evidence that he was uncertain whether he was allowed to contact his girlfriend, in the context of all the questions asked and answered, did not make sense.

[140] I find it not credible that, if he said to Brown or Osmond that he thought his girlfriend may have his lawyer's name and number while sitting in the minivan at the arrest scene, they would not have contacted her at the scene as opposed to waiting until they got to Halifax.

[141] In the elapsed time that the officers cleaned out the minivan to facilitate transporting the accused, allowed the accused time to search his cellphone in an effort to recall or find his lawyer's name and phone number, arranged for the towing of his vehicle, and waited to confirm that there was in fact a load of marihuana on the vehicle, which appears to have taken about 40 minutes before the officers and Brown left for the Halifax, it is likely that the officers would have responded

positively to a suggestion that the accused's girlfriend may have the lawyer's contact information by getting it from her immediately. I accept Brown's evidence that:

a) He was aware of the accused's desire to speak with his lawyer and was using his best efforts to assist the accused in finding the name and number of his lawyer;

b) He was fully aware from his experience of the need to facilitate access to counsel without delay and was willing to offer access to his lawyer at Brooklyn via the officer's own work cellphone; and

c) He was aware of the requirement to abstain from eliciting evidence from the accused until the accused had spoken to counsel and the fact that such evidence would not be admissible.

[142] To paraphrase *Farnya v Chorny*, 1951 CarswellBC 133, Brown's evidence was plausible and in harmony with the preponderance of probabilities, which a practical, informed person would readily recognize as reasonable in that place and in those circumstances.

[143] I accept the evidence of Constable Brown.

[144] The question of delay in the implementation of the accused's right to access counsel comes down to an assessment of whether, in the totality of the circumstances, including:

a) in the context that the accused could not remember his lawyer's name and number, but wanted to speak to his lawyer, until they were most of the way to the Halifax detachment;

b) the length of time that they remained at the scene before leaving, and the reasons for remaining there; and

c) the decision to return to the Halifax detachment, where all the facilities were known to be available to continue the investigation, versus finding a local, closer detachment,

the accused was given a reasonable opportunity to consult with his lawyer of choice.

[145] The Crown has discharged its burden to show that any delay was reasonable in the circumstances.

[146] When there is delay, I am required to consider whether the accused has been reasonably diligent in exercising his right.

[147] In this case, there were no ambiguities about what the accused wanted. He wanted to speak to his lawyer, but it was not until they were approaching Halifax in the minivan that he suggested that his girlfriend may have his lawyer's name and number. It was not objectively reasonable or practical to stop on the highway immediately, nor divert to the Halifax Airport or Sackville detachments, as opposed to continuing the extra 10 to 15 minutes to the original, intended destination, where all the required facilities existed, and where Brown immediately attempted to contact the accused's girlfriend for the hoped-for contact information.

[148] The delay in the accused actually speaking to counsel was not because of any unreasonable delay by the police. It was his failure to recall the name and number of his lawyer, until it was obtained from his girlfriend. All that delay is attributable to the accused and not to the police.

[149] Whether the police remained on the scene for about 40 minutes until they had confirmation of the existence of a substantial amount of marihuana before departing was not the cause of any delay in the accused's access to counsel. It was solely his inability to recall his lawyer's name or phone number, or how she might be contacted, until he was in transit and close to the Halifax detachment.

[150] In light of the privacy requirements for consultation, the entitlement of the accused to consult counsel of his choice, the lack of access to the lawyer of his choice, the absence of any police actions to impede his consultations, I conclude that the accused was not denied a reasonable opportunity to exercise his right to counsel.

[151] The circumstances in this case are not at all those in *Taylor*, where the police completely ignored the implementation of the accused's right to counsel.

Third Issue: Exclusion of Evidence 24(2)

[152] If I am wrong in my conclusion that the accused's s. 10(b) implementation rights were not breached, I must consider the request that the court exclude the evidence of the items seized in the search of his tractor and flatbed trailer.

Accused's Submission

[153] The accused cites the applicable s. 24(2) test from *R v Grant*, 2009 SCC 32 ("*Grant*"), at para. 71, and *R v Cote*, 2011 SCC 46 ("*Cote*"), at paras. 47 and 48.

[154] In respect of the first *Grant* factor, he cites *R v Harrison*, 2009 SCC 34 ("*Harrison*"), at para. 22. He contrasts the matrix where the state-infringing conduct is less serious, such as when the law is influx (*R v Saeed*, 2016 SCC 24 ("*Saeed*"), para. 26), and where the conduct is more serous, such as where the law is not in dispute (*R v Paterson*, 2017 SCC 15 ("*Paterson*"), para. 44).

[155] In respect of the second *Grant* factor, he cites para. 76 of *Grant* that describes the seriousness of the impact on the *Charter* protected interests in the sense of a spectrum running from profoundly intrusive to fleeting and technical.

[156] In respect of the third *Grant* factor – society's interest in a trial on its merit, he sites *Saeed* at para. 126, *Harrison* at para. 33 and *Cote* at para. 47.

[157] For the last *Grant* step – the balancing assessment, the accused acknowledges that the analysis is highly discretionary per *Grant* at para. 127 and *Paterson* at paras. 53 to 56.

[158] For the application of the *Grant* test, he refers the court to *R v Pino*, 2016 ONCA 389 ("*Pino*"). In that case, the police failed to properly inform the accused of her right to counsel and delayed for 5½ hours the implementation of that right. The evidence of 50 marihuana plants, seized from her vehicle, was excluded because of the temporal and contextual connection between the breaches and the evidence seized - not because of any causal connection.

[159] In *R v Mian*, 2015 SCC 54 ("*Mian*"), the court excluded evidence of cocaine seized because of a 20-minute delay in informing the accused of his right to counsel.

[160] In *Paterson*, the court held that where the privacy interests were high, the impact of the violation of the *Charter* right is greater. In his submission, the accused said that his tractor trailer was his home.

Crown Submission

[161] The Crown notes the accused's reliance on *Pino* for the proposition that a temporal or contextual connection between the delay in implementing the accused's right to counsel and evidence seized is sufficient to establish that the seized evidence

was "obtained in a manner" that breached the accused's rights. Further, the Crown notes that the question of whether evidence was "obtained in a manner" that infringed the applicant's right is a threshold question to be determined before embarking on the *Grant* analysis. Where there is a clear causal connection between evidence seized and a *Charter* breach, little needs to be said in the threshold analysis about the requirement that the evidence was "obtained in a manner". This applies particularly to ss. 8 and 9 breach applications. In such a case, the court moves directly to the application of the *Grant* test.

[162] However, in the case of a weak or absent causal connection, more is required. In this case, there is no causal connection between the alleged s. 10(b) breach and the evidence seized from the accused's tractor trailer.

[163] The Crown refers the court to a recent British Columbia court decision, *R v Hamdan*, 2017 BCSC 867 ("*Hamdan*"), paras. 29 to 31, for a summary of the development of the law in respect of the approach to determining whether evidence was "obtained in a manner" that violates the *Charter*.

[164] In circumstances where the alleged breach is not causally connected to the evidence sought to be excluded, the remoteness of the connection is a relevant, factual determination.

[165] The Crown submits that the interaction between Brown and the accused played no role in the activities of the other group of officers that conducted the search. The connection is remote.

[166] The Crown submits that in those decisions where the evidence has been excluded, absent a causal connection, there has found by the courts flagrant police misconduct. For example, in *Pino*, the officers were wearing masks when they arrested the accused at gunpoint, breached her s. 9 rights and, based on the manner of the arrest, both aspects of her s. 10(b) rights. In addition, the officers lied to the court.

[167] In *Mian*, there was serious police misconduct and the lead investigator intentionally mislead the court.

[168] These cases contrast with the case at bar, where the police were respectful to the accused (which he acknowledges) and used their best efforts to implement the accused's right to counsel. The Crown argues that they acted in good faith.

Conclusion

[169] If the delay in affording the accused with an opportunity to contact his counsel of choice breached his s. 10(b) implementation right, I find that the accused has not proven, on a balance of probabilities, that the evidence obtained by the search of the tractor trailer should be excluded.

[170] With respect to the first *Grant* factor, the seriousness of the breach, I find that there was no deliberate or egregious conduct by Brown or Osmond to avoid enabling the accused in exercising his right to contact counsel as soon as possible in the all the circumstances. There is no evidence of bad faith by the officers in any respect. The decision to arrest and search the vehicle was not random or arbitrary. The police acted on detailed and current information from a reliable source. The police acted towards the accused with respect.

[171] Respecting the second *Grant* factor – the impact on the accused's right, the level of expectation of privacy in the crates on the flatbed or in the contents of the cab were not high. The tractor trailer was a place of work in a regulated industry, which reduces the accused's protected privacy rights. (R *v Nolet*, 2010 SCC 24, at para. 31, and *R v Sandhu*, 2011 ONCA 124, at paras. 70 to 72)

[172] The absence of a causal connection between any breach of the s. 10(b) implementation right and the evidence contained by the search suggests admission of the evidence. (*Mian*, para. 87)

[173] Respecting the third *Grant* factor – society's interest in adjudication on the merits, the Supreme Court stated in *Harrison*, at para. 36, that:

> 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.

[174] The evidence in this case is "non-bodily physical evidence" that is highly reliable and essential to the Crown's case. This favors admission of the evidence.

[175] Balancing the three *Grant* factors supports admission of the evidence.

[176] The accused's application for exclusion of the evidence seized in the search of the accused's tractor trailer is dismissed.

Warner, J.