CITATION: R. v. Russell, 2024 ONSC 529
COURT FILE NO.: CR/23-667, 23-668
DATE: 2024-01-25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HIS MAJESTY THE KING	)	T. Mimnagh, for the Public Prosecution Service of Canada,
	)	
Respondent	)	
	)	
- and -	)	
	)	
	)	
	)	
HOLLY RUSSELL	)	K. Schofield, for the Applicant
	)	
	)	
	)	
Applicant	)	
	)	**HEARD**: December 4, 5 and 6, 2023

REASONS FOR RULING - SS. 8 , 10(b), AND 24 OF THE *CHARTER*

A. J. GOODMAN J.:

[1] The applicant, Holly Russell, ("Russell") is charged with several drug offences including possession of cannabis for the purpose of distributing; unlawfully cultivating, propagating and harvesting cannabis; possession of psilocybin for the purpose of trafficking, contrary to their respective provisions of the *Cannabis Act,* S.C. 2018 c. 16, and *Controlled Drugs and Substances Act,* S.C. 1996, c. 19 ("*CDSA*") She is also charged with possession of proceeds of crime over $5000, contrary to the *Criminal Code,* RSC 1985, c. C-46.

[2] The offences are alleged to have occurred on June 2, 2021 in the City of Hamilton.

[3] Following a search warrant executed in relation to an alleged commercial marihuana dispensary, a significant quantity of marihuana, psilocybin, cash, and other related cannabis products were discovered and seized by officers of the Hamilton Police Service ("HPS"). The applicant was arrested and was transported to the HPS Central Station.

[4] The applicant seeks an order to exclude the drugs seized by the HPS. The relief sought is premised on several grounds, including assertions of an unlawful entry into the apartment, a failure to fille a Report to a Justice, ("RTJ") and a failure to provide her with Rights to Counsel ("RTC") pursuant to ss. 8, 10(b), and 24(2) of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 ("*Charter*"). The applicant also seeks a stay of proceedings pursuant to s. 24(1) of the *Charter*, related to cumulative effect of the number of breaches that allegedly arose in this case.

[5] For the purpose of the *Charter voir dire*, the trial proceeded as a blended hearing.

Background:

[6] In late 2020, the HPS became aware that a cannabis dispensary known as the "Georgia Peach" – which had formerly had brick-and-mortar storefronts – was operating as an online delivery service.

[7] HPS received information regarding the operation of an online dispensary from a combination of four confidential informants and a Crime Stoppers tipster.

[8] Based on information received from these sources, the HPS began an investigation into the Georgia Peach, which they believed to be operating out of a residential unit at 140 Main Street West, Hamilton Ontario. Police began conducting surveillance on this building at some point in late 2020. During this surveillance, police observed what they believed to be suspected delivery drivers for the Georgia Peach entering the building. The officers made a number of observations (such as alleged marihuana odours coming from some of these drivers) that led them to focus their investigation on the building.

[9] On April 28, 2021, Detective Constable Michael Dougherty applied for and was granted a general warrant to allow police access to 140 Main Street, to enable HPS to determine the specific unit numbers involved. With their access to the building, police were able to narrow their investigation down to the 25th and 14th floors, and ultimately to unit numbers 1414 and 2502.

[10] On May 27, 2021, DC Dougherty applied for and was granted a warrant to search both units.

[11] At the time of authoring the Information to Obtain ("ITO"), DC Dougherty and the HPS were not aware of the specific potential occupants of those units. At no point in the ITO was it claimed that police believed the occupants were armed, dangerous, or otherwise posed a threat to the safety of officers upon entering.

[12] The same ITO also requested a production order to require the building's property management to provide police with information that could identify any parties that were connected with the units, so that police could rely on that information in planning and preparing to execute the warrant. Through the production order, police learned that unit 1414 was registered to a company known as "UH Properties" - Unit 2502 was registered to Russell.

[13] HPS officers ultimately executed the warrant on unit 2502 on June 2, 2021. The Crown called a number of police officers including PC Contos, Mogford, Lentz, Pacheco, James, and Tweedle. These officers did not knock or announce their presence when outside of the applicant's unit. Instead, PC Tweedle employed a battering ram to gain entry into unit 2502 at 1:21 p.m. Unbeknown to the police, the dynamic entry to this unit was captured on video by the applicant's security camera.

[14] At this hearing, the various police officers were questioned about this specific no-knock entry. All the officers testified that there was no information that the occupants were armed or dangerous, nor that police had safety or weapons concerns. In addition, all the officers who testified provided vague recollections of the briefing or did not recall if there was any discussion of any fortifications or weapons in the unit. Some of the officers, including PC Lentz, could not recall why the decision was made to make a dynamic entry into the unit – citing instead a "usual" concern for the loss of evidence, but no specific safety or weapons concerns. It was also PC Lentz' and Mogford's evidence that HPS employed dynamic entries 90% of the time – and maybe even more often than that. All the police officer witnesses did not detail the information provided at the briefing prior to the search. The officers could not explain the justification for the no-knock entry into the applicant's unit.

[15] The officers who testified all claimed that, upon entry, they shouted, "police" or "police – search warrant". This was contradicted by the audio video CCTV captures of the police entry into the unit. Rather, the CCTV shows police breaking down the door to unit 2502 with a battering ram, which took many strikes, entering the unit with weapons drawn in a holding position, and then yelling "search warrant, get on the f*** ground" after gaining entry.

[16] Once police entered, the applicant and three other women were immediately confronted by the HPS officers .

[17] During the search of the unit. police located a safe containing Canadian currency, a quantity of psilocybin, and hundreds of pounds of cannabis.

[18] The applicant was arrested by PC Contos for distribution of marihuana and for possession for the purpose of distribution. He provided the applicant with RTC and a caution at 1:25 p.m. Russell immediately requested to speak with her counsel, Mr. Peter Boushy. Other occupants of the unit at the time were also placed under arrest.

[19] Twenty minutes later, PC Contos turned over custody of the applicant to PC Anderson for the purposes of transportation to the HPS Central station. PC Contos' evidence was that he had no idea if there was an operational plan for facilitating the RTC for any of the arrested parties. The applicant was not provided with any opportunity to speak with counsel at the scene. Russell maintained that she wanted to speak to her lawyer of choice.

[20] PC Anderson arrived with Russell at HPS Central Station by 2:06 p.m. The applicant was given an opportunity to contact counsel at 2:30 p.m., but there was no answer and she left a voicemail. Russell was eventually able to contact and speak with Mr. Boushy at 3:40 p.m. – over an hour after the booking process had begun.

[21] Ultimately the delay in implementing RTC was from 1:25 p.m., when the Applicant was arrested to 3:40 p.m. – a period of 2 hours and 15 minutes.

[22] At the police station, while waiting to speak with counsel, PC James advised the applicant of an additional charge with regards to the psilocybin. No RTC or caution was ever provided to the applicant.

[23] PC Tweedle seized the drug evidence from the applicant's unit. PC Pacheco was the exhibit officer. No RTJ regarding the seized items was ever completed or submitted. PC Pacheco claimed it was "overlooked." It has not been remedied since and there are no plans to do so.

Positions of the Parties- ss. 8, 10 and 24 of the *Charter*:

[24] Ms. Schofield, on behalf of the applicant, submits that the search warrants were executed via dynamic entry, commonly referred to as a "no-knock raid." The HPS's use of dynamic entry, in the absence of exigent circumstances, and with limited or no information about the occupants was a breach of s. 8 of the *Charter*. The practice of dynamic entry without justification cannot be condoned.

[25] The applicant emphasizes that the actions of the police leading up to, during and after the search warrant was executed were not only disorganized but cavalier. This includes the fact that the RTJ was never completed, even up to the time of trial.

[26] Upon arrest, Russell asked to speak to counsel of choice. The first recorded instance of Russell speaking to counsel is three hours and 39 minutes after the search warrant was executed. When facing an additional charge, no further RTC was ever provided. The applicant submits that the HPS did not, without delay, facilitate their RTC informational or implementation obligations.

[27] The applicant submits that these breaches reflect the HPS's systemic and repetitive disregard for the rights guaranteed under the *Charter*. As such, the circumstances of this case justify the exclusion of the drugs based on s. 24(2) of the *Charter* and the *Grant* factors. The applicant submits that all evidence seized from and through the execution of the search warrant, and in proximity to her

arrest, must be excluded from evidence pursuant to s. 24(2) of the Charter. The evidence in this case was obtained in a manner that offended her *Charter* rights.

[28] The Crown disagrees with the applicant's assertions. The manner of entry into the apartment was swift and dynamic. In addition, due to the various officers' experience, the evidence to be sought, the nature of the offences and background knowledge, there were legitimate officer safety concerns.

[29] The Crown submits that the applicant' rights were not infringed by the police conduct in relation to this investigation and that there were no violations of ss. 8, and 10 of the *Charter* in the totality of the circumstances. Even if the arrest, detention, or related search and seizure are found to be a violation of the *Charter*, the evidence ought to be admitted under s. 24(2). The admission of such evidence would not bring the administration of justice into disrepute.

[30] The Crown further submits that the relief sought by the applicant in the alternative by way of a stay of proceedings pursuant to s. 24(1) of the Charter should also be rejected by this Court. The remedy of a stay is only appropriate in the clearest of cases, when no other remedy could suffice. If a breach is found the Court could implement other remedies, such as a reduction in sentence.

Legal principles – Dynamic Entry- (No Knock):

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

[32] To be reasonable under s. 8 of the *Charter*, a search must be authorized by law, the authorizing law must itself be reasonable, and the search must be conducted in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278 [*Collins* 1987].

[33] To be reasonable and therefore compliant with s. 8 of the *Charter,* searches must also be executed in a reasonable manner, including acting within the bounds of the authorization: *R. v. Amare*, 2014 ONSC 4119, at para. 86, aff'd 2015 ONCA 673.

[34] When police depart from a "knock, announce and notice" entry" there is an onus to explain the necessity for such an approach. In other words, it is acceptable for the police to enter a dwelling for which they have a warrant, without announcing themselves, where reasons exist for doing so: *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 20, *R. v. Collins*, 2023 ONCA 2, at para. 11.

[35] At the same tie, Gomery J. noted in *R. v. Bahlawan*, 2020 ONSC 952, at para. 14:

> [14] Even if they have a valid search warrant, the police must, as a general rule, knock and announce their presence before entering a home. The knock-and-announce rule has been part of our law for over 400 years; R. v. Pan, 2012 ONCA 581 (CanLII), at para. 35. Even prior to the adoption of the Charter, the Supreme Court in Eccles v. Bourque, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739 held that the police not force their way into a residence unless there were circumstances that justified it:
>
> > Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give (i) notice of presence by knocking or ringing the door bell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry.

[36] Likewise, in *R. v. McKay*, 2017 SKPC 53, the court discussed *Eccles v. Bourque et al*, [1975] 2 S.C.R. 739, stating at para. 60:

> [60] Generally, the law requires the police to knock and announce their presence and by what authority they demand entry. Only when entry is refused may the police resort to the use of force. [*Eccles v Bourque*, 1974 CanLII 191 (SCC),

[1975] 2 SCR 739 [*Eccles v Bourque*].] In that case, Dickson J. (as he then was) said:

> An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance.

[37] The principles behind dynamic entries are not only to preserve evidence, but also the protection of the privacy interests of the occupants of the dwelling, as well as the safety of the public.

[38] The departure from "knock and announce" and the use of dynamic entry is also couched in the necessity for safety when police are going to be entering a dwelling. Dynamic entry can occur where the police are concerned about a possible risk to themselves, or the destruction of evidence. The greater the departure from knock and announce, the greater the burden to demonstrate the necessity of such an approach. It must be recognized that the threshold for officer safety is not high. Clearly, the police are not obligated to put their safety or life on the line, even if there is some minimal risk of weapons or danger: *Cornell,* at para. 20.

[39] When assessing a decision to enter dynamically, "the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises" They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require": *Cornell*, at para. 24.

[40] In addition to the factors at play in the execution of a particular warrant, the police are also able to rely on their collective experience when assessing potential risks that may endanger their lives.

[41] The police are not required to seek prior judicial authorization to conduct the no-knock entry. However, the onus is on the Crown to establish that there were exigent circumstances or other justifications that made it necessary.

[42] Judicial review of dynamic entry must be assessed by what was or reasonably should have been known to the police at the time. In *Cornell*, at paras. 23-24, the Supreme Court set out the considerations for the trial judge when assessing the decision to depart from the knock-and-announce rule:

> [23] First, the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. Just as the Crown cannot rely on after-the-fact justifications for the search, the decision about how to conduct it cannot be attacked on the basis of circumstances that were not reasonably known to the police at the time: *R. v. DeWolfe*, 2007 NSCA 79, 256 N.S.R. (2d) 221 (N.S. C.A.), at para. 46. Whether there existed reasonable grounds for concern about safety or destruction of evidence must not be viewed "through the 'lens of hindsight'": *Crampton v. Walton*, 2005 ABCA 81, 40 Alta. L.R. (4th) 28 (Alta. C.A.), at para. 45.
>
> [24] Second, the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3 (S.C.C.), at para. 73; *Crampton*, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

[43] In *R. v. Flintroy,* 2019 BCSC 90, at para. 18, Williams J. summarized the legal principles for dynamic entries arising from *Cornell,* with references as follows:

> …

> 3. Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: (i) notice of presence by knocking or ringing the door bell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry: *Cornell* at para. 18, citing *Eccles* at 747.
>
> 4. Where the police depart from this approach, there is an onus on them to explain why they considered it necessary to do so. If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police have reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence. The greater the departure from the principles of announced entry, the heavier the onus on the police to justify their approach: *Cornell* at para. 20.
>
> 5. The evidence to justify such behaviour must be apparent in the record and available to the police at the time they acted. The Crown cannot rely on *ex-post facto* justifications.
>
> 6. As per Chief Justice Dickson in *Genest*, what must be present is evidence to support the conclusion that "there were grounds to be concerned about the possibility of violence".
>
> 7. The decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be: *Cornell* at para. 23.
>
> 8. Section 8 of the *Charter* does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present: *Cornell* at para. 20.

[44] As referenced by the Supreme Court of Canada in *R. v. Genest,* [1989] 1 S.C.R. 59, and reiterated by Daunt J. in *McKay,* at para. 61:

> [61] … the consideration of the possibility of violence must be carefully limited and should not amount to a *carte blanche* for the police to ignore completely all restrictions on police behaviour. The greater the departure of the standards of behaviour required by the common law and the *Charter*, the heavier the onus on the police to show why they thought it necessary to use force in the execution of the warrant.

Legal Principles Applied to this case:

[45] Given the valid judicially-issued search warrant, was there a violation of s. 8? Does this case reflect an improper and systemic use of the dynamic entry process?

[46] It is trite law that the search must be authorized by law, the law must be reasonable, and the search must be carried out in a reasonable manner: *Collins 1987*, at 278.

[47] The importance of engaging in a fulsome decision-making process was highlighted in *Bahlawan.* In discussing the manner of search, specifically the use of dynamic entry, Gomery J., stated at paras. 43-44:

> [43] I agree that, had the police actually considered whether an approach other than a dynamic entry in this case, they might well have been justified in deciding, after considering the information at hand, that the risks of announcing their presence before entry were just too high. This is not however the scenario before me. There is no evidence of such consideration. I cannot uphold a decision-making process that simply did not occur.
>
> [44] In these circumstances, I am unable to find that the Crown has met the burden if justifying the choice of a dynamic entry. The Ottawa Police Service operated on the basis of a practice that assumes that a non-dynamic entry is a rare exception as opposed to the rule. This turns the test in *Eccles v. Bourque* on its head.

[48] Additionally, in *R. v. Barrett,* 2021 NLSC 123, at paras. 87-88, McGrath J. discussed how destruction of evidence can be factored into the decision-making process, and whether to proceed with a dynamic entry or not:

> [87] However, what is most notable is that the risk of destruction of digital and electronic evidence was known to and discussed by the team during their morning briefing. At that time, the decision was evidently made that the risk of destruction of evidence did not warrant a departure from the knock and announce rule. In fact, there was never a suggestion that the team should do a dynamic entry.
>
> [88] As indicated in *Robertson*, the police will not be able to justify a departure from the knock and announce rule by relying on circumstances or

> risks that were known to them at the time they made a decision to knock and announce, unless those circumstances have changed. In this instance, the police had no information when they were at the door that would indicate an increased risk of destruction of evidence than the information they had at the 8:00 am briefing.

[49] The commentary of McGrath J. applies to the case before me.

[50] Justice Nakatsuru in *R. v. Musara*, 2022 ONSC 3190, considered dynamic entries and electronic evidence, at para. 136:

> [136] Moreover, the possibility that electronic devices could be destroyed justified a dynamic entry. On this issue, a number of factors need to be balanced. First, electronic devices are now ubiquitous. Nearly everyone has them, on their person and in their home. If too much emphasis is placed on the concern that these devices will be destroyed, the police will almost always be justified in conducting a dynamic entry.

[51] In *Musara*, the dynamic entry was found to be justified because of the possibility of firearms being in the unit at the time of entry and the history of the targets increased the possibility that the evidence could be destroyed. The case before me is distinguishable from *Musara* because the there was no suggestion the occupants of the home were violent or had access to guns.

[52] In *R. v. Lau*, 2003 BCCA 337, 175 C.C.C. (3d) 273, and *R. v. Schedel*, 2003 BCCA 364, 175 C.C.C. (3d) 193, the British Columbia Court of Appeal found the manner of search unreasonable where the police relied on a blanket policy to always use a hard entry for the search of suspected marijuana grow operations, irrespective of specific concerns of violence or destruction of evidence in each investigation. These cases were distinguished, albeit not overturned in *Cornell*.

[53] Indeed, in *R. v. Mac* (2005), 194 C.C.C. (3d) 555 (Ont. S.C.), Weekes J. held that “dynamic entry” was not justified in a marijuana “grow-op” search where there was insufficient evidence of any risk to officer safety. As such, he found a

violation of s. 8 and excluded the evidence. This example was relied upon by Code J. in *R. v. Thompson,* 2010 ONSC 2862, 255 C.C.C. (3d) 236, at para. 55, although the Court ultimately admitted the evidence in that case.

[54] In *Schedel,* the search warrant in question related to a marijuana "grow-op" and the police executed it, without prior announcement, by using a battering ram at the door. There was no evidence of "exigent circumstances" as the marijuana plants were "not susceptible of prompt destruction" and there was no suggestion the occupants of the home were violent or had access to guns. The Vancouver police were simply following the same "blanket policy" as in *Lau*: *Mac,* at paras. 34, 37.

[55] In *R. v. Vadon*, [2000] B.C.J. No. 2081 (B.C.C.A.), the court held that a dynamic entry was unreasonable given that there was no suggestion of a basis to expect a violent response and, given that the target of the search was a marihuana grow operation, concluded that the evidence which was sought was not readily disposable. The court further concluded that the decision, in effect, reflected a standard police practice which was an unreasonable policy.

[56] In *R. v. Ruiz*, 2018 ONSC 5452, the court determined that the dynamic entry was unreasonable. The court concluded that the police had very little information about the situation and found no evidence of the issue of the manner of search having been meaningfully considered by the police in making their decision. The court ruled that there was no reasonable basis upon which the police could believe that weapons were present and there was only a mere possibility that evidence could be destroyed.

[57] The *Ruiz* case appears to mirror the circumstances here. The Crown contends that the tactical team's sudden and violent entry was justified to prevent the destruction of evidence. It is true that illicit drugs are easily concealed or

discarded. It is true that a small amount of cocaine or fentanyl is easy to flush, but that is not the case here. This was an alleged commercial cannabis operation. The officers in this case had some knowledge that there would be a significant amount of cannabis product, likely kilograms, not easily disposed of down the toilet or out the window. There were no “exigent circumstances” in this case. Police officers had no reason to believe weapons were present. They did no more than a perfunctory investigation of the residence itself. They had no grounds to believe there was any threat to officer safety.

[58] Indeed, the police must make some attempt to ascertain whether there is a real likelihood that, without a sudden and violent entry of the kind that occurred here, the occupants will have time – and will proceed – to conceal or destroy the evidence that is the object of the search. It is well established that generic information about the potential presence of drugs in a home is insufficient to warrant the dynamic entry.

[59] In this case, I did not hear from the officer who made the decision, and no cogent evidence was adduced as to the rationale or impetus for the dynamic entry and manner of search. The information relayed to the assisting officers at the briefing concerning the entry into the unit was entirely lacking, including whether there were any legitimate officer safety concerns.

[60] Moreover, I am advised by counsel that months before the allegations in this case, Camara J. of the Ontario Court of Justice had occasion to consider the use of dynamic entries into homes by the HPS. Justice Camara ultimately found that officers acted in a manner that had breached s. 8 of the *Charter* by employing such a process. While certain information was not presented before the trial judge, at appeal, the appellant presented fresh evidence concerning a Notification Letter, the OIPRD Notification Letter, dated November 18, 2022, from the Office of the Independent Police Review Director to chiefs of police in Ontario

that highlighted dynamic entries as a troubling issue in policing: See *Collins 2023*, at paras. 18-21.

[61] Ultimately, both the trial judge and the Court of Appeal did not exclude any evidence on the basis of s. 24(2) of the *Charter*, finding that there was no evidence that the use of dynamic entries is a systemic problem in Hamilton: *Collins*, 2023, at para. 21, 28, 33.

[62] In this case, there is evidence before me that, during the relevant period, dynamic entries were employed by officers over 90% of the time in Hamilton. To me, dynamic entries were verging on becoming a systemic problem in Hamilton. Although I am also advised that subsequent to the timeframe of this search, the no-knock policy within the HPS has been modified.

[63] Returning to *Flintroy*, Williams J. noted that where dynamic entries have been found to be unreasonable it often includes "findings that the police were acting in accordance with what was essentially a blanket policy and without appropriate consideration of the facts of the specific situation": at para. 34.

[64] In sum, I agree with the applicant that there were no exigent circumstances, or at least, none that were identified. The fact that police knew little about the contents or occupants of the units is an important consideration. It appears police did not even turn their minds to a non-dynamic entry.

[65] Having reviewed the video captures, contrary to what was expressed by the police officers who testified at trial, there was no warning, no shouting "police" "police search" or anything of the sort, before entering the unit. The evidence is considerably lacking and no officer was even able to explain the rationale for the dynamic entry. While there was some reference to a briefing, the officers who

testified before me had limited or no recall of the instructions or operational plan for the entry.

[66] I am satisfied that the police search, specifically the use of the dynamic and “no knock entry into the unit without any justification, in this case, was therefore outside of the bounds of what was authorized. This was an egregious breach of s. 8 of the *Charter:* See *Thompson*, at paras. 69-75, citing *R. v. Gogol* (1994), 27 CR (4th) 357, wherein Fairgrieve J. explained that the power to search is not a “license to ignore the property rights” of accused.

Legal Principles - Report to Justice:

[67] Section 489.1 of the Criminal Code imposes a very specific duty on police officers following a seizure: Section 489.1(1) reads:

> Subject to this or any other Act of Parliament, if a peace officer has seized anything under a warrant issued under this Act, under section 487.11 or 489, or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,
>
> (a) return the thing seized, on being issued a receipt for it, to the person lawfully entitled to its possession and report to a justice having jurisdiction in respect of the matter and, in the case of a warrant, jurisdiction in the province in which the warrant was issued, if the peace officer is satisfied that
>
> (i) there is no dispute as to who is lawfully entitled to possession of the thing seized, and
>
> (ii) the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
>
> (b) bring the thing seized before a justice referred to in paragraph (a), or report to the justice that the thing has been seized and is being detained, to be dealt with in accordance with subsection 490(1), if the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii).

[68] The word “seizure” within section 8 of the *Charter* does not just refer to the physical act of the police taking an item. It contemplates the continued police detention of any said items because the “protective mantle” of s. 8 applies as long as the seizure continues: *R. v. Garcia-Machado*, 2015 ONCA 569, 126 O.R. (3d) 737, at paras. 40-41, citing *R. v. Colarusso*, [1994] 1 S.C.R. 20 at 61, 63-64.

[69] Section 489.1(3) of the *Code* requires the police to fill out a form (Form 5.2) describing the authority under which the seizure was made, the thing seized and where and how it was being detained: *Garcia-Machado*, at para. 15.

[70] Section 490 provides for the making of orders detaining the things seized, but also recognizes a duty to return the items to their lawful owners if no exception applies: *R. v. Backhouse* (2005), 194 C.C.C. (3d) 1, at para. 106, *Garcia-Machado*, at paras. 18-24.

[71] Failing to fill out a RTJ as soon as practicable after a seizure can give rise to a breach of s. 8 of the *Charter*: *R. v. Tsekouras*, 2017 ONCA 290, 353 C.C.C. (3d) 349, at para. 98; *Garcia-Machado*, at paras. 25, 43-45. This is because s. 8 protection “extends beyond the initial seizure of an item. The protection of s. 8 remains in place for the entire time that item remains in police custody”: *R. v. Fareed*, 2023 ONSC 1581, at para. 48.

[72] Without a RTJ, the seizure is ongoing, is not authorized by law and is therefore unreasonable and contrary to s. 8 of the *Charter*: *R. v. Lambert*, 2023 ONCA 689, at para. 97. In considering whether s. 8 of the *Charter* was breached in *Garcia-Machado*, Hoy A.C.J. (as she then was) for the Court of Appeal, at paras. 44-45, wrote:

> [44] The question on this appeal is whether the Constable's failure to comply with the requirements in s. 489.1(1) to make a report to a justice as soon as practicable also rendered the continued detention of a seized item unreasonable and therefore contrary to s. 8 of the Charter.

> [45] I conclude that the answer to that question is "yes". As I have explained, it is clear that an individual retains a residual, post-taking reasonable expectation of privacy in items lawfully seized and that *Charter* protection continues while the state detains items it has taken. Sections 489.1(1) and 490 govern the continued detention by the state of the items seized and, I conclude, the requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting privacy interests. The Constable's post-taking violation of s. 489.1(1) by failing to report to a justice for more than three months after seizure of the blood and hospital records compromised judicial oversight of state-detained property in which the appellant had a residual privacy interest. It therefore rendered the continued detention unreasonable and breached s. 8. The fact that a person may have a diminished reasonable expectation of privacy after a lawful, initial police seizure and that in a particular case there may have been virtually no impact on that expectation will be important factors in the analysis under s. 24(2) of the *Charter*. However, they will not render continued detention after a clear violation of the requirement in s. 489.1(1) to report to a justice as soon as practicable reasonable.

Legal Principles Applied to this Case:

[73] As of the time of this application, no completed RTJ had been disclosed, nor does it appear that one had properly been filed before a justice. Consequently, what has transpired is effectively a continued unlawful detention of the seized items, from June 2, 2021 until present day.

[74] Unlike the *Criminal Code*, which requires a peace officer who has seized anything under warrant to report to a justice “as soon as practicable” that the thing has been seized and is being detained, the *Cannabis Act* sets out explicit 30-day timelines for when seized cannabis needs to be reported to the Minister of Health and a justice: *Cannabis Act*, s. 89(1).

[75] The law further requires where any seizure is made under s. 87 of the *Cannabis Act,* or pursuant to the *Criminal Code*, that “the individual who caused the report to be sent to the Minister must also, within 30 days after the seizure, cause a report to be filed with the justice who issued the warrant”: *Cannabis Act*, s. 89(2).

[76] Section 190(1) of the *Cannabis Act* requires, where a peace officer not only seizes but disposes of the cannabis, they must "within 30 days" after so doing, "cause a report to be sent to the Minister [of Health]" including the following required information: i. A description of the cannabis or property; ii.The amount of it that was disposed of or otherwise dealt with; iii. The manner in which it was disposed of or otherwise dealt with; iv. The date on which it was disposed of or otherwise dealt with; v. The name of the police force, agency or entity to which the peace officer, inspector or prescribed person belongs; vi. The number of the file or police report related to its disposition or the other dealing with it; and, vii. Any other prescribed information.

[77] Returning to the context of section 489.1 of the Code, the section requires that the RTJ be completed and submitted "as soon as is practicable." A specific timeline is not built into the legislation, but it appears what is commonly contemplated is a matter of days, not years. Breaches of s. 8 have been found when a delay of three months took place; here the delay is more than six times that amount – and counting.

[78] Indeed, courts have resisted viewing compliance with s. 489.1 as a mere exercise in "meaningless" paperwork, as it provides a measure of police accountability: *R. v. Canary*, 2018 ONCA 304, at para. 45. This point is underscored very clearly by the forms used themselves: Property Reports require no less than three officers to review them at various times, and specifically require the completing officer to turn his or her attention to the completion of a RTJ, and the search warrant itself reminds executing officers on its face that a report must be completed following the search.

[79] Follow-up and diligence are built into the system, and yet a handful of experienced HPS officers failed completely in compliance. Many of these officers are senior members of the police service's drug and gangs team – and are

therefore supposedly experienced in the seizure of such items. Their participation in this failure makes this *Charter* breach all the more egregious.

[80] I adopt the comments of Molloy J. in *Fareed,* at para. 72: [t]he legislation requiring the report [to a Justice of the Peace] exists for an important reason – to ensure judicial oversight and public accountability whenever police take property away from people. This is an important value in our society."

[81] These comments are similar to those made by Fairburn J. (as she then was) in *Canary.* At para. 45, Fairburn J. stated that s. 489.1 not only "provides for a measure of police accountability when dealing with property seized" but "provides an important measure of protection to the party who is lawfully entitled to the property."

[82] As mentioned, no RTJ had been disclosed that includes any mention of seized cannabis, nor does it appear that one had properly been provided to a justice. Justice Molloy in *Fareed* lamented what she considered to be an increasing number of these sorts of police failures, at paras. 79, 84:

> [79] While I recognize that this is purely anecdotal, lately I am seeing more cases in which the police failure to file a report under s. 489.1 of the Criminal Code is raised. Sometimes recurring issues are mere coincidence, rather than a pattern. Also, even if there are more of these applications coming before the courts, I have no way of knowing if that is because the police are increasingly failing to file reports, or whether counsel are increasingly raising it with the courts. However, whatever the origin or explanation, this is a troubling trend. I am not aware of any case where a failure to file a s. 489.1 report has resulted in the exclusion of evidence. I have decided not to do so in this case, notwithstanding that it was not the only Charter breach involved.
>
> …
>
> [84] On the issue before me, I note that the purpose of the reporting requirement is one that goes to the core of the integrity of the administration of justice, making the police publicly accountable for any seizures of property. In circumstances where, as here, the seizure is made without a warrant, there is no public record of the seizure until the police file the required report. It is not a duty that should

> be trivialized as mere paperwork. It is important that police forces receive proper training and education on the need to file these reports, and the important policy reasons for doing so. In future cases, a failure to file a report might well be the factor that tips me towards excluding evidence I might otherwise have found admissible. I find a breach of the applicant's s. 10(b) rights.

[83] In *Fareed*, the police did not file any RTJ for a firearm and satchel that were seized from the accused. Justice Molloy held it was a "clear breach" of s. 8 of the *Charter* and that "no reasonable excuse" could be offered for the ongoing failure to file a RTJ as mandated by the *Criminal Code*: at paras. 54-55. She found a breach but did not exclude the evidence: at para. 77. Similarly, in *R. v. Yogeswaran*, 2021 ONSC 1242, at paras. 155 and 162, the court wrote:

> [155] Second, the circumstances surrounding the failure to file the report required by s. 489.1(1)(b)(ii) of the Code are extremely concerning. To be sure, if that failure were only the result of inadvertence, the breach would fall on the less serious end of the spectrum. However, Detective Ball made a deliberate choice not to file the report even after he realized his oversight. To date, he has still not filed the report. His explanation for failing to do so reveals an unacceptably cavalier attitude towards this legal and constitutional obligation.
>
> …
>
> [162] Nevertheless, this is not merely a case of delayed compliance but a situation involving complete non-compliance: *Garcia-Machado*, at para. 6. To date, Constable Ball has still not filed a report and fulfilled the requirements of s. 489.1(1)(b)(ii) of the *Code*. Although there has been no practical impact on Mr. Yogeswaran's privacy interests, the officer's conduct has wholly subverted the judicial supervision of police seizures that are the very purpose of these provisions.

[84] With respect to the RTJ issue raised in this case, the temporal and contextual connection is made out. The "as soon as practicable" part of s. 489.1 of the *Code* means that the police have a positive duty and obligation to turn their minds to – and complete – this requirement.

[85] Here, approximately $500,000 worth of marijuana products and $50,000 cash were seized by the HPS. No RTJ was ever filled out for these seized items.

PC Pacheco testified that this was a rare oversight on the part of the HPS. He acknowledged “partial responsibility” for the “team error”. The officer confirmed that no return has been filed to date and had no plans to rectify the situation. He could not give an explanation why it had not been done.

[86] The Crown argues the accused was not in lawful possession of these items, and therefore the importance of filling out the RTJ is limited because the items never would have been returned to the accused anyways.

[87] I cannot accept that argument. To the contrary, I agree entirely with applicant’s counsel’s argument that it is nonetheless an important, mandated albeit oversight on the part of the HPS. From the defence perspective, the things seized are still items of value. Fundamentally, the concern is for the integrity of the system and keeping control over what the state has. This was a large-scale operation. The seriousness of this breach is underscored both by how long it went on for – over two years – and the sheer number of officers who participated in this search. This is especially troublesome given the nebulousness of the evidence in reviewing the whole operational plan.

[88] Furthermore, unlike the circumstances in other matters where breaches of s. 8 on the basis of RTJ noncompliance have been made out, the breach occasioned by a number of seasoned officers, all of whom had over a year to rectify the issue. In this case, I do not find that there was mere inadvertence. The police conduct therefore is of such a serious nature that it undermines their statutory obligation and public confidence in the rule of law.

[89] The obvious failure to advise a justice of any seized cannabis – within 30 days and through to the present – constitutes a further breach of s. 8 of the *Charter*, as it rendered the seizures unreasonable.

Section 10(b) of the Charter- Right to Counsel:

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

> 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.

[91] Once engaged, s. 10(a) obliges the police to provide the reasons for the arrest or detention. Section 10(b) imposes both an informational and implementational duty on the police. The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay.

[92] The implementational duty requires that police provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminating evidence from the detained person until he or she has exercised RTC and has been provided with a reasonable opportunity to reach a lawyer or has unequivocally waived his or her rights.

[93] Should detainees opt to exercise the RTC by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their RTC by calling another lawyer

or the police duty to hold off will be suspended: *R. v. Leclair*, [1989] 1 S.C.R. 3 at 10, 12-13, *R. v. Richfield*, (2003) 178 C.C.C. (3d) 23 (Ont. C.A.), at para. 7.

[94] In *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 49, the court held at para. 35 (citations omitted):

> [35] Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation: Black. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended.

[95] Courts have recognized that specific circumstances, including concerns for police safety, public safety, or the preservation of evidence, may justify some delay in providing a detainee access to counsel: *R. v. Suberu*, [2009] 2 S.C.R. 460, at para. 42; *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 26; *R. v. Griffith*, 2021 ONCA 302, 408 C.C.C. (3d) 244, at para. 38. Such concerns must be case-specific rather than general concerns applicable to virtually any case: *Griffith*, at para. 38; *Rover*, at para. 27; *R. v. La*, 2018 ONCA 830, 366 C.C.C. (3d) 351, at paras. 39-40.

[96] As Doherty J.A. explained in *Rover,* at para. 27, the police may delay access to counsel only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even if such circumstances exist, the police must take reasonable steps to minimize the delay in granting access to counsel. *Griffith,* at para. 38.

[97] Where those circumstances prevail, the police must move as efficiently and reasonably as possible to minimize any ensuing delay: R. v. Keshavarz, 2022 ONCA 312, 413 C.C.C. (3d) 263, at paras. 74-75. In *R. v. Jarrett*, 2021 ONCA 758, the Ontario Court of Appeal wrote the following about the implementation of s. 10(b), at para. 43:

> [43] There are a number of ways in which the police may facilitate a detainee's right to immediate contact with counsel. Where the police assume the responsibility of making first contact, rather than providing the detainee with direct access to a phone or internet connection, they must be taken to have "assumed the obligation to pursue [the detainee's] constitutional right to [access counsel] as diligently as she would have": *R. v. O'Shea*, 2019 ONSC 1514, 372 C.C.C. (3d) 352, at para. 42; *R. v. Doobay*, 2019 ONSC 7272, 61 M.V.R. (7th) 225, at paras. 29–33. "Anything less would encourage token efforts by the police and imperil the right of those in detention to consult a lawyer of their choosing": Doobay, at para. 30.

[98] The police may not delay the right to counsel because of a “[g]eneral or theoretical concern for officer safety and destruction of evidence”: *La*, at paras. 39-41. Sometimes, the delay in contacting counsel can be justified, as considered by *Rover*, at paras. 26-27:

> [26] The s. 10(b) jurisprudence has, however, always recognized that specific circumstances may justify some delay in providing a detainee access to counsel. Those circumstances often relate to police safety, public safety, or the preservation of evidence. For example, in *R. v. Strachan*, [1988] 2 S.C.R. 980 (S.C.C.), the court accepted that the police could delay providing access to counsel in order to properly gain control of the scene of the arrest and search for restricted weapons known to be at the scene. Subsequent cases have accepted that specific circumstances relating to the execution of search warrants can also justify delaying access to counsel until the warrant is executed: see e.g. *R. v. Learning,* 2010 ONSC 3816, 258 C.C.C. (3d) 68 (Ont. S.C.J.), at paras. 71-75.
>
> [27] These cases have, however, emphasized that concerns of a general or non-specific nature applicable to virtually any search cannot justify delaying access to counsel. The police may delay access only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even when those circumstances exist, the police

> must also take reasonable steps to minimize the delay in granting access to counsel: (citations omitted).

[99] While the facts are disparate, *R. v. Khan*, 2019 ONSC 2617, dealt with a large-scale police operation involving multiple arrestees and only one officer responsible for the booking of the individuals. In discussing RTC, Davis J. wrote the following, at para. 23:

> [23] The Crown argued that it was reasonable for the police to assign one officer to facilitate rights to counsel for all the detainees and that Detective Coulthard "did his best" to get them all in touch with counsel as quickly as possible. The Crown argues that, in the circumstances of a project case like this, the delay in affording Mr. Khan access to counsel was not a violation of s. 10(b). I do not agree.

[100] Moreover, at para. 27, the court in *Khan* wrote:

> [27] In my view, s. 10(b) of the Charter requires the police to assign enough personnel to the task of facilitating each detainee's right to access counsel immediately when they are planning to make a number of arrests. Police efficiency and convenience in terms of resource allocation cannot justify delaying an accused's right to speak to counsel for six hours.

Application of Legal Principles to this Case:

[101] In *R. v. Wu*, 2017 ONSC 1003, Di Luca J. noted that “[e]ffectively, the right to counsel should not be suspended unless exigent circumstances exist”: para. 78(a). At para. 78(b), Di Luca J. succinctly summarized circumstances in which the jurisprudence has recognized a basis for the suspension of the right to counsel:

> i. Cases where there are safety concerns for the police, see *R. v. Grant*, 2015 ONSC 1646 at para. 107, *R. v. J.J.,* 2010 ONSC 735 at paras 276-8, and R. v. Learning, at para. 75;
>
> ii. Cases where there are safety concerns for the public, see *R. v. Thind*, 2011 ONSC 2054 at paras. 113-15 and 122;
>
> iii. Cases where there safety concerns for the accused, see *R. v. Strehl*, 2006 CanLII 39572 (ONSC) at para. 4;

iv. Cases where there are medical concerns, see *R. v. Willier*, 2010 SCC 37 at para. 8 and *R. v. Taylor*, 2014 SCC 50 at para. 31;

v. Cases where there is a risk of destruction of evidence and/or an impact on an ongoing investigation, see *R. v. Rover*, 2016 ONSC 4795 at para. 66 and 70, *R. v. Kiloh,* 2003 BCSC 209 at para. 15 and 38, and *R. v. Salmon*, 2012 ONSC 1553 at para. 92; and,

vi. Cases where practical considerations such as lack of privacy, the need for an interpreter or an arrest at a location that has no telephone access justify some period of delay, see *R. v. J.(K.W.),* 2012 NWTCA 3 at para. 29-30, and *R. v. Khairi*, 2012 ONSC 5549.

[102] The latter factor is most relevant; the lack of privacy. In this case, Russell was given an opportunity to attempt to contact counsel approximately one-hour after her arrest. I accept that the officer could not afford privacy at the scene. There was no obligation on the arresting officer to provide his cell phone to effect the call to counsel. Here, a voicemail was left for the applicant's counsel of choice at 2:30 p.m. At 3:39 p.m., the lawyer called back and spoke to Russell.

[103] Applicant's counsel argues that the police should have given Russell another opportunity to contact different counsel and that this was a delay constituting a further violation of her s. 10(b) rights. I disagree. I find that there was no obligation on the police to go back to the accused after an hour of not hearing from counsel to offer a second opportunity to contact new counsel. No statement or conscripted evidence was obtained in that time period.

[104] There is recognition that there are privacy and safety concerns applicable to the implementation of the right that do not apply at the informational stage. It is well-established that an arrested person is entitled to privacy while exercising his or her RTC. Here, the officers made reasonable attempts to contact counsel of choice. The applicant's requests to speak with Mr. Boushy were not ignored.

[105] I do not find that the delay in implementing RTC in this case gives rise to a breach of the accused's s. 10(b) *Charter* rights. Counsel could not point to any cases that set out a best practices or magic timeframe for facilitating such calls.

[106] Moreover, I agree entirely with the holding in *R. v. Musa*, 2021 ONSC 2615. In that case, the court dealt with a delay in implementation of the right to counsel where the officers explained that the right to counsel could not be facilitated at the arrest scene, because the accused could not be given the privacy required to speak to counsel. Ultimately, the court found that the delay of little more than one hour did not amount to a s. 10(b) violation. In coming to this conclusion, the court highlighted the difference in the informational duty versus implementational duty.

[107] Amongst other comments, the court in *Musa* determined that an arrested person might be free to discuss the circumstances of his or her case with counsel without fear of making admissions in the presence of the police. Privacy is not always available at the scene of the arrest; facilitating the right to privacy may give rise to safety and security concerns, particularly when an arrest is made outdoors: at paras. 114-116, 134.

[108] To this point, I agree with the Crown that there was no obligation to implement the applicant's RTC until she was back at the station, and safely booked and searched. The officers made best efforts to facilitate safe transport of the applicant and all the other detainees to the HPS station.

[109] Once at the station, the police held off questioning and treated the applicant with courtesy. There is an explanation for the delay in implementing the applicant's RTC. I do not accept the applicant's submissions to the effect that the police made no real, substantive (and documented) efforts to contact her counsel of choice or that the alleged delay in speaking with counsel from the time of

arrest to the time of contact gives rise to a breach. I am satisfied that any delay at issue here does not “demonstrate a disregard of a fundamental constitutional right”, rather, it is designed to ensure the proper implementation of that right.

[110] However, this does not end the analysis.

[111] As referenced earlier, mere minutes before speaking with counsel, the applicant faced an additional drug offence for possession for the purpose of trafficking, and her jeopardy was either practically or notionally altered. No RTC or caution was ever provided to her in response to this additional charge.

[112] Detainees are entitled to be informed of the reasons for their detention or arrest. The s.10(a) right is founded on the notion that one is not obliged to submit to an arrest if one does not know the reasons. Further, the s.10(a) right informs the right to silence: when detainees understand the extent of jeopardy they face, they can meaningfully decide whether or not to provide information and whether or not to seek the advice of counsel. Section 10(b) also links with the right to silence and an informed choice to speak: See *R. v. Evans*, [1991] 1 S.C.R. 869, at 886-887, *Willier*, at para. 27, citing *R. v. Bartle*, [1994] 3 S.C.R. 173, at 191.

[113] The Supreme Court of Canada in *Suberu,* at para. 40, explained that “the purpose of section 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy.” The constitutionally guarded right assists those regain their liberty and protect against involuntary self-incrimination.

[114] Moreover, and of significance in this case, where the jeopardy the accused is facing changes, the police must reiterate the accused's RTC. This was discussed in *Evans*, at 892-893:

> …This Court's judgment in *R. v. Black*, per Wilson J., makes it clear that there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one requiring reconsideration of an initial waiver of the right to counsel…
>
> 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.

[115] I must disagree with the Crown's submissions of no operative *Charter* breach. Given the effect of not providing RTC to Russell upon being advised of a new charge arising from the search, not much more need to be said. Rare is the case wherein there is an absolute withholding of providing an applicant with their RTC, following a potential or real change in the jeopardy, which includes the addition of a new substantial charge. This is a fundamental breach of s. 10 of the *Charter.*

Section 24(2) of the *Charter:*

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

> (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[117] In the seminal case of *R. v. Grant,* 2009 SCC 32, [2009] 2 S.C.R. 353, the Supreme Court of Canada held that the purpose of s. 24(2) is to maintain the good repute of the administration of justice. The provision focuses not on immediate reaction to the individual case, but rather on the overall repute of the justice system. The disrepute is to be considered by the court in its role of maintaining the integrity of, and public confidence in the justice system. It is an objective inquiry; it asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter* would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[118] The approach to s. 24(2) requires consideration of the long-term, probable effect of admission of the evidence from the perspective of society at large: *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para 36. The focus is not on punishing the police or compensating the accused: *Grant*, at para. 70.

[119] The onus is on the applicant to establish on a balance of probabilities that the admission of the evidence seized would bring the administration of justice into disrepute.

[120] The Supreme Court in *Grant*, at para. 71 outlined the following three lines of inquiry to take into consideration when determining whether the admission of the evidence would bring the administration of justice into disrepute. They are:

(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.

[121] In considering the seriousness of the *Charter*-infringing state conduct, the Court must ensure that they are not, in effect, condoning state deviation from the law. This is to be determined by looking at the breach on a spectrum where inadvertent or minor violations will be viewed differently from wilful or reckless disregard of *Charter* rights.

[122] The impact on any breach on the *Charter*-protected interests of the accused calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The Court should assess whether any breach, if there was one, was "fleeting or technical" as opposed to "profoundly intrusive": *Grant,* at para. 76. This factor does not assess the extent to which the state intruded on the individual generally, but only the extent to which the state intruded on the individual beyond any intrusion that was lawfully permitted. In *Grant,* at para. 109*,* the Supreme Court described this line of inquiry as "the danger that admitting the evidence may suggest that *Charter* rights do not count". The seriousness of the intrusion upon the rights of an accused may vary greatly. I must consider whether, on balance, the admission of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute.

The Seriousness of the *Charter*-infringing State Conduct:

[123] The question under this first inquiry is whether admission of the evidence would bring the administration of justice into disrepute. Police conduct that show a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law: *Grant* at para. 74. At para. 75 of *Grant,* the court elaborated on this factor by stating:

> Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach: *R. v. Silveira,* [1995] 2 S.C.R.

> 297, *per* Cory J. 'Good faith' on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest,* [1989] 1 S.C.R. 59, at p. 87, *per* Dickson C.J.; *R. v. Kokesch,* [1990] 3 S.C.R. 3, at pp. 32-33, *per* Sopinka J.; *R. v. Buhay,* 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

[124] The Crown argues that Unit 2502 was operating as an illegal dispensary – a business with two locations in the same building. It was not the applicant's residence, thus a lower, but not nonexistent privacy interest is at stake. I do not find favour with that argument.

[125] Further, I do not accept that the evidence seized would have been destroyed even if the police had knocked and announced their presence. Contrary to cases with electronic evidence or easily destroyed evidence, for example, powdered product to be flushed down a toilet, here we are dealing with huge quantities of cannabis product.

[126] As mentioned, the police acted without information regarding the occupants of the unit, employing a dynamic entry without some justification.

[127] I note that in *R. v. Pino,* 2016 ONCA 389, 130 O.R. (3d) 561, the Court of Appeal overturned a trial judge's conviction of production of marihuana, finding that the trial judge erred in law by holding that *Charter* breaches after discovery

of challenged evidence could not meet the “obtained in a manner” requirement in s. 24(2). While the facts are distinguishable, the court considered that the breaches were all temporally and contextually connected to evidence sought to be excluded, as they all occurred in the course of the same transaction: At paras. 49, 70, 74.

[128] The impact of the breach of failing to return to a RTJ is also serious. It favours exclusion, because it created a situation where a number of seized items have existed in a jurisdictional limbo for over 17 months. This factor particularly favours exclusion when considered in light of all the additional Charter breaches at the hands of these same officers.

[129] The s. 10(b) *Charter* breach is also of concern. Indeed, the cumulative effect of these breaches is readily apparent in this case. Taken together all these related breaches in this case portray the cavalier approach to *Charter* rights that these HPS officers appeared to have had that day.

[130] It must be remembered that it is not necessary that the police officers’ conduct amounted to bad faith or a flagrant or deliberate attempt to disregard the applicant’s *Charter* rights. As stated in *Grant*, even “ignorance of Charter standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith”: at para. 75.

[131] When considering the entire “chain of events” between the applicant and the police in this case, and applying the approach required by s. 24(2), the *Charte*r-infringing police misconduct in this case is part of the same course of conduct as that which resulted in the seizure of evidence. There is a temporal and contextual connection between the *Charter*-infringing conduct of the police and the seizure of the evidence. The connection is neither tenuous nor remote,

and will consequently meet the “obtained in a manner” requirement under s. 24(2).

[132] In my opinion, the admission of this evidence would send a message that the justice system is somehow condoning serious state misconduct and its admission would greatly undermine public confidence in the justice system. In my view, this factor weighs heavily in favour of its exclusion.

The Impact of the *Charter* violation on the *Charter*-Protected Interests of the Accused:

[133] The second branch of the test is outlined in *Grant* at paras. 76 and 78:

> This inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused’s protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* right however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.
>
> ...
>
> Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity is more serious than one that does not.

[134] The measure of seriousness is a function of the deliberate or non-deliberate nature of the violation by the authorities, circumstances of urgency and necessity, and other aggravating or mitigating factors. Accordingly, discoverability retains a useful role in assessing the actual impact of the breach. It is well established that this factor may weigh against a finding that the breach has had a meaningful impact on the accused’s *Charter*-protected interests.

[135] For the initial arrest and sets of charges, there was no attempt to question the accused before she spoke with counsel. There was no pattern of police ignoring the applicant's constitutional rights. Unlike *Rover* (where the evidence was excluded), any delay in implementing the applicant's RTC was not the product of a systemic police policy, but was clearly the result of case specific factors considered by the police.

[136] However, I do not arrive at the same conclusion regarding the subsequent charge and the complete failure to provide RTC to the applicant. The officers' conduct following the additional charges was either deliberate or careless. Nonetheless it was egregious and I cannot conclude that the officers acted reasonably and in good faith.

[137] The s. 10(b) breach in this matter cannot be considered "technical" or "minor." This matter involved a number of experienced HPS officers failing to comply with their obligations. Nothing could be more serious, nor have a greater impact, on *Charter*-protected interests.

[138] Further, there is evidence of negligence or carelessness regarding the failure to file the RTJ.

[139] Moreover, the unexplained rationale for the dynamic entry demonstrated a pattern of disregard of the applicant's rights. Given the factual background and the information known to the police, I am not persuaded that there was some urgency to the situation based on officer safety concerns or the destruction of evidence. This is not a case like *R. v*. *Omar* 2018 ONCA 975, 369 C.C.C. (3d) 544, per Brown J.A. in dissent, (aff'd. 2019 SCC 32), where the officers were confronted with a difficult, intricate, real-time decision.

[140] The impact on the applicant's *Charter*-protected interests was significant. The manner of search and obtaining of the evidence along with the s. 10(b) violation and failure to file the RTJ were, cumulatively, serious violations. My consideration of the second factor weighs in favour of exclusion.

Society's Interest in the Adjudication of the Case:

[141] The reliability of the evidence is an important factor in this line of inquiry. If the breach in question undermines the reliability of the evidence, that militates in favour of exclusion. As the Supreme Court stated in Grant, at paras. 79 and 82:

> [79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's 'collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law.' … Thus the Court suggested in Collins that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.
>
> …
>
> [82]…The Court must ask itself "whether the vindication of the specific Charter violation through exclusion of the evidence exacts too great a toll on the truth-seeking goal of the criminal trial...

[142] In *Grant*, at para. 83, the Supreme Court discussed how the importance of the evidence to the Crown's case is a relevant consideration:

> The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

[143] This aspect of the inquiry considers whether the truth-seeking function of the criminal trial process would be better served by admission or exclusion of the evidence. As the Crown submits, should the evidence be excluded, the prosecution's case would be at an end.

[144] Indeed, as noted in *Grant*, here is a societal interest in ensuring that those who break the law are brought to trial and dealt with according to the rule of law. In this case, it cannot be said that the evidence of the drugs is of marginal value.

[145] The Crown submits that society's interest in adjudication on the merits leans towards admission. The drugs are real evidence. The importance of the evidence to the Crown's case is an important factor. It is obvious that the exclusion of the drug evidence in this matter would gut the prosecution. This is a very large quantity of drugs and it is indisputable that this quantity of drugs represents very serious criminality.

[146] The Crown submits that any vindication of the applicant's *Charter* rights through exclusion of evidence would extract an excessive an unjustifiable toll on the truth-seeking goal of the trial. The exclusion of the drugs will leave the Crown with absolutely no evidence in support of the prosecution's case.

[147] While I must be cautious not to place too much emphasis on this latter point, I am mindful that in *Grant*, at para. 84, the Supreme Court offered that the seriousness of the offence may be a neutral consideration as it has the potential to "cut both ways". In this case, I conclude that society's interests in the adjudication of the case on its merits are best served by not excluding evidence when its probative value is so strong. A consideration of this public interest factor militates in favour of admission of this evidence.

Overall Balancing:

[148] The final step is a balancing of all of these factors. In *Harrison*, the Supreme Court provided some guidance to trial judges at para. 36:

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

[149] I accept that the community needs to have serious cases tried on their merits, especially where drug-related crimes are committed.

[150] However, as mentioned, the impact on the *Charte*r-protected interests of the applicant was serious. The police conduct in this case did also demonstrate a deliberate or cavalier disregard or as it pertains to the manner of search, the new charge and change in jeopardy and in their failure to provide any s. 10(b) RTC; an absolute ignorance of well-established *Charter* rights.

[151] I adopt the comments made in *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at paras. 77-78, and find they apply here:

> [77] I can find little, if anything, that might be said to mitigate the police misconduct. This was not a situation in which the police conduct slipped barely over the constitutional line, or in which legal uncertainty could reasonably be said to have blurred that line. Finally, there is nothing by way of extenuating circumstances that might offer some excuse for the police disregard of the appellant's constitutional rights.
>
> [78] Courts, as representatives of the community, cannot be seen to condone the blatant disregard of the appellant's rights that occurred in this case. The only way the court can effectively distance itself from that conduct is by excluding the evidentiary fruits of that conduct.

[152] I find that the actions of the police in this case would invite a negative impact on the public confidence in the administration of justice and the rule of law. The balancing of all of the s. 24(2) factors militate in favour of exclusion of the evidence.

[153] Finally, Ms. Schofield's submissions regarding the exercise of my residual discretion to exclude the evidence under s. 24(1) of the *Charter* has some merit in this case.[i] However, as I have concluded that the evidence ought to be excluded pursuant to s. 24(2) of the *Charter*, I need not delve further into this alternative argument, or the entreaty for the imposition of a stay of proceedings under s. 24(1) of the *Charter*.

Conclusion:

[154] For all of the aforementioned reasons, I find that the applicant's ss. 8, and 10(b) *Charter* rights were breached. Pursuant to s. 24(2) of the *Charter,* all the drugs and drug-related evidence seized from unit 2502 is to be excluded.

_____

A.J. Goodman J.

Released: January 25, 2024

CITATION: R. v. Russell 2021 ONSC 529
COURT FILE NO.: CR 23-667, 23-668
DATE: 2024-01-25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HIS MAJESTY THE KING

Respondent

- and -

HOLLY RUSSELL

Applicant

REASONS FOR RULING - SS. 8 , 10(b), AND 24 OF THE *CHARTER*

A. J. GOODMAN J.

Released: January 25, 2024

[i] In *R. v. Bjelland*, [2009] 2 S.C.R. 651, at para. 19, the Supreme Court of Canada affirmed that trial courts have jurisdiction to exclude evidence pursuant to s. 24(1), providing the accused can establish a breach of a *Charter* right:

> [19] Here, we are concerned with aspects of the conduct of a criminal trial and of the operation of the justice system, where the courts have to pass upon the guilt or innocence of an accused. While the exclusion of evidence will normally be a remedy under s. 24(2), it cannot be ruled out as a remedy under s. 24(1). However, such a remedy will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system.

In *R. v. White*, [1999] 2 S.C.R. 417 at paras. 87, 89, Iacobucci J. acknowledged a Court's common law power to exclude evidence, as well as its jurisdiction to do so under s. 24(1) of the *Charter*:

> [87] The possibility of excluding evidence under s. 24(1) of the Charter was addressed again more recently in *Schreiber v. Canada (Attorney General),* [1998] 1 S.C.R. 841. In concurring reasons, Lamer C.J. stated, at para. 24, that evidence may be excluded under a combination of ss. 7 and 24(1) of the *Charter* where the use of such evidence would affect trial fairness. Lamer C.J. cited on this point the decisions of the Court in *Harrer*, supra, as well as *R. v. Terry*, [1996] 2 S.C.R. 207, where the Court held that an accused may use ss. 7 and 11(d) of the *Charter* to obtain redress where the admission of evidence would violate the Charter. Speaking for the majority of the Court in *Schreiber*, L'Heureux-Dubé J. stated, at para. 35, that she agreed with the Chief Justice that s. 7 may apply to justify excluding evidence where it is necessary to preserve the fairness of the trial. L'Heureux-Dubé J. did not specifically advert to the possible role of s. 24(1).
>
> **...**
>
> [89] Although I agree with the majority position in *Harrer*, supra, that it may not be necessary to use s. 24(1) in order to exclude evidence whose admission would render the trial unfair, I agree also with McLachlin J.'s finding in that case that s. 24(1) may appropriately be employed as a discrete source of a court's power to exclude such evidence. In the present case, involving an accused who is entitled under s. 7 to use immunity in relation to certain compelled statements in subsequent criminal proceedings, exclusion of the evidence is required. Although the trial judge could have excluded the evidence pursuant to his common law duty to exclude evidence whose admission would render the trial unfair, he chose instead to exclude the evidence pursuant to s. 24(1) of the *Charter*. I agree that he was entitled to do so.