PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Lambert*, 2020 NSPC 37

Date: 2020-10-06
Docket: 8260204, 8260205, 8020206, 8260207, 8260208, 8260209, 8060210, 8260211, 8260212, 8260213, 8260214, 8260215, 8060216, 8260217, 8060218
Registry: Halifax

Between:

Matthew Lambert, Darcy Bailey and Dangis Seinauskas

Applicants

v.

Her Majesty the Queen

Respondent

DECISION GLOBAL *VOIR DIRE* – VOLUNTARINESS, *CHARTER* (SS. 7, 8, 9 & 10), *GAROFOLI* AND S. 24(2)

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	May 6 - 10, 14 - 16 & 24, June 18, 20 & 21, July 3, 25, 29 & 30, 2019 in Halifax, Nova Scotia
Decision:	October 6, 2020 (written)
Charges:	Section 465(1)(c), *Criminal Code* and ss. 5(2), 5(1) & 6(1), *Controlled Drugs and Substances Act*
Counsel:	Joel Pink, Q.C. and George Franklin, for the Applicant, Matthew Lambert Patrick MacEwen, for the Applicant, Darcy Bailey Stanley MacDonald, Q.C. and Paul Neifer, for the Applicant, Dangis Seinauskas Jeff Moors & Angela Nimmo, for the Respondent, Crown

By the Court:

Introduction

[1] Nelson Alvarado-Calles, Matthew Lambert, Darcy Bailey, and Dangis Seinauskas are charged with offences relating to the importation of 157 kg of cocaine. The cocaine was discovered in an underwater chamber (sea chest) in the hull of a cargo vessel, the Arica.

[2] The Arica first came to the attention of authorities in the Port of Montreal. Information was passed on to the RCMP in Halifax, the Arica's next port of call. Upon its arrival in Halifax, authorities discovered anomalies with the grate covering one of the Arica's sea chests and saw three or four men in a pontoon boat behaving suspiciously around the vessel. RCMP found the pontoon boat a short time later and had a conversation with Mr. Bailey and Mr. Seinauskas who were onboard. Through that afternoon and early evening, authorities continued surveillance on the Halifax waterfront, around the Arica and at a nearby beach. They came to focus on four individuals, believed to be the accused. By the end of the day, Mr. Lambert, Mr. Bailey, and Mr. Seinauskas had been arrested and the cocaine found in the Arica's starboard sea chest. Mr. Alvarado-Calles was arrested some weeks later in Ontario.

[3] Mr. Lambert, Mr. Bailey and Mr. Seinauskas have applied for exclusion of evidence under s. 24(2) of the *Charter*, alleging breaches of ss. 7, 8, 9, and 10(a) & (b) of the *Charter*. The alleged s. 8 violations relate to warrantless and judicially authorized searches. production orders and interceptions of private communications. Mr. Bailey and Mr. Seinauskas also challenged the voluntariness of their initial statement to police onboard the pontoon boat.

[4] Mr. Alvarado-Calles did not take part in the applications, but his counsel maintained a watching brief.

[5] The Applicants allege a series of *Charter* breaches beginning with breaches of ss. 7 and 10 during the first interaction between police and Mr. Bailey and Mr. Seinauskas onboard the pontoon boat. They argue that information obtained during that interaction was used to focus further investigation, led to the discovery of evidence, and resulted in a cascade of subsequent *Charter* violations. They also argue other *Charter* violations during the ensuing investigation that are not dependent on that initial information. If I find *Charter* breaches, they will argue that the individual and cumulative impact of these breaches justifies exclusion of evidence.

[6] Counsel agreed to a global *voir dire* to deal with all alleged *Charter* breaches, including a *Garofoli* hearing in relation to the first search warrant. Since grounds for subsequent judicial authorizations relied on similar information, it was thought that a decision on the first warrant would inform analysis of the later authorizations. A separate voluntariness *voir dire* was scheduled. However, counsel agreed that the evidence from the global *Charter voir dire* could apply and no further evidence was required.

[7] The amount of time required for the *voir dire* was underestimated. It was difficult to schedule additional time for both the *voir dire* and the trial. To make the best use of court time and the availability of counsel and witnesses, some matters were heard out of order. Considering the principles in *R. v. Jordan*, 2016 SCC 27 and *R. v. Cody*, 2017 SCC 31 and to assist counsel, I provided conclusions and decisions on specific issues as the matter proceeded.

[8] This decision deals with all matters and incorporates reasons previously given.

Factual Overview

[9] On June 7, 2018, Cpl. Sherri Campbell (then constable) with the RCMP Federal Serious and Organized Crime unit (FSOC) in Halifax received information from a colleague in Montreal concerning suspicious activity around a cargo ship, the M/V Arica (the Arica). The Arica was headed for Halifax and the author of the email believed the information might be relevant to "marine smuggling". Cpl. Campbell advised Sgt. Nancy Mason who was in charge of the Halifax FSOC unit. Sgt. Mason advised Canada Boarder Services Agency (CBSA) in Halifax who agreed to conduct an examination of the Arica when it arrived.

[10] The Arica arrived in Halifax early on the morning of June 9th. CBSA investigators conducted an inspection of its underwater hull using a Remotely Operated Vehicle (ROV) and noted anomalies on the starboard sea chest (an open chamber in the hull that allows sea water to enter for engine cooling purposes). CBSA investigators on the bridge of the Arica also observed a suspicious pontoon boat in the area. Details were provided to Cpl. Campbell and Sgt. Mason. Sgt. Mason felt confident they were dealing with a drug importation. She approved Cpl. Campbell to conduct surveillance and Sgt. Aaron Glode (then corporal), was called in to assist.

[11] Cpl. Campbell and Sgt. Glode went to the Halifax waterfront to look for the pontoon boat and located it around 1:00 p.m. at a pier in downtown Halifax. It was

unoccupied and contained diving gear and a hand-held radio. A short time later, two men, later identified as Mr. Bailey and Mr. Seinauskas boarded the boat. As the men were preparing to leave, the officers approached and, with permission, boarded the boat and had a conversation. They remained on the boat for about 20 minutes and learned, among other things, that Mr. Bailey and Mr. Seinauskas were with two other men who were diving at Black Rock Beach in Point Pleasant Park, they were driving a Black Cadillac Escalade with Quebec plates and were staying at the Future Inn in Bedford. Black Rock Beach is adjacent to the pier where the Arica was docked so Cpl. Campbell called to alert CBSA investigators on the Arica that there might be divers in the water at Black Rock Beach.

[12] CBSA IO Amanda Visser was on the Arica. As a result of the call from Cpl. Campbell, at about 1:40 p.m., she started to walk the deck to look for divers.

[13] At about 1:50 p.m., Cpl. Campbell and Sgt. Glode left the dock area to return to their vehicle and Mr. Bailey and Mr. Seinauskas left in the pontoon boat. At approximately 1:55 p.m., IO Vissers saw the pontoon boat reappear in the harbour, heading toward Black Rock Beach. Sgt. Glode and Cpl. Campbell drove to Black Rock Beach to look for the other two men, arriving at about 2:00 p.m. Once there, they located the Escalade in the parking lot. Sgt. Glode saw a diver, later identified as Matthew Lambert, just coming out of the water and another man, later identified as Nelson Alvarado-Calles, on shore. He also saw the pontoon boat in the Harbour just off the beach. The pontoon boat left the area, heading in the direction of downtown. Mr. Lambert and Mr. Alvarado-Calais loaded the dive gear into the Escalade and left.

[14] Sgt. Glode and Cpl. Campbell followed the Escalade to a parking lot on the waterfront in downtown Halifax. Mr. Bailey and Mr. Seinauskas arrived in the pontoon boat and met Mr. Lambert and Mr. Alvarado-Calles. They removed the diving gear from the pontoon boat, put it in the Escalade and the four of them left in that vehicle. The officers tried to follow the Escalade but lost it in traffic.

[15] Sgt. Glode and Cpl. Campbell went back to Black Rock Beach and drove around looking for the Escalade but couldn't find it so went to check the Future Inn. They located the Escalade there, parked and unoccupied. They were joined by two CBSA investigators, IO Adam Delvalano and IO Sean Foster, who had been brought in to assist with surveillance.

[16] The Escalade eventually left the hotel and was followed back to Black Rock Beach. IO Foster and IO Delvalano followed the Escalade into the parking lot

nearest the beach. During the drive, IO Delvalano thought the route was unusual and thought that at one point he advised others on the radio that there might be a "heat check". Sgt. Glode and Cpl. Campbell parked in an outer lot, located at the entrance to the beach parking lot. D/Cst. Fairbairn and D/Cst. Underwood (Halifax Regional Police (HRP) officers who had been brought in to assist with surveillance) arrived shortly after and also parked in the parking lot nearest the beach. IO Foster, IO Delvalano, D/Cst. Fairbairn and D/Cst. Underwood all left their vehicles and observed the beach area and parking lot while on foot, in their vehicles or both. Neither Sgt. Glode nor Cpl. Campbell could see the beach from their location so relied on information provided to them by the other members of the surveillance team. During this time, Cpl. Campbell and Sgt. Glode were also communicating with Sgt. Mason and CBSA investigators who were on or around the Arica.

[17] Members of the surveillance team saw Mr. Bailey and Mr. Lambert get out of the Escalade and walk along a sea wall toward the Arica. They then returned to the Escalade where Mr. Bailey got dressed in dive gear. At around 6:00 p.m., IO Vissers saw an individual near a black SUV putting on diving gear and heading toward the beach. Members of the surveillance team saw him enter the water and start swimming in the direction of the Arica using a propulsion device. Once CBSA investigators on the Arica were advised that there was a diver in the water, they decided to pull out the commercial diver who had been inspecting the hull and put the ROV back in.

[18] At approximately 6:30 p.m., while Mr. Bailey was in the water, Mr. Lambert drove the Escalade to the outer parking lot where Sgt. Glode and Cpl. Campbell were located. He took something out of the vehicle, threw it into the woods and then drove back to park near the beach. The item was retrieved and found to be a socket set connected by a bungee cord with a carabiner attached.

[19] CBSA IO Brian Gillespie was watching the video feed from the ROV and, at approximately 6:45 p.m., he observed a diver under the Arica. The diver waved at the camera on the ROV and then left, using a propulsion device.

[20] Mr. Bailey came out of the water. He had with him an item that was described by IO Foster as a large heavy black cylinder. Mr. Lambert went to the water to meet Mr. Bailey and they dragged/carried the item and the diving gear up the beach and put it into the back of the Escalade. They got into the vehicle and drove away quickly.

[21] Sgt. Glode and Cpl. Campbell testified they believed contraband had been removed from the Arica and was now in the Escalade, so Sgt. Glode made the decision to stop the vehicle and arrest the occupants. Sgt. Glode and Cpl. Campbell had moved their vehicle from the lot at the entrance to the beach and were closer to downtown so missed the vehicle when it left Black Rock Beach.

[22] D/Cst. Underwood followed the Escalade. He received instructions from Sgt. Glode to stop the vehicle and arrest the occupants. He contacted Sgt. Perry Astephen, a uniform member of HRP, for assistance. At approximately 7:10 p.m., Sgt. Astephen stopped the vehicle and D/Cst. Underwood arrived moments after. D/Cst. Underwood arrested the driver, Mr. Lambert, for conspiracy to import and possession for the purpose of trafficking cocaine, advised him of his right to counsel and cautioned him and asked if he wished to speak to counsel. He indicated he understood his rights and said, "No man, we don't have any cocaine". An access card for the Future Inn was found in his pocket.

[23] Sgt. Astephen arrested Mr. Bailey, advised him of his right to counsel and cautioned him. Sgt. Astephen made the decision to delay implementation of Mr. Bailey's right to counsel because of the ongoing investigation. He told Mr. Bailey he would not be able to speak to a lawyer now and told the transport officers to "put him on ice", meaning they would not be permitted to contact counsel, until they heard from the investigators. After advising Mr. Bailey of his rights, but before he had an opportunity to consult counsel, Sgt. Astephen asked Mr. Bailey a question, which he answered.

[24] D/Cst. Underwood overheard Sgt. Astephen's direction to delay implementation of the right to counsel, but no other member of the investigation team was advised that it had been given.

[25] The Escalade was searched incident to arrest and investigators discovered that the cylindrical item that had been removed from the water was a propulsion device and did not contain cocaine. A small quantity of what appeared to be personal use drugs was located in one of the bags in the Escalade. The Escalade was seized and eventually searched again pursuant to a warrant.

[26] Mr. Bailey and Mr. Lambert were transported to HRP Headquarters where, at approximately 7:40 p.m., they were each placed in a holding room to wait for investigators. Neither were given access to counsel during that time. Mr. Bailey had been wearing a wet dive suit when he was arrested. That was removed (at least the upper part) to facilitate handcuffing but the clothing he was wearing underneath

was damp. He was provided with a blanket in the holding room but was not given dry clothes until sometime after approximately 9:30 p.m.

[27] Sgt. Glode and Cpl. Campbell left the location of the vehicle stop and went to Future Inn to try to locate the other two men. They knew from the access card folder that had been seized from Mr. Lambert that he was staying in room #329. When they arrived, they were told that, moments before, staff had assisted in moving the occupants of that room to #327 due to a faulty lock.

[28] While waiting for uniform police and the emergency response team (ERT), Cpl. Campbell learned that divers had removed bags from the Arica that were consistent with an offload.

[29] When ERT arrived, Cpl. Campbell and Sgt. Glode knocked on the door to room #327 and it was opened by Mr. Seinauskas. Sgt. Glode stepped inside the room and arrested him. He was turned over to a uniform officer to be transported to HRP Headquarters. There is no evidence that he was cautioned or advised of his right to counsel until later at the station.

[30] At approximately 9:15 p.m., Sgt. Mason met D/Cst. Fairbairn at HRP headquarters and spoke to Mr. Bailey in the holding room. Their interaction was video and audio recorded. They confirmed that he was under arrest for offences including conspiracy to import cocaine, cautioned him and advised him of his right to counsel. His responses will be discussed in detail later in this decision.

[31] At 9:25, D/Cst. Fairbairn and Sgt. Mason entered Mr. Lambert's holding room. They confirmed that he was under arrest for offences including conspiracy to import cocaine and advised him of his right to counsel. He asked to speak with a lawyer and arrangements were made for him to consult his counsel of choice.

[32] At 9:40 p.m., D/Cst. Fairbairn spoke with Mr. Seinauskas and arranged for him to consult with duty counsel.

[33] At approximately 10:10 p.m., Cpl. Campbell and Sgt. Glode arrived at HRP Headquarters. Sgt. Glode spoke with D/Cst. Fairbairn and understood that Mr. Bailey had been cautioned and advised of his right to counsel but had refused. At approximately 10:46 p.m., he and Cpl. Campbell entered Mr. Bailey's holding room. Their interactions were video and audio recorded. Sgt. Glode provided Mr. Bailey with a secondary caution and "Prosper" warning. Mr. Bailey's responses will be discussed in detail later in this decision. He then provided a statement which ended at approximately 12:56 a.m.

[34] On June 10, 2018, Sgt. Glode prepared a search warrant for #327 at the Future Inn. He asked for authority to seize "suitcases, duffle bags, garbage and any other items not associated to the hotel room". The authorizing Justice of the Peace crossed out "and any other items not associated to the hotel room". Sgt. Mason was present during the execution of the warrant. She seized luggage, electronic devices, coats and toiletries.

[35] During the days and weeks that followed, additional judicial authorizations were obtained. These included warrants to search the Escalade, electronic devices that had been seized from room #327 at the Future Inn and the Escalade, residences associated with the four men, production orders to obtain various records and authorizations to intercept communications.

[36] Additional facts will be detailed as they become relevant to specific legal issues.

Alleged Breaches

[37] I will address the alleged breaches in chronological order:

1. Pontoon Boat - Mr. Bailey and Mr. Seinauskas - ss. 7, 10(a) and (b) of *Charter* and voluntariness;

2. Roadside - Arrests, Searches Incident to Arrests and Seizure of Escalade
    a. Mr. Bailey and Mr. Lambert – grounds to arrest and legality of search of persons and vehicle incident to arrest – ss. 8 and 9
    b. Mr. Bailey – questioning before opportunity to exercise right to counsel – s. 10(b)
    c. Mr. Lambert and Mr. Bailey – seizure of vehicle – s. 8
    d. Mr. Lambert and Mr. Bailey - delayed implementation of right to counsel - s. 10(b)

3. Halifax Regional Police Station - Mr. Bailey – s. 10 (b)

4. Future Inn- Arrest of Mr. Seinauskas
    a. Grounds for arrest – s. 9
    b. Lack of *Feeney* warrant - s. 8

c. Delay in advising of right to counsel - s. 10(a) & (b)

5. Future Inn – Search of Room #327 – Mr. Bailey, Mr. Seinauskas & Mr. Lambert

a. Excision and Sufficiency of Grounds – s. 8

b. Over seizure and plain view exception - s. 8

6. Subsequent Judicial Authorizations – s. 8

[38] Finally, if I find that there were any *Charter* breaches, I will have to consider exclusion of evidence under s. 24(2). That will require me to consider issues relating to the threshold for a remedy under s. 24(2) (standing), derivative evidence, discoverability, the cumulative impact of multiple breaches and how to apply those considerations in the context of a multi-accused/multi-applicant trial/hearing.

Analysis

1. Pontoon Boat - Statement from Mr. Bailey and Mr. Seinauskas - *Charter*, ss. 7, 10(a (b) and Voluntariness

[39] The Applicants argue that the men were detained when they spoke to police onboard the pontoon boat. As such, they should have been advised of the reasons for their detention, their right to remain silent and their right to retain and instruct counsel without delay as guaranteed by ss. 7 and 10(a) and (b) of the *Charter*. They also argue that irrespective of detention, the men were "suspects" in a drug importation investigation and should have been advised of that and cautioned. They argue that the failure to do so renders their statements involuntary under the common law confessions rule.

[40] The Crown argues that the men were not detained, so there was no obligation on the police to provide them rights under ss. 7 or 10 of the *Charter*. The Crown concedes that they were not advised of the s. 10(b) right to consult counsel, so if they were detained this would result in a breach. However, the Crown argues that the information provided was sufficient to comply with s. 10(a). The Crown also argues that the men were not suspects in a drug investigation, so no caution was required. Alternatively, the Crown argues that even if they were "suspects" and deserving of a caution, the failure to provide one in these circumstances did not breach s. 7 of the *Charter* or make the statements involuntary.

[41] The specific issues therefore are as follows:

a) Were Mr. Bailey and Mr. Seinauskas detained when they spoke with police on board the pontoon boat?

b) If they were detained, was the information provided by police sufficient to comply with s. 10(a) of the *Charter?*

c) Were police required to caution Mr. Bailey and Mr. Seinauskas? If so, does the failure to caution them in these circumstances, render the statements involuntary and/or violate s. 7 of the *Charter*?

Legal Framework for ss. 7, 10(a) & (b) and Voluntariness

Detention

[42] The police duties under ss. 10(a) and (b) of the *Charter* are triggered by any form of detention, including investigative detention (*R. v. Suberu*, 2009 SCC 33, at para. 2; *R. v. Grant*, 2009 SCC 32; and *R. v. Mann*, 2004 SCC 52).

[43] The defence has the burden of proving detention on a balance of probabilities. A detention can arise in various circumstances (*R. v. Therens***,** [1985] 1 S.C.R. 613**;** *R. v. Mann*, 2004 SCC 52, at para. 19; *R. v. Grant*, *supra*, at paras. 26 & 44; and *Suberu*, *supra*, at para. 3).

[44] In this case, the Applicants are alleging psychological detention. The test for psychological detention in the absence of legal compulsion is whether the police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police (*Grant, supra.*, at para. 31; and *Suberu, supra.*, at para. 26). So, this case is about whether a reasonable person in the circumstances of Mr. Bailey and Mr. Seinauskas would have concluded that he or she had no choice but to stay with the officers and answer their questions (*Grant*, *supra.*, at paras. 30, 26, 31 & 44; and *Suberu*, *supra.*, at paras. 3 & 22).

[45] This is an objective test (*Grant, supra.*, at paras. 31 & 44; and *Suberu*, *supra.*, at para. 22). As such, the subjective belief of the specific accused is relevant but not determinative (*Grant, supra.*, paras. 32 & 50). Neither Mr. Bailey nor Mr. Seinauskas testified and were not required to. The onus to establish psychological detention requires evidence but can be satisfied from evidence other than from the applicant (*Grant, supra.*, at para. 49).

[46] The circumstances must be assessed from the perspective of the individual. Therefore, the subjective intent of the police officer is also not determinative. It is relevant only insofar as their intent may have been conveyed to the individual through the officer's demeanour, words or actions as would be reasonably perceived by the individual (*Grant, supra.*, at paras. 31 & 32).

[47] Not every interaction with police amounts to a detention for *Charter* purposes (*Mann, supra.*; *Grant, supra.*, at paras. 26 & 29; and *Suberu, supra.,* at para. 3). Constitutional rights, including the right to counsel under s. 10(b), are triggered when an individual's liberty interest is suspended "by a significant physical or psychological restraint" (*Grant, supra.,* at para. 44; and *Suberu, supra.,* at para. 25, emphasis added). Detention is not the same as "delayed" or "kept waiting" and does not necessarily arise even when a person is under investigation for criminal activity and is questioned or physically delayed by contact with the police (*Mann,* at para. 19; *Grant,* at para. 26; and *Suberu,* at paras. 3 & 23).

[48] The determination of whether a psychological detention has occurred "must be made in light of the circumstances as a whole" but, in *Grant* (*supra.,* at para. 44) the court provided a non-exhaustive list of factors which would be relevant:

> (a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual, where relevant, including age; physical stature; minority status; level of sophistication.

[49] The Supreme Court has acknowledged that "[t]he line between general questioning and focussed interrogation amounting to detention may be difficult to draw" (*Grant, supra.,* at para. 29). Even focussed suspicion or questioning of a person who is under investigation for criminal activity does not necessarily turn an encounter into a detention (*Suberu, supra.,* at para. 23; *Mann, supra.,* at para. 19).

What is important is how the police interact with the subject based on that suspicion and whether that interaction would cause a reasonable person to believe he or she was not free to choose to walk away or decline to answer questions (*Grant*, at para. 41).

Right to be Informed of Reasons for Detention under s. 10(a)

[50] If Mr. Bailey and/or Mr. Seinauskas were detained, the police were required to advise them in "clear and simple language, of the reasons for the detention" (*Mann*, at para. 21).

[51] An important purpose of s. 10(a) is to inform a detainee of the extent of his jeopardy thus allowing him to make informed choices about whether to exercise his other *Charter* rights, including his right to counsel and right to silence (*R. v. Evans*, [1991] 1 S.C.R. 869; and, *R. v. Nguyen*, 2008 ONCA 49, paras. 20 – 21; and, *R. v. Hebert*, [1990] 2 SCR 151 . The police are not required to use the technical wording of the offence that is under investigation (*R. v. Roberts*, 2018 ONCA 411, at para. 63). However, the information must convey the true extent of the detainee's jeopardy (*ibid.*, at para. 78; *Evans*, *supra.*, at pp. 886-88; and, *Nguyen*, *supra.*, at paras. 16-22.).

Right to Silence – Police Caution, Common law Confessions Rule and s. 7 of the Charter

General Principles

[52] Under the common law confessions rule no statement made by an accused to a person in authority is admissible unless the Crown proves beyond a reasonable doubt that it was made voluntarily (see: *R. v. Spencer*, 2007 SCC 11, para. 11). The confessions rule is concerned with both the reliability of the statement and "fundamental notions of trial fairness" (*R. v. Oickle*, 2000 SCC 38). The trial fairness branch of the rule incorporates the principle against self incrimination and the common law right to silence (*R. v. Hebert*, *supra*,; *Oickle*, *supra.*, paras. 24 – 33; *R. v. Whittle*, [1994] 2 SCR 914; and *R. v. Paterson*, 2017 SCC 15, at paras. 15 - 16). The right to silence is also a principle of fundamental justice, so is protected by s. 7 of the *Charter* (*Hebert, supra.*; *Oickle, supra.*; and, *Whittle*, *supra.)*.

[53] The focus of concern in this case is the trial fairness aspect of voluntariness, and more particularly the principle against self-incrimination and the pre-trial right

to silence. Because of the overlap between this aspect of voluntariness and the right to silence protection in s. 7 of the *Charter*, I will consider them together. However, I must keep in mind that the scope, burden, standard of proof and remedies are different (*Oickle, supra.,* at para. 30).

[54] Police are permitted to question people, but everyone is entitled to choose whether to answer their questions. The common law and s. 7 of the *Charter* protect that right to choose and, importantly, protect the right of the individual to make an "informed" and "meaningful" choice whether to speak to the authorities or not (*R. v. Singh,* 2007 SCC 48, at para. 35; *Hebert, supra.,* para. 67 - 80; and, *Whittle, supra.,* para. 29). As was succinctly state by Watt, J. (as he then was), in *R. v. Worral,* [2002] O.J. No. 2711 (Ont. Sup. Ct. J.), at para. 106), "Voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them.".

[55] The information and access to counsel guaranteed by s. 10(a) and (b) of the *Charter* and the standard police caution assist an accused to make an informed and meaningful choice about whether to give up his right to remain silent.

The Police Caution and Relationship to Voluntariness

[56] The standard police caution, in plain language, informs the suspect of his right to remain silent, including his jeopardy, his right to say nothing and the consequences of speaking (*Singh, supra.,* at para. 31).

[57] The police do not have to caution everyone they meet or question.

[58] In *Worrall,* (*supra.,* at paras. 104 – 107), Watt J. (as he then was) held that an individual must be cautioned if there is information that would alert "a reasonably competent investigator" to the "realistic prospect" that the individual was associated with a crime.

[59] In *Singh,* Charron, J., writing for the majority, quoted with approval the advice provided by René Marin (*Admissibility of Statements* (9th ed. (loose-leaf)), at pp. 2-24.2 and 2-24.3, cited in *Singh, supra.,* at para. 32):

> The warning should be given when there are reasonable grounds to suspect that the person being interviewed has committed an offence. An easy yardstick to determine when the warning should be given is for a police officer to consider the question of what he or she would do if the person attempted to leave the questioning room or leave the presence of the officer where a communication or exchange is taking

> place. If the answer is arrest (or detain) the person, then the warning should be given.

[60] Charron, J. went on to say that "even if the suspect has not formally been arrested and is not obviously under detention, police officers are well advised to give the police caution in the circumstances described by Marin" (*Singh, supra.,* at para. 33).

[61] The "reasonable grounds to suspect" standard has been described by the Supreme Court of Canada in multiple decisions (including, *R. v. Chehil,* 2013 SCC 49; *R. v. Kang-Brown,* 2008 SCC 18; and, *R. v. Mann,supra.*).

[62] It is more than mere suspicion and less than reasonable grounds to believe (*Kang-Brown, supra.,* at para. 75). Suspicion "is an expectation that the targeted individual is possibly engaged in some criminal activity" (*Kang-Brown, supra.,* at para. 75). Reasonable suspicion is more because it is grounded in objectively discernable facts (*Chehil, supra.,* at para. 29). It is less than "reasonable grounds to believe" because it requires a "reasonable possibility, rather than probability of a crime" (*Chehil, supra.,* at para. 27, emphasis added).

[63] To ground a reasonable suspicion, the facts must be indicative of the possibility of criminal behaviour, rather than a "generalized" suspicion (*Chehil, supra.,* at para. 30). The Court in *Mann* spoke of the need for a reasonable suspicion that an individual is connected to a "particular crime" (*supra.,* at para. 45). However, that does not require officers to "point to a specific ongoing crime", identify the "precise illegal substance being searched for", or to "pinpoint the crime with absolute precision" (*R. v. Nesbeth,* 2008 ONCA 579, at para. 18, leave to appeal refused, [2009] S.C.C.A. No. 10; and *Chehil, supra.,* at paras. 35 and 37). In *Nesbeth,* the Court concluded it was enough that the officer had reasonable grounds to suspect that the individual was in possession of contraband (drugs or weapons or both) as opposed to being a mere trespasser (*ibid,* at para. 18). In *Chehil,* the Court concluded it would be enough that the suspicion was linked to the possession, traffic or production of drugs or drug-related contraband (*supra.,* at para. 37).

[64] There is general agreement that police are required to caution a "suspect" before questioning him (See: *R. v. Smyth,* [2006] O.J. No. 5227, at para. 81; *R. v. Garnier,* 2017 NSSC 338, at para. 81; *R. v. Sandeson,* 2017 NSSC 197; *R. v. Merritt,* 2016 ONSC 7009; *R. v. Randall,* [2003] O.J. No. 718 (S.C.J.); *R. v. Wong,* 2017 ONSC 1501; *R. v. Morrison,* [2000] O.J. No. 5733 (Sup. Ct.); and, *R. v. Oland,* 2018 NBQB 255).

[65] The officer's training and experience, understanding of the term "suspect", and his or her subjective view of whether the person being questioned was a "suspect" can be relevant (*R. v. Chehil*, *supra.*, at para. 47; and *Garnier, supra.*, and the cases referenced therein). However, "reasonable grounds to suspect" is a subjective/objective standard (*Mann, supra.*). It requires that a reasonable person, in the position of the officer, would have suspected the individual was involved in the criminal activity being investigated (*R. v. Chehil, supra.,* at paras. 22-37). Justice Watt's "reasonably competent investigator" is often used to inform the objective part of the analysis (see for example: *Garnier; supra.,* at para. 81; *Wong, supra.,* at para. 67; and *J.R., supra.,* at para. 19).

[66] The cases use different formulations for the threshold of when a caution must be provided. There are, however, common themes that emerge. A caution may be required even where an individual is not detained or under arrest. A caution should be provided where there are reasonable grounds to suspect a criminal offence and that the individual being questioned is implicated in that offence. It is concerned with reasonably grounded possibilities not probabilities. The individual officer's subjective belief should be assessed using a "reasonably competent investigator" in the position of the officer.

The failure to caution a suspect is not necessarily fatal to the voluntariness of a statement. The absence of a caution is an important factor in many cases, but all the surrounding circumstances must be considered (*Singh, supra.,* at para. 31; *R. v. Boudreau,* [1949] S.C.R. 262; *R. v. Bottineau,* 2011 ONCA 194, at para. 88; and, *R. v. Pearson,* 2017 ONCA 389, at para. 19). As was made clear in *Oickle* (*supra.*, at paras. 47 & 71), the voluntariness analysis is contextual, and all the relevant factors must be considered.

Additional Facts Relevant to Analysis of Pontoon Boat Statements

[67] On June 9, 2018, at approximately 12:30 p.m., when Cpl. Campbell and Sgt. Glode went to the Halifax waterfront to conduct surveillance, they were looking for the pontoon boat. They had information from Montreal and from CBSA in Halifax.

[68] As a result of an email from a colleague in Montreal, they were aware that:

- The author of the email believed the information might be relevant to "marine smuggling";

- On June 4th, 2018, port security in Montreal had observed a RHIB (rigid hull inflatable boat) with 4 occupants, one with dive gear, around the Arica (a cargo vessel);
- The RHIB was stopped and the diver questioned. He said he was diving for algae;
- The following day, video from the 4th was reviewed and port security saw that the RHIB had gone behind the Arica, the diver had gone into the water and appeared to have retrieved an object, but the video was not clear;
- The Arica was on its way to Halifax;
- The diver was Matthew Ross Lambert who was from B.C. He was connected to 270 files there, believed to be associated with organized crime, and involved in cocaine trafficking and other criminality; and,
- The author of the email did not believe the diver was diving for algae. He thought it more likely that he was taking something out of the water that had been thrown overboard and less likely that he was putting something on the Arica.

[69] They also had information from IO Delvalano about what had been observed by CBSA that morning:

- the Arica had arrived in Halifax in the early morning of June 9th;
- CBSA had conducted an inspection of the underwater hull of the Arica using a Remotely Operated Vehicle (ROV);
- the ROV inspection was negative in the sense that nothing was attached to the hull but CBSA observers did note that the grate covering the starboard sea chest (an open chamber in the hull that allows sea water to enter for engine cooling purposes) was missing bolts and a wire;
- bridge officers on the Arica had seen a pontoon boat with three occupants hovering near the Arica, they believed the boat may have contained diving gear, and, the presence of the pontoon boat

was described as unusual for the area, weather and time of day, so CBSA officers felt it was very suspicious;

- the pontoon boat had come closer to the Arica;
- it had a maroon coloured top with a racing stripe; and,
- as of approximately 11:42 a.m., the pontoon boat had four occupants who were looking at the Arica with binoculars.

[70] At about 1:00 p.m., Cpl. Campbell and Sgt. Glode located a pontoon boat which they believed to be the boat that had been around the Arica earlier (it matched the description and a photograph provided by IO Delvalano). The boat was unoccupied and contained diving gear and a hand-held radio. They took photographs of the boat and began surveillance. A short time later, Mr. Bailey and Mr. Seinauskas boarded the boat. The officers continued their surveillance and Cpl. Campbell took photographs of the men. Cpl. Campbell overheard Mr. Bailey tell someone on the phone that they were getting ready to leave and both officers saw Mr. Seinauskas apparently untying the boat. The officers immediately went down to the lower dock where the pontoon boat was located to speak with the men.

[71] The officers were each cross-examined at length on what was in their minds when they approached the men. They denied it was their intent to stop them. However, both acknowledged that they believed the men were leaving, wanted to speak with them and knew they would not be able to do that if they left. Therefore, they chose that time to approach them.

[72] Each officer's subjective belief as to whether the men were "suspects" is relevant to my determination of whether they should have been cautioned and my ultimate decision on voluntariness. Neither Sgt. Glode nor Cpl. Campbell was asked to define the term "suspect" or about any relevant training or policies in that regard. Sgt. Glode denied the men were "suspects". Cpl. Campbell acknowledged that prior to boarding the boat she viewed the men as "suspects of some sort".

[73] Cpl. Campbell acknowledged that the information from Montreal made her aware that authorities in Montreal were suspicious of marine smuggling. She briefed Sgt. Mason about that information to try to get more resources because she was "suspicious about what might happen in Halifax" in relation to the Arica. She also acknowledged that IO Delvalano had informed her that the activity around the Arica was suspicious or unusual. She agreed that this added to her suspicion that

something criminal might be happening in relation to the Arica. She testified that at this point she wasn't "sure" if the group in Halifax was the same group as had been seen in Montreal. She also acknowledged that information from IO Delvalano about the missing bolts and wire from the Arica's sea chest added to her suspicion. When she advised Sgt. Mason of this, Sgt. Mason authorized her and Sgt. Glode to conduct surveillance. She testified that at this point "we did not know if it was the same group of people that were seen in Montreal or if it was a totally different group here in Halifax and what they were actually doing". She denied that she was investigating a potential drug importation. She went on to say, "So we did have suspicion. It was suspicious activity and that's what we were basing our actions on." She was then asked, "It was suspicious activity about something that, at least, suggested pretty strongly to you that drugs may be involved?" and responded, "possibly could be involved, yes".

[74] Cpl. Campbell testified that when they located the pontoon boat, she believed it was the same one that had been around the Arica that morning and acknowledged that she wanted to get information from the men as part of her investigation. In cross-examination, by counsel for Mr. Seinauskas, the following exchange took place:

> Q. Okay. And when you were standing on that lower deck before you got on the boat, you believed that these men may be involved in criminal activity, correct?
>
> A. I did not know for sure at that time.
>
> Q. No, I'm not asking you if you knew for sure. I'm asking if you believed that they may be involved in criminal activity.
>
> A. They may be involved, yes, I believed they may have been involved.
>
> Q. In criminal activity?
>
> A. Yes.

[75] She testified that once on the boat, she was trying to determine whether the men were the same men who had been seen earlier by CBSA around the Arica. Near the end of the conversation, when Mr. Bailey told the officers that one of their group was named "Matt Lambert", she knew these were the same men who had been in Montreal.

[76] Sgt. Glode agreed that he had concluded the behaviour reported by IO Delvalano was suspicious. His focus was to find the pontoon boat and talk to the

people on it. He agreed that when he went looking for the boat, drug smuggling was something that "may be" in play and was in his mind, but testified that at that point there was nothing to base it on. He acknowledged that when they found the boat, he believed it was the one that had been seen around the Arica and that the actions of the officers (surveillance and photographs etc.) were done for an investigational purpose.

[77] He denied that the men were "suspects" when he saw them board the pontoon boat and said they were "of interest" in the investigation. It was suggested to him that "of interest" meant "that these were people who may potentially be involved – may have been involved in Montreal, correct?". This was followed by this exchange:

> A. "I didn't know if they were involved in Montreal then.".
>
> Q. No, I'm not saying that you knew. I'm asking you whether or not you thought they might be.
>
> A. No. Well, no. I didn't know, like, if it was two similar circumstances, are they the same people, I don't know. I didn't know at that time.
>
> Q. But most certainly these are the two people that you're going to want to get information from, correct?
>
> A. Yes, I want -- yeah, we wanted to speak to them.
>
> Q. Because what you want to find out is, as part of your investigation, are these two guys part of these four people that were in Montreal, right?
>
> A. At some point, yes.

[78] He acknowledged that he thought the two men might have been on the pontoon boat when it was around the Arica that morning. He acknowledged that the circumstances involving the boat around the Arica in Halifax and Montreal were similar and agreed that this was suspicious. He also acknowledged that, as the conversation continued, he obtained sufficient information to suspect that Mr. Bailey and Mr. Seinauskas were the same people who had been in Montreal and he suspected this even before he heard the name "Matthew Lambert". He maintained that he still did not have an "offence" and did not know if the activity in Montreal was related to the activity in Halifax.

[79] What the officers told the men and when is central to my determination of whether, if there was a detention, there was a breach of s. 10(a) of the *Charter*. The

officers went down to the lower dock where the boat was, identified themselves as RCMP and showed their badges. Sgt. Glode believed he also told them he was with the federal serious and organized crime unit. Both testified that immediately after they introduced themselves, they provided the men with information about what they were investigating.

[80] Sgt. Glode testified in direct examination that he told the men, "we had received a call from CBSA with suspicious activity around the MV Arica and wondered if we could talk to them for a few moments".

[81] Cpl. Campbell testified that the men were told that "we had received a report of suspicious activity in the port" and "wished to talk to them". In cross-examination, when counsel suggested that she had used the name "Arica", she reiterated that she had told the men the complaint related to suspicious activity in the "port" or "harbour".

[82] Both officers testified that they asked the men if they could speak to them. In direct examination, both testified that Mr. Bailey invited them onboard. However, in cross-examination, Cpl. Campbell was confronted with her notes where she had recorded that she "requested to board and chat" and "the second male gave permission". She eventually agreed that her notes were probably more accurate than her recollection and adopted them. Sgt. Glode maintained that neither he nor Cpl. Campbell asked to board the boat. I find as a fact that they asked to board the boat and were given permission rather than being invited onboard without request. On this point, Cpl. Campbell's recollection, after being refreshed by her contemporaneous notes, is more reliable than Sgt. Glode's. I say this because she had a reasonably contemporaneous note about the dialogue.

[83] When the request to board the boat was made, the officers were standing on a lower dock which was essentially at the same level as the boat, meaning that a person standing on the dock would be at approximate eye level with a person on the boat. The officers could have conversed with the men on the boat without boarding the boat, but instead, chose to ask to board.

[84] Neither officer was in uniform and neither was carrying a visible firearm, although Cpl. Campbell had hers with her but concealed. The area around the boat was busy with a lot of pedestrians. With Mr. Bailey's consent, the officers boarded the boat and sat. The boat is a relatively small, open boat with a canopy, seats and one entrance. Sgt. Glode sat near the entrance but not blocking it.

[85] There is no evidence that either officer raised their voice. Both testified that Mr. Bailey was friendly and talkative and willingly provided information with very little questioning. Neither officer was recording the conversation or making contemporaneous notes. Not surprisingly, their evidence about the sequence and specific content of the conversation is not always consistent with each other.

[86] In her direct examination, Cpl. Campbell testified that:

- After they were all seated on the boat, Sgt. Glode asked them their names and for ID, which was produced.

- Sgt. Glode asked if he could photograph their ID, they agreed, and he did;

- Mr. Bailey produced a business card and started talking about his Ocean Plastic Alliance project;

- Mr. Bailey volunteered a great deal of information about ocean pollution and the work the organization was doing, including that they were travelling around taking algae samples;

- Mr. Sienauskas was quiet throughout. When Mr. Bailey was describing Ocean Alliance, Sgt. Glode asked him what his role was, Mr. Bailey started to answer for him, Sgt. Glode asked him if he could speak English, he said he could and Sgt. Glode told Mr. Bailey to let him answer himself. Mr. Seinauskas said he was the computer guy. Cpl. Campbell recalled that Mr. Sienauskas spoke with a heavy accent, so he was asked where he was from, he said Lithuania and confirmed he was a Canadian citizen;

- While Mr. Bailey was talking about his business, he said he was in Halifax to collect algae and said they used traps;

- Sgt. Glode asked to see a trap and was told that the traps would not arrive until Monday;

- Sgt. Glode asked what they were doing until the traps arrived and Mr. Bailey said they were diving to find good places to put the traps;

- After Mr. Bailey said the traps weren't coming until Monday, he said there were four people in their group and the two others were diving at Black Rock Beach and they were on their way to meet them;

- Mr. Bailey said he wasn't sure if they would go over to get their friends or their friends would swim back;

- Later, Mr. Bailey said they had been diving in Montreal port three days earlier but the tides were too strong, so they decided to come to Halifax and their friends had rented a black, Cadillac Escalade, with Quebec plates;

- It was at this point that Mr. Bailey was told that their boat matched the description of a boat that had been involved in suspicious activity round a vessel at Halterm that morning and Mr. Bailey said they'd rented the boat;

- Mr. Bailey said he and his friend had driven, while "Matt" flew;

- Mr. Bailey said they were staying at the Future Inn Hotel in Bedford by Costco;

- After Mr. Bailey referred to his friend "Matt", Cpl. Campbell asked who the other two were and he said "Matt" and "Rick";

- She asked what their last names were and he said "Matt Lambert" and "Rick Avalaro", but said he didn't know how to pronounce it because it was Spanish;

- At this point Cpl. Campbell recognized the name "Matt Lambert" as the name given in Montreal so knew it was the same group;

- She excused herself from the boat and went to call CBSA who were on the Arica to alert them to the fact that there were divers in the water;

- When she returned, Sgt. Glode was off the boat, they thanked the men and left.

[87] In cross-examination, Cpl. Campbell testified that:

- She asked no questions other than general conversation questions and related to ocean plastics;

- Sgt. Glode asked some questions;

- After Mr. Bailey said that they were planning to go meet the others, either she or Sgt. Glode asked where they were; and,

- She left the boat to make the call to the CBSA because she thought it was not polite to take out her phone and make a call in front of people, not because she wanted to keep the call hidden or private from the men.

[88] Sgt. Glode's direct evidence about the sequence of the conversation was more difficult to follow:

- When they first boarded the boat, he again told Mr. Bailey why they were there;

- He asked for identification which was produced and photographed;

- He asked for an operator's licence for the boat which was produced and photographed;

- Mr. Bailey started talking about Ocean Plastics and provided a lot of detail;

- Mr. Bailey told them they were in Halifax setting algae traps;

- After Mr. Bailey stopped talking about the business, Sgt. Glode asked Mr. Seinauskas what he did and he said he was a computer programmer;

- When Mr. Bailey was talking about his business, he said they were going around setting traps to collect algae, Sgt. Glode asked to see one and Mr. Bailey said they were arriving on Monday;

- Sgt. Glode then asked how they were setting traps if they didn't have any and Mr. Bailey said they were scouting for locations;

- Mr. Bailey said they had been in Montreal the week prior and set some traps there, he mentioned that the current there had been too strong so they came to Halifax;

- Mr. Bailey said he and Dangis had driven to Halifax in a rented Cadillac Escalade the others flew;

- Mr. Bailey volunteered that they were staying at the Future Inn;

- Sgt. Glode told him that CBSA had seen four people on a boat and asked him where the other two were;

- Mr. Bailey said that "Matt" and "Alavaro" were diving at Black Rock Beach and Sgt. Glode asked where that was;

- Sgt. Glode asked them if they had dive flags and Mr. Bailey said "no";

- Mr. Bailey said they had seen the ROV around the Arica that morning;

- Mr. Bailey was asked if they had to go pick up the other guys who were diving at Black Rock, he said he didn't know, he was asked how they would find out, he said they would probably call them, he was asked how they would do that if the others were in the water and he said he didn't know;

- Once they heard that there was a diver in the water at Black Rock Beach, Cpl. Campbell left to call CBSA to tell them;
- Sgt. Glode also left the boat and waited around on the floating dock for her to return; and,

- Once Cpl. Campbell returned, they asked who "Matt" was and Mr. Bailey said "Lambert" and the officers then left.

[89] Some parts of the conversation are particularly significant to the issues I have to decide. Sgt. Glode testified that when they first boarded the boat, before asking for identification, he "again informed them that CBSA had called us talking about being in close proximity to the Arica or they felt was suspicious and we just wanted to talk to them for a few minutes". Later in direct examination, he said "when we first went onboard, again I explained that I had received a call from – or Sherry had received a call from CBSA and we wanted to talk to them". Cpl. Campbell did not refer to this in her testimony. When asked in direct examination to describe what next happened after they were seated on the boat, she said "We asked for their identification".

[90] Both officers testified that very early in the conversation, Mr. Bailey advised them that he was in Halifax diving for algae.

[91] Cpl. Campbell testified that, at some point during the discussion, the officers told the men that their boat matched the description of a boat that had been involved in suspicious activity near a vessel in the harbour at Halterm terminal. Sgt. Glode did not specifically mention this, but did testify that, during the conversation, the men were told that CBSA had observed four people in a boat.

[92] Both officers testified that hearing the name "Lambert" was significant because it confirmed these were the same men who had been in Montreal. However, their evidence is inconsistent on when they heard this. Cpl. Campbell said she heard it at the end of the conversation, and this prompted her to leave the boat to call CBSA. Sgt. Glode testified that Cpl. Campbell left the boat because they heard there was a diver in the water at Black Rock Beach and they did not hear the name "Lambert" until she returned.

[93] Both officers testified that Mr. Bailey provided virtually all the information without questions from them. Sgt. Glode recalled asking for ID, if he could photograph the ID, if they could show him an algae trap, what Mr. Seinauskas' role was, where their friends were, whether they had dive flags, if they were going to

pick up their friends, how they would find out if they had to pick them up, how he would call their friends if they were diving, and either he or Cpl. Campbell asked for Matt's last name. In cross-examination, Sgt. Glode acknowledged that he could not recall all the questions he had asked and may have asked more.

[94] I believe that more questions were asked than the officers recall. It simply does not accord with common experience that either the volume of information or the specifics would be provided in the course of a relatively brief conversation, in the absence of questions. First, the conversation lasted less than 25 minutes and by the end of it, the officers had learned virtually everything they wanted to know from the encounter (that the men had been near the Arica, had been in Montreal, had two associates, the names of their associates, the colour, make, model of their vehicle, the fact that it had Quebec plates, the name and location of their hotel, where their associates were and what they were doing). Second, some of the specific information is not the kind of information that would typically be provided without a question. For example, Cpl. Campbell testified that Mr. Bailey said his friends were driving "a black, Cadillac Escalade with Quebec plates". In normal conversation, a person might say they had rented an SUV in Montreal, but would not provide the colour, make, model and advise that the vehicle had "Quebec plates", in the absence of questions.

[95] It is not clear how long the officers were on the boat. Sgt. Glode testified that it was approximately 25 minutes. He did not note the time the encounter began but testified that, according to his notes, they left the dock area at 1:50 p.m. This would have been after Cpl. Campbell's call. Cpl. Campbell testified that they were on the boat for 10 - 15 minutes, however, her notes indicate that they identified themselves as police at 1:25 p.m. and she left the boat to make the call at 1:33 p.m. (only 8 minutes). The Crown acknowledged that, given the evidence as to what transpired on the boat, the actual time on the boat is probably closer to Sgt. Glode's estimate and I agree. It is impossible to be precise about how long they were on the boat, but it is reasonable to say it would have been at least 15 minutes.

[96] When Cpl. Campbell left the boat to make a call, she walked away from the boat. Sgt. Glode testified he left the boat when Cpl. Campbell did, but remained near it on the lower dock. Both testified that they did not board the boat again after the call. According to Cpl. Campbell, no further information was obtained after she came back from making the call. According to Sgt. Glode, a further question was asked, and an important piece of information received after her return.

Application of the Principles to Pontoon Boat Statements

a) Detention

[97] The defence argues that Mr. Bailey and Mr. Seinauskas were suspects in a drug importation investigation, they were stopped from departing the dock and that detention continued while the police were on the boat. They argue that the first and second *Grant* factors strongly support a finding that a reasonable person would have felt compelled to remain and answer questions. The Crown argues that when the encounter began, police were making general inquiries only. They were specifically interested in the boat in relation to suspicious activity, but the men were not yet suspects and the suspicious circumstances were not yet a specific crime. The Crown further argues that the encounter began with Mr. Bailey either inviting or giving permission to the police to come on board to chat, continued in a similar consensual vein and that Mr. Bailey made a conscious choice to speak with police because he was eager to provide them with an innocent explanation for their presence.

Factor 1 - Circumstances of the Encounter

[98] From the perspective of Mr. Bailey and Mr. Seinauskas, the encounter began as they were preparing to untie their boat and depart the dock. The officers approached, identified themselves as RCMP with the "federal serious and organized crime" unit, showed their badges and asked if they could come on board for a chat. That caused the men to change their mind about leaving, but does not, in and of itself, create a detention. At that point, they were told that the police were investigating suspicious activity on the waterfront and were asked for permission to board. At that time, the officers were still on the dock. A reasonable person would believe the police were making general inquiries regarding an occurrence and would have felt they had the choice to decline the request. However, once on board the boat, the tone of the interaction changed. The men were asked to produce identification and that identification was photographed. Mr. Bailey was also asked if he had a pleasure boat operator's card (which he was legally required to have). Mr. Bailey started to tell them about "Oceans Plastics" and diving for algae. He was asked if he had dive flags (which he was legally required to have). Once the police asked for documentary proof of their identification and took photographs of those documents, most reasonable people would start to feel that this was not just a general inquiry. As the interaction continued, both officers were asking questions. Those questions started to become challenging (how are you collecting algae without traps?) and focussed (how many are in your group? Where are the others? etc.).

[99] As I have said, the officers' view of the situation is only relevant to the extent that it was reflected in their language or behaviour and was capable of being perceived by Mr. Bailey and Mr. Seinauskas. To the extent that it is relevant, when I examine the encounter from the police perspective, I have no hesitancy in concluding that this was a focussed investigation - possible drug smuggling or importing involving the Arica. I am also satisfied that Mr. Bailey and Mr. Seinauskas were singled out in that investigation from the time the officers approached the boat believing it had been around the Arica and suspecting the men were implicated, at least in Halifax. At that time, they may not have suspected the men were also involved in Montreal. However, early in the conversation, the officers learned that the men were diving and collecting algae. This was exactly what the men in Montreal had told port security. At that time, the officers must have suspected that these men were either the same men who had been in Montreal or were connected to them. At that time, their investigation and their questions became even more focussed.

[100] Given the officers' request to board the boat, the request and photographing of ID and the questions asked, I am satisfied that a reasonable person in the circumstances of Mr. Bailey and Mr. Sienauskas would believe the police were "singling" them out "for focussed investigation" as that term is used in the first *Grant* factor.

Factor 2 - The Nature of the Police Conduct

[101] The second factor identified in *Grant* is the nature of the police conduct, including the language used, the use of physical contact, the place where the interaction occurred, the presence of others, and the duration of the encounter.

[102] In this case, the police showed their badges and identified themselves as RCMP and Sgt. Glode probably identified himself as being with the "federal serious and organized crime" unit. There was nothing improper in that and the officers denied that that they did it for the purpose of asserting control or authority. However, regardless of their intent, a police officer is normally perceived as a person with authority and the language "federal serious and organized crime" would have had an additional coercive or intimidating impact on a reasonable person.

[103] The police asked for permission to board the boat. This would cause a reasonable person to believe they had a choice and detracts from a finding of psychological restraint. However, immediately upon boarding, the men were asked for proof of their identity and Mr. Bailey was asked if he had a pleasure boat

operator's card. Boating is a regulated activity and people operating pleasure craft are required to have a card (*Competency of Operators of Pleasure Craft Regulations*, under the *Canada Shipping Act*, 2001). As the conversation continued, the police also asked if the men had dive flags. There is a legal requirement when diving from a boat to carry and display warning flags to let other boaters know when there is a diver in the water. This would not be dissimilar from an officer asking the driver of a motor vehicle to produce a licence or insurance. It would cause a reasonable person to believe he or she had a legal obligation to remain and respond.

[104] Relatively early in the conversation, Sgt. Glode directed Mr. Bailey to allow Mr. Seinauskas to answer for himself. The Crown argues that this is relatively innocuous, and the same kind of comment might be made in any social situation where one person was dominating a conversation. This submission does not take account of the reality that this was not a dinner party. From the perspective of the two men, two police officers were on their boat, they had already been asked for identification, for proof of operator's licence (both of which had been photographed), and queried about whether they had dive flags. A reasonable person in Mr. Bailey's position would have perceived that comment from Sgt. Glode as a direction to stop speaking and a reasonable person in Mr. Seinauskas' position would have perceived it as a direction to speak. There is evidence to support that view in that Mr. Seinauskas, who had been silent up to that point and was silent after, answered Sgt. Glode's question and the follow up question about where he was from.

[105] The encounter took place in an area that was visible to the public at midday when there were a lot of people around. I accept that this would give a citizen comfort that nothing untoward would happen. However, more specifically, the encounter took place on board Mr. Bailey and Mr. Seinauskas' rental boat. Police asked to board the boat to speak to them when they could easily have had a conversation from the lower dock without boarding. Once police were on the boat, their presence created a practical difficulty for Mr. Bailey and Mr. Seinauskas if they wished to leave the encounter; they either had to ask the police to leave the boat or leave it themselves. Asking the police to leave would have required knowledge that they had the right to do so and a level of assertiveness beyond what would be required during an interaction on the street or if the police had stayed on the dock to speak with them. Because of the position of Sgt. Glode near the exit, anyone wishing to leave the boat would have had to pass him. I am not persuaded that he took that seat for any strategic or tactical advantage, but that position would have had some, probably slight, psychological impact on a reasonable person.

[106] There is no evidence of raised voices or physical contact, and, according to the officers, the conversation continued in a very friendly manner with Mr. Bailey chatting at length about his business and providing information voluntarily. I accept that, at the beginning, Mr. Bailey was forthcoming about "Oceans Plastics" and there may have been an atmosphere of consent and conversation. However, as the encounter progressed, it took on the character of an interrogation with police asserting control by telling Mr. Bailey to let Mr. Seinauskas answer his own questions and asking questions that were more invasive, pointed and directed at the focus of their suspicion.

[107] Even if the encounter was only eight minutes long (Cpl. Campbell's notes), it was relatively long compared to other cases. For example, in *Grant*, the encounter was minutes and in *Suberu*, it was a minute or less. The reality though is that the officers were probably on the boat for 15 - 25 minutes which is significantly longer than the encounters in those cases.

Factor 3 - Characteristics of the Accused

[108] I am not aware of any characteristics of the Applicants that would cause them to be more psychologically vulnerable than others.

Conclusion on Detention

[109] The Supreme Court has acknowledged the reality that police may not always know at the beginning of an encounter that there is an offence or that the person they are speaking with is potentially implicated and at risk for self-incrimination. Police do not have to abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel." (*Grant, supra.*, at para. 38). However, police powers have limits and police tactics may be "coercive enough to effectively remove the individual's choice to walk away from the police." (*Grant, supra.*, at para. 39). Where this happens, there is a risk that the person may reasonably feel compelled to incriminate himself or herself. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions (*Grant, supra.*, at para. 41). In situations where the police are uncertain about whether "their conduct is having a coercive effect on the individual, it is open to

them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go." (*Grant, supra.*, at para. 32). Sgt. Glode and Cpl. Campbell could easily have done this. They did not. The result is that I have to decide whether I'm satisfied that they were constitutionally required to.

[110] I have concluded that when Cpl. Campbell and Sgt. Glode approached the pontoon boat, they were conducting a specific criminal investigation, believed the boat was involved and had a suspicion that the two men were implicated in some way. They required further information, knew the men were leaving and that they would not be able to speak with them if they left. They singled Mr. Bailey and Mr. Seinauskas out for focussed investigation, and I am satisfied that their conduct would cause a reasonable person in the position of Mr. Bailey and Mr. Seinauskas to believe that they had to remain and answer questions.

[111] As such, I am satisfied that Mr. Bailey and Mr. Seinauskas were detained for *Charter* purposes and should have been advised of their right to counsel under s. 10(b) of the *Charter*. That detention would have crystalized at the earliest when they were asked for proof of identification and at the latest when the officers directed Mr. Bailey to allow Mr. Seinauskas to answer for himself and began asking more probing questions.

[112] In reaching that conclusion, I have taken into account that Mr. Bailey gave permission for the officers to board the boat and was initially forthcoming. However, in determining that they were psychologically detained, I have focussed particularly on the following:

- Mr. Bailey and Mr. Seinauskas were preparing to leave the dock when approached by police;

- Police asked for and photographed their ID;

- Police asked for and photographed Mr. Bailey's pleasure boat operator's card which imports an element of legal compulsion to co-operate, at least with that request;

- Police asked if the men had dive flags (another legal obligation);

- Police directed Mr. Bailey to allow Mr. Seinauskas to answer for himself;

- The police asked increasingly focussed questions about how many were in their group, where the others were, how they were going to meet, etc.;

- My finding that more questions were asked than the officers recalled while testifying;
- The interaction lasted for approximately 20 minutes; and,

- The interaction took place on the Applicants' boat which made it more difficult for them to leave.

b) Reasons for Detention - s. 10(a) of the Charter

[113] Because they were detained, Mr. Bailey and Mr. Seinauskas had a right, under s. 10(a) of the *Charter*, to be advised of the reasons for their detention. I accept that Cpl. Campbell and Sgt. Glode did not appreciate that they were detaining Mr. Bailey and Mr. Seinauskas, so of course did not say to the men, "I am detaining you for ….". They did, however, provide them with some information about what they were investigating. Therefore, my task is to determine whether that information adequately informed them of their jeopardy such that, viewed reasonably in all the circumstances of the case, they could make informed choices about whether to exercise their right to remain silent (See for example: *Roberts, supra.*, at para. 78; *Evans, supra.,* at para. 35; and *R. v. Rodgerson*, 2016 ONSC 6094, para. 81).

[114] The defence argues that the police knew they were investigating a possible drug importation using the Arica and told Mr. Bailey and Mr. Seinauskas only that they were investigating a report of suspicious activity on the waterfront. They argue that this information did not inform them of their true jeopardy and did not allow them to make informed choices about whether to speak to authorities or ask for counsel. They further argue that the early requests by police for a boat operator's licence and the questions about dive flags would have contributed to a misunderstanding of the true nature of the inquiry and caused the men to underestimate their true jeopardy.

[115] The Crown argues that s. 10(a) was complied with because the information the police gave Mr. Bailey and Mr. Seinauskas essentially reflected the totality of their knowledge, that they were investigating suspicious activity on the waterfront.

The Crown further argues that the Sgt. Glode's reference to "the Arica" would have provided the men with important information and more information was provided relatively early in the conversation. Finally, the Crown argues that at the time of the interaction Mr. Bailey and Mr. Seinauskas had the "informational advantage" so would have fully understood their jeopardy and there was no risk that the questions about dive flags and licences could have led to a misunderstanding.

[116] I do not accept the Crown's submission that the information the officers gave the men essentially reflected the totality of the information they had. However, the officers had no obligation to provide the men with all the information they had. Their obligation was to provide information that fairly reflected the matter under investigation so the men would know their jeopardy. Both officers were experienced drug investigators and Sgt. Glode had previously been involved in the investigation of an offload. On the whole of the evidence, I find that when the officers approached the pontoon boat, they were investigating a suspected importation of contraband, possibly of drugs, involving the Arica. They knew the circumstances in Halifax were similar to those in Montreal and both were suspicious, they knew one of the men in Montreal was associated to organized crime and drugs, they knew witnesses were reporting four men in Montreal and four men in Halifax, they knew there were signs of tampering on one of the Arica's sea chests, and believed they had located the boat they were looking for within a relatively short time. They focussed on Mr. Bailey and Mr. Seinauskas because they were on the boat. They approached, questioned and detained the men in relation to their investigation. They did not at any time tell the men that the investigation involved criminal activity, importation, smuggling or drugs.

[117] Despite the absence of that specific information, I have looked at what the police did tell Mr. Bailey and Mr. Seinauskas to see if it adequately informed the men of the extent of their jeopardy. As I said, the officers' recollection of specifically what was said differs. I accept that each officer might have a better recollection of what he or she said, than what the other officer said. In my view, it is unlikely that both officers told the men what they were investigating prior to boarding the boat. It makes sense that each would have introduced themselves, but it doesn't make sense that both would have explained why they were there.

[118] I do not accept that Sgt. Glode used the name of the vessel, "the Arica", before boarding the boat. Cpl. Campbell made no mention of that in her testimony and it is significant enough that I believe she would have mentioned it if she'd heard Sgt. Glode use it. She was not asked specifically about what Sgt. Glode had said, but

when it was suggested that she had referred to the "Arica", she corrected counsel and did not volunteer that Sgt. Glode had said that.

[119] According to Sgt. Glode, once on the boat, he again advised the men that the complaint related to suspicious activity around the Arica. Cpl. Campbell's description of the sequence of events does not corroborate this. In her narrative, she described the first thing that happened when they were on the boat as Sgt. Glode's request for identification. According to her evidence, specific information about the report from CBSA was not provided until later in the conversation.

[120] I prefer the evidence of Cpl. Campbell on this. Her evidence about the sequence of the conversation was much clearer than Sgt. Glode's. His evidence about the order of the conversation was confusing and left me unsure of whether he recalled the sequence of the conversation. Further, her testimony about when the men were told further details of the complaint made sense. According to her, it flowed from something Mr. Bailey had said. If Sgt. Glode had already provided this information, there would have been no need for her to repeat those details later.

[121] According to Cpl. Campbell's evidence, before the officers boarded the boat, the men were told the investigation related to "a report of suspicious activity in the port". This essentially provided no information about the matter under investigation or the men's jeopardy. The men did have some other information. They were told the officers were with the RCMP and I accept that Sgt. Glode probably told them they were with the "federal serious and organized crime" unit. That information would seem inconsistent with an investigation of a minor infraction and might have informed the men that the matter was more serious. However, it says nothing about the specific matter under investigation.

[122] Both officers testified that more information was provided during the interaction. It is not entirely clear when that information was provided. At some point, the men were informed that the investigation related to a report from "CBSA". To a person who knew what the acronym "CBSA" meant and knew the mandate of that organization, that term might have conveyed valuable information. However, I cannot assume that Mr. Bailey and Mr. Seinauskas had that knowledge. It also seems that, at some point, the men were told that the investigation concerned diving near the Arica (Sgt. Glode's testimony) or near a vessel at Halterm (Cpl. Campbell's testimony). That information came too late, after the detention had crystalized and after Mr. Bailey had given up his right to remain silent and provided important information. In the absence of any other information, the men could reasonably have thought they were being questioned about violations of boating or diving regulations

or safety concerns because they were too close to the Arica. The early request for an operator's permit and the questions about dive flags would reasonably have supported that misunderstanding.

[123] The Crown argues that the men had the "informational advantage" during the interaction so would have known their jeopardy. I understand the Crown to essentially be arguing that since the men knew they were involved in importing drugs, they would have known that their jeopardy included that offence. If this is an informational advantage, it is the reality in most s. 10(a) cases. The factually guilty detainee will almost always know more about the offence than the police. I am not aware of any case where knowledge based on factual guilt has been used to overcome deficits in the information provided by police to a detainee. Under s.10(a), it is the police who have the obligation to provide the detainee with information and the information the section is primarily concerned with is the "reasons for detention". A factually guilty detainee may have an informational advantage concerning the offence(s) he has committed but the police have the informational advantage concerning their reasons for detaining him and that is the information they must provide. A detainee, even one who has committed an offence, is not required to guess the reasons for his detention based on the crime(s) he may have committed.

[124] The Crown's argument in this regard is similar to reasoning that was rejected by Iacobucci, J., albeit in a different context, in *R. v. Borden*,[1994] 3 S.C.R. 145. In that case, the accused was under arrest for sexual assault and consented to provide blood. The sample was used to inculpate him in an earlier sexual assault that the police had not told him they were investigating. The Crown argued that his consent was informed and applied to use of the sample in the other investigation. In doing so, the Crown argued that he had committed the earlier offence, so it was reasonable to infer that he knew it was still under investigation. In response to that argument, Iacobucci, J. (para. 36) said,

> As my colleague Sopinka J. pointed out at the hearing of this appeal, the logical extension of this argument would be that the protections afforded by the *Charter* no longer apply whenever the person arrested is guilty of the offence for which he or she has been detained. Also inherent in this line of argument is the unfairness of relying on the results of evidence whose admissibility is in dispute to support the contention that the respondent's rights were not violated.

[125] I accept that Cpl. Campbell and Sgt. Glode did not have reasonable grounds to believe an offence had been committed or that Mr. Bailey and Mr. Seinauskas

were involved. However, the obligation under s. 10(a) is triggered by detention, including investigative detention which I have found here. The investigation was focussed on the Arica, the possibility it was being used for smuggling, and the men in the pontoon boat which was associated with the Arica. The police were entitled to question the men about their investigation, but they had to tell them why they were detaining them. The obligation was on the police to give Mr. Bailey and Mr. Seinauskas that information before they waived their right to remain silent and chose not to ask to speak to counsel. The information given to Mr. Bailey and Mr. Seinauskas, viewed reasonably in all the circumstances, did not adequately inform them of their jeopardy so was not sufficient to permit them to make an informed choice about whether to exercise their rights. Therefore, there was a breach of their rights under s. 10(a).

c) Right to Silence – Police Caution, Common law Confessions Rule and s. 7

Were Police Required to Caution Mr. Bailey and Mr. Seinauskas?

[126] The defence argues that the men were "suspects" and should have been cautioned. The Crown argues they were not "suspects" because police did not yet know if any criminal offence had been committed, much less that the two men were involved.

[127] In determining whether Mr. Bailey and Mr. Seinauskas should have been cautioned, I have to be careful not to assess the circumstances with the unfair benefit of hindsight (*Oland*, at para. 50; and, *R. v. Merritt*, 2016 ONSC 7009).

[128] At the point when the officers approached Mr. Bailey and Mr. Seinauskas, they had information from their colleague in Montreal, information from CBSA in Halifax and their own observations. They knew that: four men in a small boat had been diving around the Arica in Montreal; one of the men was associated to drugs and organized crime; authorities in Montreal were suspicious of marine smuggling; authorities thought the men had removed something from the water; upon arrival in Halifax, the Arica's sea chests showed signs of tampering; a small boat with four men had been around the Arica in Halifax; authorities here thought that suspicious; and, they had found the boat with diving gear on board.

[129] Cpl. Campbell acknowledged that the activity was suspicious and that drugs possibly could be involved. She also acknowledged that when she approached the men, she believed they may have been involved in the criminal activity she was investigating. I appreciate that she wasn't sure there was a drug offence or that the

men were the same ones who had been in Montreal. However, the "reasonable grounds to suspect" standard does not require her to be "sure" or to "know". It is grounded in reasonable possibility not reasonable probability. Cpl. Campbell essentially acknowledged that she subjectively suspected a drug offence, was investigating that offence and suspected the men might be involved.

[130] Sgt. Glode testified he did not view the men as "suspects" because he thought the circumstances might involve drugs but felt he had nothing to base that on and because he did not know if the men were the same group that had been in Montreal.

[131] Other police/authorities clearly felt the circumstances were enough to ground suspicion of criminal behaviour. Authorities in Montreal were suspicious of marine smuggling. Sgt. Mason was "quite convinced" they were dealing with a drug importation and Cpl. Campbell acknowledged that drugs might possibly be involved. At the point when Sgt. Glode and Cpl. Campbell approached the pontoon boat, they had information that would alert a reasonably competent investigator to the reasonable possibility that the activity around the Arica involved illegal importation of some commodity. In other words, another officer in their position would have concluded he or she had reasonable grounds to suspect an offence.

[132] When the officers approached the men, they had more than a generalized suspicion. They may not have been able to pinpoint the offence under investigation as "importation of cocaine", but they were investigating specific suspicions about the activity around the Arica. At the very least, that suspicion was that the Arica was being used for smuggling (illegal importation of some commodity).

[133] I also have to assess whether there were reasonable grounds to suspect that Mr. Bailey and Mr. Seinauskas were implicated in the activity under investigation. When the officers approached the men, they did not "know" the men had been around the Arica that morning and did not "know" that the people around the Arica were the same people who were around the Arica in Montreal. However, the officers knew the boat had left the vicinity of the Arica, they found a matching boat in relatively close proximity to the Arica a little over an hour after it had been last seen. They were confident it was the same boat. The Crown argued that it was possible that the boat (a rental) had been returned and rented by someone else before the officers found it. Neither officer suggested that possibility was in their mind and, in the circumstances, it is not a reasonable possibility. Many of the CBSA witnesses testified about how unusual it was to see a pontoon boat in the harbour. It would be even more unusual to have one rented by two different groups, both with diving gear, within a couple of hours. Given the timing of events, location of the pontoon boat

when it was found and the presence of diving gear, there was at least a reasonable suspicion that Mr. Bailey and Mr. Seinauskas had been on the boat when it was around the Arica that morning.

[134] The circumstances around the Arica in Montreal and Halifax were very similar – a small boat with four men around the same container vessel, one of the men was diving in Montreal and dive equipment was seen on the pontoon boat in Halifax. Based on that alone, it was reasonable to suspect that the group around the Arica in Montreal was connected to the group in Halifax. However, very early in the conversation, the officers obtained important information that connected Mr. Bailey and Mr. Seinauskas to the group in Montreal. Mr. Bailey told the officers about collecting algae. That was an unusual piece of information and was exactly the same information that had been provided to port authorities in Montreal. At that point, if not before, there were reasonable grounds to suspect the men had been in Montreal or were associated with the men in Montreal.

[135] I appreciate that Sgt. Glode and Cpl. Campbell, may not have viewed the men as "suspects". On any objective view of the circumstances known to Sgt. Glode and Cpl. Campbell, Mr. Bailey and Mr. Seinauskas were "suspects". Given all the information, including the comment from their colleague in Montreal that the information he was transmitting might be relevant to "marine smuggling", I believe that any reasonably competent police officer would at least suspect that the Arica was being used for importation of some illegal commodity and these men were associated to that suspected crime, either because they were the same men who had been involved in Montreal or were associated with those men.

Does the Failure to Caution Render the Statements Involuntary?

[136] In this case, none of the voluntariness concerns relating to reliability are present (threats, inducements, oppression or lack of operating mind). Nor is there any indication that the men felt intimidated, were tired, uncomfortable with the situation, asked to leave, or asked the officers to leave.

[137] The concern here is the informational gap created by the absence of the caution. In some cases, other circumstances can fill that gap. For example, compliance with s. 10(a) of the *Charter* can inform the suspect of his jeopardy. Where a detainee speaks with counsel following compliance with s. 10(b), counsel can inform him of his right to silence. Where, as in this case, there has been no opportunity to speak to counsel and the individual is not properly informed of his jeopardy, the caution is more important (*Singh, supra.,* at para. 33).

[138] Mr. Bailey and Mr. Seinauskas gave up their right to remain silent. They were not told they could leave the pier, that they could decline to have the officers on the boat, what was being investigated, that they did not have to speak or what was at stake in choosing to speak. I am not persuaded they knew their jeopardy or knew their choices. In all the circumstances, including the absence of a caution, I am not persuaded their decision to speak was informed or meaningful. As such, I am left with a reasonable doubt as to the voluntariness of their statements.

Do the Circumstances also Result in a Violation of s. 7 of the Charter?

[139] Mr. Bailey and Mr. Seinauskas were detained when they spoke with Sgt. Glode and Cpl. Campbell. Section 7 of the *Charter* gives a detained person the right to choose whether to speak to authorities or remain silent (*Hebert*, *supra.*, at para. 51). That right includes the right to make a meaningful and informed choice (*ibid.*, at paras. 53 and 69). Applying the burden to the Applicants to establish the breach on a balance of probabilities, I am persuaded, for the reasons given above, that their right to silence as guaranteed in s. 7 of the *Charter* was also breached.

Conclusions - Pontoon Boat Statement

[140] I have concluded that Mr. Bailey and Mr. Seinauskas were detained when they spoke to police on the pontoon boat. They were not properly advised of the reasons for their detention, of their right to remain silent or of their right to speak with counsel, so ss. 7 and 10(a) & (b) were breached. I have also concluded that they were suspects so should have been cautioned and, in these circumstances, the failure to caution them rendered their statements involuntary. Because the Crown has proven the statements were involuntary, they are not admissible at trial.

[141] For purposes of analysis of subsequent alleged breaches, it is important to identify the information that flowed from the *Charter* breaches on the pontoon boat. It is difficult to define with precision the exact moment that their detention began. I have concluded that the detention would have crystalized at the earliest when they were asked for proof of identification and at the latest when the officers directed Mr. Bailey to allow Mr. Seinauskas to answer for himself and began asking more probing questions. The burden is on the Applicant and I am not persuaded that the psychological detention crystalized before Mr. Bailey was directed to allow Mr. Seinauskas to answer for himself. This occurred while Mr. Bailey was still describing Ocean Alliance. The information which I find came after that is as follows:

- Mr. Seinauskas' description of his role in the business, Sgt. Glode's suspicion of that answer and perception that Mr. Bailey was surprised by it;

- Information from Mr. Bailey that there were four in their group and that the others were diving at Black Rock Beach;

- Information from Mr. Bailey that their friends had a black, Cadillac Escalade with Quebec plates;

- Information from Mr. Bailey that they were staying at the Future Inn in Bedford, near the Costco;

- Information from Mr. Bailey that the other two people they were with were named "Matt Lambert" and "Rick" with a last name that was something like "Avaliro"; and,

- Information from Mr. Bailey that they had seen the ROV around the Arica that morning.

2. Roadside – Arrests, Searches Incident to Arrest and Seizure of Escalade

[142] The Applicants allege the following breaches related to the vehicle stop, arrests of Mr. Bailey and Mr. Lambert, searches of the men and the vehicle and seizure of the vehicle:

> a) Sgt. Glode did not have reasonable grounds to arrest Mr. Bailey and Mr. Lambert so their arrest and the searches incident to the arrest violated ss. 8 and 9 of the *Charter*. Specifically,
>
> > (i) His subjective grounds relied on his belief that contraband had been removed from the Arica and put in the Escalade. That stated belief is not credible and/or not objectively reasonable; and,
> >
> > (ii) Information obtained as a result of the *Charter* breach on the pontoon boat cannot be used to support grounds for arrest. Without that information, Sgt. Glode did not have reasonable grounds.

b) Sgt. Astephen breached Mr. Bailey's s. 10(b) rights by questioning him before he had an opportunity to consult with counsel;

c) Once Sgt. Glode learned he was wrong that contraband had been placed in the vehicle, the continued detention of Mr. Lambert and Mr. Bailey and the seizure of the vehicle breached ss. 8 & 9 of the *Charter*; and,

d) Sgt. Astephen's decision to delay implementation of their right to counsel breached s. 10(b) of the *Charter*.

Legal Framework Arrests, Search Incident to Arrests and Seizure

Reasonable Grounds for Arrest – ss. 8 & 9

[143] The burden to establish a breach of the right not to be arbitrarily arrested under s. 9 of the *Charter* is on the applicants on a balance of probabilities. An arrest that is not lawful is also arbitrary (*R. v. Mann, supra* at para. 20 and (*Grant, supra*, at para 54).

[144] The subsequent searches of Mr. Bailey and Mr. Lambert, the initial search of the Escalade and the seizure of the Escalade were all warrantless. A search will be reasonable if it is authorized by law, if the law is reasonable and the search is carried out in a reasonable manner (*R. v. Collins,* [1987] 1 S.C.R. 265, at para. 23). The Crown has the burden of proving on a balance of probabilities that those searches/seizure were authorized by law. Their legality relies on the common law power to search incident to a lawful arrest. If the arrests were not lawful, the incidental searches and the seizure of the vehicle were not authorized by law so were unreasonable and a breach of s.8 (*R. v. Caslake,* [1998] 1 S.C.R. 51, at para. 13).

[145] An arrest will be lawful if the officer subjectively has reasonable grounds to make the arrest and the grounds are objectively reasonable (*R. v. Storrey* [1990] 1 S.C.R. 241). A police officer must personally believe he has reasonable and probable grounds and "it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say, a reasonable person standing in the shoes of the police officer would have believed that reasonable and probable grounds existed to make the arrest…" (*ibid.*). In determining whether reasonable grounds exist, an officer must take into account all of the information available to him, including information that might detract from his belief. He is entitled to

disregard only what he has good reason for believing is not reliable (*Chartier v. AG-Que*, [1979] 2 S.C.R. 474).

Obligations Under s. 10(b)

[146] Section 10 (*b*) imposes informational and implementation obligations on police. The informational obligation arises immediately upon detention. The implementational obligations "arise only when detainees express a wish to exercise their right to counsel" (*R. v. Bartle,* [1994] 3 S.C.R. 173; *R. v. Fuller*, 2012 ONCA 565, paras. 16-17; *R. v. Baig,* [1987] 2 S.C.R. 537 at 540; and, *R. v. Owens,* 2015 ONCA 652, paras.22-31).

[147] The "implementational" obligations require that the police provide the detainee with a reasonable opportunity to exercise the right to counsel and refrain from questioning or eliciting evidence until the detainee has been allowed to exercise the reasonable opportunity (*R.* v. *Manninen*, [1987] 1 S.C.R. 1233). Where the detainee evokes the right, he must be reasonably diligent in exercising it.

[148] A detainee can waive the right to counsel. The standard for waiver is high. The Crown must prove it was "clear and unequivocal" (*R. v. Prosper*, [1994] 3 S.C.R. 236; and, *R. v. Bartle, supra.*). The detainee who waives the right to consult counsel must understand what it is he is giving up (*Prosper, ibid.,* at para. 44).

[149] When a detainee initially asserts a desire to exercise the right, but then has a change of mind, police must "advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee" (*Prosper*, *supra.*, at para. 51).

[150] Police may delay access to counsel, but "…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 (*R. v. Rover*, 2018 ONCA 745, para. 27).

Additional Facts Relevant to Roadside Arrests, Searches and Seizures

[151] Sgt. Glode did not make the arrests, but he gave the direction, so it is his grounds that we are concerned with. In his testimony, Sgt. Glode identified the information that caused him to subjectively believe he had reasonable grounds to

arrest Mr. Bailey and Mr. Lambert for possession for the purpose of trafficking cocaine and conspiracy to import cocaine. Sgt. Glode testified that his grounds to arrest relied on the "totality of the circumstances", including the following:

- The content of the email from Montreal;
- Information from CBSA about events from that morning - the boat with 4 guys in it, with dive gear, watching the Arica with binoculars, and that CBSA thought the presence of the boat was suspicious;
- Information received from Mr. Bailey and Mr. Seinauskas on the pontoon boat - they said they were using traps to collect algae but had no traps, they were diving but had no dive flags, Mr. Seinauskas' response didn't make sense and seemed to surprise Mr. Bailey, "Matthew Lambert" was with them and they were diving at Black Rock Beach;
- Observations made during the first trip to Black Rock Beach - there were two guys on the beach with dive gear, the pontoon boat was close, and a diver had just come out of the water;
- They were diving but were not using a buddy system;
- All four men met on the waterfront in downtown Halifax, Mr. Lambert appeared to make eye contact with Sgt. Glode and nodded and smirked, and the men put dive gear into the Escalade;
- The vehicle appeared to be doing "heat checks" when it was followed from the Future Inn to Black Rock Beach;
- When back at Black Rock Beach, the two men walked toward the Arica and were pointing at it and talking;
- Mr. Bailey put on dive gear and swam toward the Arica with a propulsion device;

- Mr. Lambert threw away a socket set which appeared to be a specialty socket set that was intertwined with a bungee and had attached a carabiner consistent with use for attaching to a dive belt;

- The diver with propulsion had been near the Arica and waived to people on deck;

- The two men removed a large black cylinder from the water which was heavy enough to require two to carry it, that no one on the surveillance team could say they'd seen it go into the water so he believed it had come from the water; and,

- When they left the parking lot at Black Rock Beach, they were in a hurry.

[152] In cross-examination, Sgt. Glode agreed that he "would not have felt [he] had reasonable grounds to arrest those people without something new coming out of the water". Later in cross-examination he again agreed that the information that something new had come out of the water was the "critical piece of information for the arrest".

[153] He and the surveillance officers were cross-examined extensively on the foundation for Sgt. Glode's stated belief that something new came out of the water.

[154] D/Cst. Fairbairn testified that he spoke with the diver when he was in the water. The diver had a propulsion device and went out toward the end of the seawall. He thought he had communicated this to Sgt. Glode and Cpl. Campbell but could not recall for sure.

[155] IO Delvalano testified that he saw the diver enter the water but did not see a propulsion device. He said he was familiar with what a propulsion device was and was aware that they could be cylindrical. He testified that when the diver came out of the water, he saw him carrying a heavy, black "torpedo shaped item" and thought it was a parasitic attachment (a device used for smuggling contraband) that he had recovered from the Arica. He was with IO Foster at that point and IO Foster advised the RCMP that it looked like something had been removed from the vessel and placed in the vehicle.

[156] IO Foster testified that he saw the diver enter the water and could not recall having seen anything in his hands. In cross-examination, it was suggested that he

had seen the diver enter the water with a propulsion device. He testified that he could not recall that and later confirmed that he did not know the diver had entered the water with a propulsion device. Unfortunately, IO Foster's notes had been stolen shortly after the events, so he did not have the benefit of refreshing his memory prior to testifying. He was advised that Cpl. Campbell had noted that he had told her the diver entered the water with a propulsion device, however, he could not recall having told her that. At the time, he was not familiar with propulsion devices.

[157] IO Foster also took photographs while he was watching the men at Black Rock Beach. Two of these photographs were taken just prior to the diver going into the water (Ex. 23 and Ex. 24). They depict two men on the beach near the water, one wearing diving gear and the other helping the diver. IO Foster acknowledged that the photographs show the diver holding a black tube and that it looks like what he saw the man come out of the water with. He testified that he took the photographs using his cell phone but did not notice the tubular device at the time. He testified that he was taking the photographs surreptitiously so was not always looking in the direction when he snapped the photo. He also noted that the printed photographs are much larger than they would appear on the screen of his device. He testified that he sent one of the photographs to Cpl. Campbell by text message because it showed the diver was preparing to go into the water.

[158] IO Foster testified that when the diver came out of the water, he had dive tanks and a giant black tube which the other man helped carry to the vehicle and put in the back.

[159] Cpl. Campbell knew that the diver had entered the water with diving gear, including tanks. She testified that she was also told, she believed by IO Foster, that he had a propulsion system with him. She agreed that in her notes she had recorded that "Sean [Foster] advised they had a propulsion system". She testified that she didn't know what it looked like and at that point had not seen any photographs taken by IO Foster. Cpl. Campbell testified that she heard over the radio that the diver was out of the water and had something large and cylindrical and he and the other man (Mr. Lambert) were dragging it up the beach. She told Sgt. Glode and they discussed the possibility that something had been retrieved from the Arica. They then learned over the radio that the men were leaving quickly in the vehicle. She and Sgt. Glode thought contraband had been taken from the Arica and was now in the vehicle so decided to stop the vehicle.

[160] She acknowledged that none of the surveillance officers had told her the diver had brought a "parasite" out of the water. She acknowledged that the cylinder that

had come out of the water could have been a dive tank and could have been a propulsion device.

[161] Sgt. Glode testified that he learned, possibly from D/Cst. Fairbairn over the radio, that one of the men was in the water with a propulsion device. Later, Cpl. Campbell received a call from CBSA informing her that they had seen a diver with a propulsion device near the Arica who had waved at the ROV. He testified that before that day, he had only seen propulsion devices on TV. He knew it was a device that would pull you through the water and believed they came in different shapes and sizes.

[162] Sgt. Glode was told when the diver came out of the water that he had a black cylinder with him that appeared heavy. No one had seen him go into the water with it and the men seemed to be in a hurry. In cross-examination, he repeated that he was told that there was a black cylinder that came out of the water that nobody saw going in. He acknowledged that this fact that he was told that no one had seen it going in was not recorded in any of his notes or reports.

[163] He testified that no one had told him that they had actually seen the diver enter the water with the device. He would not agree that the only logical explanation for the fact that the diver had one in the water was that he had taken it into the water. He suggested it was possible it had been left in the water earlier.

[164] He testified that he had not seen the photographs that IO Foster had sent to Cpl. Campbell and did not know that a propulsion device was cylindrical. He acknowledged that he could have asked someone what it looked like but didn't.

[165] When the Escalade was searched, he realized the black cylinder was the propulsion device and it did not contain any contraband.

[166] Sgt. Astephen testified that he was aware the decision to delay access to counsel was an extreme measure but felt it was appropriate in the circumstances because it was a conspiracy investigation, there was at least one other suspect at large and another location. His concern was that if the men were given access to a phone, they could contact an accomplice and destroy evidence. Even contact with a lawyer was a concern. A lawyer would not intentionally alert an accomplice but could contact a potential surety or family member who could pass on information.

Application of the Principles to Roadside Arrests, Searches and Seizure

a) Grounds for Arrest

(i) Credibility and Reasonableness of Belief there would be Contraband in the Vehicle

[167] The stop of the Escalade, arrest of Mr. Bailey and Mr. Lambert, search and seizure of the Escalade all rely for their legality on Sgt. Glode's grounds for arrest. He testified that without his belief that "something new", which he believed to be contraband, had been taken out of the water and put in the Escalade, he did not have reasonable grounds to stop the vehicle and arrest the occupants. The Crown argues that Sgt. Glode's evidence is credible, that he subjectively had grounds to believe there was contraband in the vehicle and, based on the totality of the circumstances, that belief is objectively reasonable.

[168] I accept that Sgt. Glode believed that something new came out of the water. That belief, however, was not objectively reasonable in light of the evidence to the contrary.

[169] Neither Sgt. Glode nor Cpl. Campbell could see the beach from where they were located. They were relying on others to provide them with information. They were communicating using two different radios and cellular telephones with two HRP officers, two CBSA officers on the beach and more CBSA officers on the Arica. They were also receiving photographs that were sent to them by some of the surveillance officers. It is clear that at least some of the surveillance officers knew that Mr. Bailey entered the water with a propulsion device and this was communicated in some form to Sgt. Glode. I find that he knew that Mr. Bailey entered the water with such a device. However, he did not know what it looked like and there is no evidence that anyone described it to him.

[170] He then received information that something was being removed from the water and the divers were moving quickly to the Escalade. There is no evidence that any of the surveillance officers said that something new had come out. However, IO Foster reported seeing a heavy black tube. I believe that Sgt. Glode simply did not associate this with the propulsion device that he had earlier heard about and leapt to conclude there was something new. He believed contraband had been removed. However, the objectively discernable facts did not support that belief: a large cylindrical object was carried into the water; the diver had been seen using a propulsion device in the water; a large cylindrical device was removed from the water; it was a sunny afternoon at a public beach with people around; and, Mr. Bailey knew from his earlier encounter with Sgt. Glode at the pontoon boat that police were

suspicious of his activity. I appreciate that Sgt. Glode did not hear anyone say that the propulsion device had been carried into the water and did not know what it looked like, but that information was readily available to him. Once the men were in the vehicle, things happened quickly. However, it took time for them to carry the gear to the vehicle and load it. He had time to consider whether the item being removed might be the propulsion device or ask the surveillance officers for more information. He had time to consider whether it was reasonable to believe that the targets would remove contraband from the water in broad daylight, in front of people, after being seen on camera by the ROV and after being confronted by himself and Cpl. Campbell earlier in the day. Instead he reacted immediately and directed that the vehicle be stopped and the occupants arrested.

[171] In the circumstances, I accept that he honestly believed he had grounds to believe contraband would be found in the vehicle and had grounds to stop the vehicle and arrest the occupants. However, his belief that contraband would be found was not reasonable, so his grounds were not objectively reasonable. As a result, the searches of Mr. Bailey and Mr. Lambert and the vehicle that were incident to that arrest were not authorized by law and so were not reasonable and breached s. 8 of the *Charter*.

(ii) Impact of Unconstitutionally Obtained Evidence on Grounds for Arrest

[172] Since I have concluded that Sgt. Glode's grounds for arrest were not objectively reasonable, it is not strictly necessary that I consider this additional argument. However, in case I am wrong in my conclusion that Sgt. Glode's belief was not reasonable, I will.

[173] The information obtained on the pontoon boat was obtained unconstitutionally. It was then used by Sgt. Glode to support his grounds to arrest Mr. Bailey and Mr. Lambert. The Applicants argue that unconstitutionally obtained information cannot be used to support grounds for arrest so this information should be excised and what is left is insufficient to support the arrest. The Crown argues that the rule of excision applies only to the review of judicial authorizations and unconstitutionally obtained information should not be "excised" from the grounds in the warrantless arrest context. The Crown argues that any remedy for the use of that information should be addressed within the s. 24(2) framework where evidence can be excluded if it is causally connected to the earlier breach.

[174] To properly assess the Crown's argument, it is necessary to first briefly, review the history of the *Garofoli* excision option.

[175] In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the Supreme Court concluded that a search warrant that relied, in part, on incorrect or privileged information could be saved if the warrant could still have issued without that information. In *R. v. Grant*, [1993] 3 S.C.R. 223, and its companion cases of *R. v. Plant*, [1993] 3 S.C.R. 28; and, *R. v. Wiley*, [1993] 3 S.C.R. 263, the Supreme Court extended *Garofoli* excision to warrants that relied, in part, on unconstitutionally obtained information.

[176] The Crown, in their brief (June 26, 2019, at para. 5.4), is critical of the rule requiring that unconstitutionally obtained information be excised in the judicial authorization context. It also argues that the "jump" from excising privileged information in *Garofoli* to excising *Charter*-infringing conduct in *Grant* was never analyzed or explained by the Supreme Court of Canada. I disagree.

[177] The analysis and explanation are provided by Sopinka, J., writing for the majority in *Grant* (pp. 251-252/para. 50). He began his discussion of excision by referencing *R. v. Kokesch*, [1990] 3 S.C.R. 3. In that case, the results of an unconstitutional perimeter search formed the foundation for a warrant to search a home. The majority of the Supreme Court concluded that the evidence seized pursuant to the warrant should be excluded under s. 24(2) because of the unconstitutional perimeter search. The Court concluded that there was a sufficient nexus between the seizing of the evidence pursuant to the warrant and the *Charter*-offending perimeter search to satisfy the "obtained in a manner" pre-requisite in s. 24(2). The Court in *Kokesch* did not attempt to save the warrant by assessing whether it could have been issued without the unconstitutionally obtained information (perhaps because the warrant relied entirely on the results of the unconstitutional perimeter search). The Court simply concluded that the evidence had been obtained in a manner that offended the *Charter* and, on balancing the 24(2) factors, should be excluded.

[178] Sopinka, J. then went on to contrast the *Kokesch* situation (where the very foundation of the warrant was unconstitutionally obtained information) with a situation where there were facts in addition to those that were obtained unconstitutionally and said that in those situations, the reviewing Court should use the *Garofoli* procedure to determine whether the warrant could have been issued if the unconstitutionally obtained information was excised. He went on to say:

> In this way, the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event. Accordingly, the warrant and search conducted thereunder in the case at bar will be considered constitutionally sound if the warrant would have

> issued had the observations gleaned [page252] through the unconstitutional perimeter searches been excised from the information. (emphasis added)

[179] In my view, a careful read of these comments reveal that the decision to extend the *Garofoli* excision option to unconstitutionally obtained information was a response to *Kokesch* to save search warrants that might otherwise be lost.

[180] As a result, in my view, the first question is whether unconstitutionally obtained information can be used to support grounds for a warrantless arrest. If the answer to that question is "no", then the second question is whether the *Garofoli/Grant* excision process should be used to determine whether the arrest is constitutionally sound because reasonable grounds existed without the unconstitutionally obtained information.

[181] I find that the first question was resolved in the Applicant's favour by the Nova Scotia Court of Appeal in *R. v. MacEachern*, 2007 NSCA 69, at paras. 21 – 24. The case involved an appeal from a decision admitting evidence found during a search incident to arrest. Mr. MacEachern was detained and questioned without being advised of his rights under s. 10(b). This was unconstitutional. He was then arrested, searched and drugs were found. The officer acknowledged that he did not have grounds to arrest without the unconstitutionally obtained information. On appeal, the Crown apparently conceded that the officer could not rely on that information for his subjective grounds to arrest. The following portion of the Crown factum was quoted by the Appeal Court (para. 23):

> Without the Appellant's responses Cst. Pattison lacked the subjective grounds to arrest the Appellant (i.e. a belief that the Appellant was illegally in possession of drugs). Therefore the arrest was not lawful under s. 495(1)(a) of the *Code*, and the search was not incidental to a lawful arrest: *R. v. Caslake*, [1998] 1 S.C.R. 51. Hence the search was not authorized by law within s. 8 of the *Charter*.

[182] The Court of Appeal accepted this concession and said (para. 24):

> In *Feeney* at para. 59 Justice Sopinka said that information obtained as a result of a *Charter* breach cannot support the issuance of a search warrant. The same principle applies to the grounds for a warrantless search: *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at pp. 623-5. Mr. MacEachern's search was incidental to the arrest. The subjective prerequisite for arrest derived from Mr. MacEachern's answers to questions that should not have been asked before Mr. MacEachern was informed of his right to counsel under s. 10(b). The search of MacEachern's knapsack violated s. 8 of the *Charter*.
>
> (emphasis added)

[183] The Crown is not bound by the concession it made in *MacEachern*, but I am bound by the conclusions of the Court of Appeal. The Crown before me argued that *MacEachern* can be distinguished because, in that case, the arrest immediately followed the breach and in the case before me the arrest occurred hours later. The significance of this, the Crown says, is that in the present case further information was discovered during the intervening period that contributed to the grounds. I agree this is a factual distinction, but I do not agree that this distinguishes the legal principle in *MacEachern* - that subjective grounds for arrest cannot derive from unconstitutionally obtained information. Many, but not all, other courts have reached the same conclusion (*R. v. Masjedee,* 2017 ONSC 4920, at paras. 55 - 56; *R. v. Amoa-Yeboah*, 2018 ONSC 1965, at paras. 99 - 105; *R. v. Woychyshyn*, 2017 ONCJ 663, at paras. 103 - 108; *R. v. Riley*, [2009] O.J. No. 62 (OSCJ), at paras. 56-57; *R. v. Lam*, 2014 ONSC 3538, at paras. 335 & 341; and, *R. v. Vulic*, 2012 SKQB 221, at para. 27; *contra. R. v. Wong*, 2017 BCSC 1170, at para. 42; and, *R. v. Flintroy,* 2019 BCSC 35).

[184] Applying *MacEachern* to the case before me, I conclude that the information obtained as a result of the *Charter* breaches on the pontoon boat cannot be used to support Sgt. Glode's grounds for arrest of Mr. Bailey. The situation for Mr. Lambert is more complicated since his rights were not breached on the pontoon boat. I will address his circumstance after I deal with the excision question.

[185] The next question is whether the *Garofoli/Grant* excision process should be used to potentially save the arrest. The Court in *MacEachern* was not required to discuss the excision process because the officer conceded that he did not have subjective grounds without the unconstitutionally obtained information. In the cases referred to above, rather than simply concluding that the arrest was unlawful because the grounds included unconstitutionally obtained information, the Courts used the *Garofoli/Grant* excision procedure to determine whether what remained in the grounds was sufficient to support the arrest. The main rationale in these cases is that there is no principled basis upon which to treat the review of a warrantless arrest any differently than a review of a warranted search where unconstitutionally obtained evidence would be excised (See: *Masjedee*, *supra*, at para. 56). I agree.

[186] Without the information obtained from Mr. Bailey on the pontoon boat, Sgt. Glode still had the information from Montreal, the information from the CBSA officers who were around the Arica, and the information obtained during the surveillance that afternoon. The statement on the pontoon boat (the reference to

algae and the reference to the name "Matthew Lambert") established the link between the group in Halifax and the group in Montreal. That link was significant. Without the statement from the pontoon boat, Sgt. Glode had the similarities between the activity in Halifax and Montreal and the observations of the men in a vehicle with Quebec plates. This grounded a reasonable suspicion that the men were interested in the Arica and might have come from Montreal. However, it did not constitute reasonable grounds to believe Mr. Bailey had committed criminal offences. Therefore, without the unconstitutionally obtained information, the arrest was unlawful and violated s. 9 of the *Charter.*

[187] This leads to the question of whether the arrest of Mr. Lambert is also impacted by these findings. Mr. Lambert argues that the police should not be permitted to rely on evidence obtained through a breach of Mr. Bailey and Seinauskas' rights in support of his arrest. In doing so, he relies on *R. v. Mack,* [1988] 2 S.C.R. 903, and also argues it would violate s. 7 of the *Charter,* so would be an abuse of process, falling under the "residual category" recognized in (*R. v. O'Connor,* [1995] 4 S.C.R. 411 and *R. v. Piccirilli*, 2014 SCC 16). He argues that the abuse can be avoided by recognizing the police misconduct and excising the information from the officer's grounds to arrest and search Mr. Lambert. Finally, Mr. Lambert argues that I have common law jurisdiction (*R. v. Buhay*, 2003 SCC 30).

[188] The Crown does not dispute that Mr. Lambert has standing to assert that his arrest and subsequent search of his person and the vehicle breached ss. 8 and 9 of the *Charter*. However, it argues that the grounds for arrest can include information obtained in violation of his co-accused's *Charter* rights.

[189] For the reasons that follow, I conclude that in the particular circumstances of this case, the officer cannot rely on the information obtained in violation of Mr. Sinauskas' and Mr. Bailey's *Charter* rights to support his grounds to arrest Mr. Lambert.

[190] I have first looked at the language and rationale for the general rule that unconstitutionally obtained information must be excised from grounds to support judicial authorization (*Grant, supra.*; *R. v. Plant, supra*; and *R. v. Wiley*, *supra*. These decisions and the more recent decision of Watt, J.A. in *R. v. Mahmood,* 2011 ONCA 693, all involved excision of evidence obtained in violation of the Applicant's own *Charter* rights. However, their language does not limit the remedy to that circumstance. In *R. v. Mahmood* , Watt, J.A., writing for the Court, described the excision rule as follows: ... Information obtained by unconstitutional means must

be excised from the ITO ... and what remains, as amplified on review, must be assessed to determine whether the warrant could have issued…" (at para. 116, emphasis added, and citations omitted).

[191] The rationale for excision of unconstitutionally obtained information, as discussed in these cases, is also not limited to that circumstance. In *Grant ,supra.*, at para. 64, the purpose was described as to prevent the state from benefitting from the illegal acts of police officers. That would logically extend to evidence obtained in violation of a third party's *Charter* rights.

[192] This issue has also been specifically addressed in the context of challenges to judicial authorizations with conflicting results. In that context, it has been characterized as a question of "standing" to argue excision. However, cases have emphasized that it is important not to conflate it with the "standing" requirement for s. 24(2) relief. Excision is not a s. 24(2) remedy and does not address admissibility at trial.

[193] Some cases have suggested that where a person has standing to assert a *Charter* violation in relation to a judicial authorization, that is sufficient to give them standing to seek excision of unconstitutionally obtained information, even where that information was obtained as a result of the breach of another person's rights (*R. v. Brown* [2000] O.J. No. 1177 (Ont S.C.J); *R. v. Guilbride*, 2003 BCPC 177; *R. v. Vu* [2004] O.J. No. 5681 (OSCJ); *R. v. J.J.***,** 2010 ONSC 735, at paras. 339 - 359).

[194] That view is not universally held. Other courts have concluded that unconstitutionally obtained information will only be excised if the accused can show it was obtained as a result of a breach of his own *Charter* rights (See for example: *R. v. Croft*, 2013 ABQB 716).

[195] Many of the cases in this area have been decided in the context of wiretap authorizations and are complicated by circumstances specific to that context. Some have distinguished between information obtained as a result of an authorization that was unlawful on its face versus an authorization that was obtained as a result of potentially insufficient grounds. Many appear to have been heavily influenced by pragmatic concerns. Often, deciding the constitutionality of the information would require a full blown *Garofoli* hearing in relation to authorizations that did not involve the accused before the Court and would sometimes require the Court to go back more than one level of authorization. This would make already lengthy trials unmanageable.

[196] In this case, Mr. Lambert has direct standing to assert a breach of his *Charter* rights in relation to his arrest and the searches of his person and the vehicle. The pragmatic concerns identified in the cases do not exist. I have already decided the constitutionality of the prior statements, so no further *Garofoli* hearing is required, the breaches at issue relate to co-accused/co-applicants (as opposed to third parties), the breaches occurred during the same investigation that led to Mr. Lambert's arrest so are temporally, contextually and causally related, and there is a conspiracy charge which means that many of the evidentiary, constitutional and legal issues are intertwined.

[197] In my view, the policy reasons for excision expressed in *Grant*, *Plant* and *Wiley* support excision of unconstitutionally obtained information even when it does not involve a violation of the Applicant's rights and there is no practical reason not to apply that policy in the circumstances of this case. Therefore, I conclude that the information obtained as a result of the breaches of his co-accused's *Charter* rights can not be relied on to support the grounds for Mr. Lambert's arrest. As a result, for the reasons outlined above, I find that his arrest lacked reasonable grounds so was unlawful and violated s. 9 of the *Charter.*

[198] The searches of Mr. Lambert, Mr. Bailey and the vehicle were incident to arrest. Because the arrests were not lawful, those searches were not authorized by law so were unreasonable and breached s. 8 of the *Charter.*

Conclusions - Roadside Arrests and Incidental Searches

[199] I have concluded that the arrest of Mr. Bailey and Mr. Lambert and the searches incident to those arrests were breaches of ss. 9 & 8 of the *Charter*. Specifically, Sgt. Glode's grounds were not reasonable because his belief that contraband had been taken from the water and put in the Escalade was not objectively reasonable and he was not entitled to rely on the information from the pontoon boat. As a result, the searches were not incident to a lawful arrest so breached s. 8 of the *Charter.*

b. Mr. Bailey – Questioning Before he Exercised Right to Counsel

[200] Sgt. Astephen complied with the initial informational obligation by advising Mr. Bailey of his right to consult counsel. However, he then asked Mr. Bailey a question before Mr. Bailey was given an opportunity to consult with counsel. The

Crown concedes this failure to "hold off" was a breach of his s. 10(b) rights (*R.* v. *Manninen*, *supra*).

c. Seizure of Vehicle

[201] After everything was removed from the vehicle, Sgt. Glode knew that he was mistaken in his belief that contraband had been removed from the water and placed in the vehicle. On his evidence, this fact was crucial to his subjective belief that he had grounds to arrest the occupants and he knew he was mistaken. At that point, his subjective justification for the arrest, search and seizure was gone and he did not provide any other justification. In the evidence, there was reference to some quantity of suspected drugs being found in the vehicle. This might have provided grounds to re-arrest Mr. Bailey and Mr. Lambert and seize the vehicle. However, Sgt. Glode did not testify that this was in his mind. As was stated in *Caslake* (*supra.*, at para. 27), "…the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched.". This was put succinctly in *R. v. Whitaker,* 2008 BCCA 174, para. 65: "In deciding whether the police infringed *Charter* rights, they are to be judged on what they did, not what they could have done.".

[202] Therefore, the seizure of the vehicle in these circumstances was a breach of s. 8 and the continued detention of the men, a continuing breach of s. 9.

d. Delayed Implementation of Right to Counsel - s. 10(b)

[203] Sgt. Astephen and D/Cst. Underwood complied with their initial informational obligation by advising Mr. Bailey and Mr. Lambert of their right to consult counsel. The implementational obligations "arise only when detainees express a wish to exercise their right to counsel" (*R. v. Bartle,* [1994] 3 S.C.R. 173; *R. v. Fuller*, *supra*, paras. 16-17; *R. v. Owens*, *supra*, paras.22-31).

[204] D/Cst. Underwood advised Mr. Lambert of his right to contact counsel and confirmed he understood. He asked Mr. Lambert if he wished to contact counsel and Mr. Lambert said, "No man, we don't have any cocaine". Counsel for Mr. Lambert argues that his "no" related to cocaine and was not responsive to the question about counsel. I disagree. It was a direct response to the preceding question. In the circumstances, that constituted an informed waiver and relieved D/Cst. Underwood of his implementational obligations at that time. In the event that I am wrong, any breach was of little consequence since Mr. Lambert exercised his

right to counsel later at the police station and no evidence was obtained from him in the intervening period.

[205] The situation was different for Mr. Bailey. Sgt. Astephen had made the decision to delay Mr. Bailey's access to counsel and told Mr. Bailey of that. Sgt. Astephen turned his mind to the specific circumstances and concluded that the need to preserve evidence justified a delay in granting access to counsel. He articulated a reasonable basis for that conclusion. However, he took no steps to minimize the delay. He didn't advise Sgt. Glode, Cpl. Campbell or D/Cst. Fairbairn that he had suspended the right to counsel. Even if Sgt. Glode, the lead investigator, had agreed that step was reasonable, the need for it would have disappeared once Mr. Seinauskas was arrested and the hotel room secured. The Crown acknowledges this and concedes a breach of Mr. Bailey's rights under s. 10(b) of the *Charter* for that time period.

[206] In the circumstances, the decision to delay implementation of the right to counsel was justified but the failure to take reasonable steps resulted in a breach of s. 10(b) of the *Charter* in relation to Mr. Bailey which was not limited to the time after Mr. Seinauskas was arrested. Mr. Lambert waived his right to counsel at the roadside, so the subsequent delayed implementation did not impact him.

3. Halifax Regional Police Station – Statement from Mr. Bailey – ss. 7 and 10 (b)

[207] Mr. Bailey was in wet clothing when he was arrested at 7:10 p.m. He was not provided with dry clothing until D/Cst. Fairbairn got him dry clothing after meeting with him at 9:14 p.m. Uniformed officers who were tasked with transporting and observing him while they waited for the investigating officers to arrive either did not notice he was cold or did not feel it was their responsibility to remedy the situation.

[208] The delayed implementation of the right to consult counsel exacerbated this situation. He knew he was under arrest and knew he was not permitted to speak with counsel. He was not provided with any further information, so had no idea how long he would be required to wait in wet, cold clothing and had no ability to report the situation to anyone.

[209] D/Cst. Fairbairn and Sgt. Mason spoke with him at 9:14 p.m. That interaction was recorded and the recording entered as an exhibit on the hearing (Ex. 42). Prior to them entering the interview room, Mr. Bailey had been laying on the floor apparently sleeping. He had a blanket but was still wearing wet clothes. Sgt. Mason

testified he was still in the wet dive suit and was cold. She said he was almost in a fetal position on floor and was slow when trying to get up. She asked if he was ok and he said he was fine but cold and had a sore back and wrist. She said he was clearly not well.

[210] Sgt. Mason testified that she was concerned about the fact that Mr. Bailey was cold and in wet clothes so took corrective action. D/Cst. Fairbairn arranged for him to be provided with dry clothes. He read him his right to counsel and cautioned him and Mr. Bailey indicated he understood those rights.

[211] Sgt. Mason testified that Mr. Bailey declined counsel and D/Cst. Fairbairn wrote on the "right to counsel form" that Mr. Bailey did not wish to speak with counsel. The recording of the interview shows that his exact words were, "Yes, are you kidding me that's what you want to ask me right now? I'm sitting here like six thousand of miles away from home and you want to ask me if I want to talk to a lawyer. Not at this time, at this time I want to hear what it is that you have to say.".

[212] Sgt. Glode testified that he believed Mr. Bailey had been advised of his right to counsel and declined so he read the "Prosper warning" and the secondary police caution. He believed he understood and did not want to speak to counsel so proceeded with the interview.

[213] The recording shows that Sgt. Glode told Mr. Bailey that he understood he had been advised of his right to counsel and declined counsel. Mr. Bailey responded, "I said I didn't want to speak to a lawyer at that time …I wanted more information …". Sgt. Glode then read the secondary caution and Mr. Bailey acknowledged he understood. Sgt. Glode then read the "Prosper warning" which begins with "you've decided not to speak to a lawyer . . .". He then asked Mr. Bailey, "Do you understand?". To which Mr. Bailey responded "No, …". Mr. Bailey was clearly upset and proceeded to vent his frustration. After which Sgt. Glode effectively said "ok, lets get to it" and proceed with the interview.

[214] In my view, the recording shows that Mr. Bailey told Sgt. Glode at the very beginning of the discussion about counsel that he had not waived his right to speak with a lawyer. Sgt. Glode simply didn't acknowledge that. He continued with reading what he had to read. Mr. Bailey let him do that and listened. When asked if he understood the Prosper Warning, Mr. Bailey clearly said "No". Again, Sgt. Glode did not acknowledge that. He did nothing to try to explain or to find out what the confusion was. Nor did he simply ask "do you want to speak to a lawyer?". Instead, he simply said "ok, we'll get right into it".

[215] This was not a clear and unequivocal waiver. Mr. Bailey's right to counsel under s. 10(b) of the *Charter* was breached. I do not find that the circumstances of his detention rise to the level of a s. 7 breach. However, as will be discussed later, it is relevant to the s. 24(2) analysis.

4. Future Inn- Arrest of Mr. Seinauskas – ss. 8 & 9 of *Charter*

[216] Mr. Seinauskas alleges multiple breaches of his *Charter* rights arising from his arrest.

a. Absence of Reasonable Grounds after Excision – s. 9

[217] First, he alleges that when unconstitutionally obtained information is excised from the grounds for arrest, what remains does not constitute reasonable grounds. I agree. For the reasons set out above, I have concluded that Sgt. Glode cannot rely on unconstitutionally obtained information for his grounds to arrest Mr. Seinauskas. That would include the information obtained on the pontoon boat and during the searches of Mr. Lambert, Mr. Bailey and the vehicle at the roadside. Therefore, his arrest was unlawful and a violation of s. 9 of the *Charter*.

b. Entry into the Hotel Room to Arrest without a Feeney warrant - s. 8

[218] The Crown concedes that Mr. Seinauskas was arrested inside his hotel room without a *Feeney* warrant and that this constituted a breach of s. 8.

c. Delay in Advising of Right to Counsel – s. 10(b) of Charter

[219] The Crown also concedes that Mr. Seinauskas was not cautioned or advised of his right to counsel immediately upon arrest and this was a breach of the informational component of s. 10(b).

5. Future Inn - Search of Room #327 – Mr. Bailey, Mr. Seinauskas and Mr. Lambert – s. 8

[220] The hotel room was searched pursuant to a search warrant. The Crown does not dispute that all three of the Applicants had a privacy interest in the hotel room so have standing to challenge the warrant. That search warrant is presumed to be

valid and the Applicants bear the burden of establishing on a balance of probabilities the search was nonetheless unreasonable.

a. Sufficiency of Grounds

[221] The sufficiency of the Information to Obtain the search warrant (ITO) is to be assessed based on the revised record – the grounds set out in the ITO as amplified by evidence heard during the hearing and absent any information that is appropriately excised from it (*R. v. Garofoli, supra.*). The Applicants argue that once unconstitutionally obtained information is excised from the ITO, the remaining grounds were not sufficient for its issuance.

[222] The test is whether there is a basis upon which an authorizing judge, acting judicially, could have granted the authorization. As was stated by Justice Sopinka in *Garofoli*:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If based on the record which was before the authorizing judge as amplified on review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.

[223] As is clear from this passage and cases that follow it, my role is not to determine whether I would have granted the authorization.

[224] A search warrant is properly issued where there is information under oath that provides ". . . sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place" (*R. v. Morelli*, 2010 SCC 8, at para. 40).

[225] Reasonable grounds to believe is not the same as proof beyond a reasonable doubt and less than balance of probabilities. It has been described as reasonable probability and the point where credible-based probability replaces suspicion.

[226] The authorizing judge must consider the evidence explicitly set out in the ITO but may also draw reasonable inferences from that evidence. This must also form part of the review process.

[227] It is important to assess the ITO as a whole, with each piece of information viewed in the context of the whole and allowing for the possibility that weaknesses in one area could be compensated by strengths in another.

Scope of Excision

[228] The first task is to determine what information should be excised from the grounds in the ITO. The ITO at issue was provided to the Court and entered as an exhibit on the *voir dire* (Ex. 30). There is no dispute that the sufficiency of the grounds to support a search warrant is to be assessed after excision of evidence obtained directly as a result of a *Charter* breach. However, there are remaining issues about the scope of excision: whether information obtained in violation of one Applicant's rights should be excised for all Applicants; whether I excise only evidence that is the direct and immediate result of the established *Charter* breach(es) or all observations, information and evidence that derived from those breach(es); and, if so, whether the discoverability analysis applies to excision.

[229] With respect to the first issue, the Crown argues that a separate excision analysis should be conducted for each Applicant. For each, only evidence obtained in violation of that Applicant's rights would be excised and the sufficiency of the remaining grounds assessed for each Applicant. I do not agree. Based on the authorities reviewed above in the context of excision from grounds for arrest, I have concluded that there are circumstances where evidence obtained as a result of a breach of the rights of someone other than a specific applicant should be excised. In the case before me, the Applicants all have standing to challenge the legality of the search warrant for the Future Inn, the breaches at issue relate to co-accused/co-applicants (as opposed to third parties), the breaches at issue are temporally, contextually and causally related, and there is a conspiracy charge. In these circumstances, I have decided that all unconstitutionally obtained evidence should be excised from the ITO in support of the warrant for the hotel room and the sufficiency of the remaining grounds assessed for all three applicants together. The individual circumstances of each applicant can be considered under s. 24(2) if a breach is found.

[230] The next two issues, excision of derivative evidence and discoverability, can be considered together.

[231] In *R. v. Ferguson*, 2018 BCSC 378, Justice DeWitt-Van Oosten (as she then was) conducted a comprehensive review of the caselaw relating to excision of derivative evidence from an ITO. She ultimately concluded that she did not have to decide the parameters of the excision rule because the case before her involved a facial challenge to a warrant so was limited to the "four corners of the affidavit". In her case, no additional evidence was called and the ITO itself provided no

information about a derivative relationship between the information that was obtained directly as a result of the breach and the other facts the Application sought to have excised (paras. 61 - 65). However, Justice DeWitt-Van Oosten's discussion of the issue is tremendously helpful:

> **40** [34] The accused argues that for the purpose of the excision rule, the Court should take the same broad-based and flexible approach that has been adopted under s. 24(2) of the *Charter* in deciding whether evidence has been "obtained in a manner" that infringed a *Charter* right (a pre-condition to accessing the remedy of exclusion). This would necessarily capture information or facts that were obtained by police as an immediate result of the *Charter* breach, as well as anything that was "temporally, contextually and/or causally connected" to the breach.
>
> **41** [35] The accused emphasizes that the underlying rationale for excision and exclusion under s. 24(2) are functionally the same--to ensure "state actors not benefit from *Charter*-infringing conduct or be permitted to sidestep the *Charter*". If the objectives of these two enquiries are the same, there should be consistency between their analytic contours.
>
> **42** [36] A relatively recent statement of the test applied in deciding whether evidence was "obtained in a manner" that infringed a *Charter* right is found in *R. v. Mack*, 2014 SCC 58:
>
> > [38] Whether evidence was "obtained in a manner" that infringed an accused's rights under the *Charter* depends on the nature of the connection between the *Charter* violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned evidence will not suffice ... [Internal references omitted. Emphasis added.]
>
> **43** [37] The Crown says because of the limited context in which the excision mandate unfolds (a pre-remedial review of a warrant for determining whether a s. 8 violation has occurred), a narrower construct is warranted.
>
> **44** [38] Although the Crown accepts that the "obtained in a manner" jurisprudence has informative value to the excision analysis, it argues that the predominant focus of the excision exercise should be on causality. Only information that has a clear causal connection to the breach should be caught by the rule. Otherwise, says the Crown, the excision enquiry runs the risk of developing into a "full-fledged

hearing" process akin to s. 24(2), one that requires an in-depth assessment of the relationship between each of the facts relied upon in support of the warrant; whether they are temporally, contextually or causally connected to the *Charter* infringement; and the strength of that connection.

45 [39] In *R. v. Goldhart*, [1996] 2 S.C.R. 463, for example, the Supreme Court made clear at para. 40 that in deciding whether derivative evidence should be withheld from the state for use against an accused because it was unconstitutionally obtained, the "entire relationship" between the impugned evidence and the breach from which it is said to have flowed must be examined.

46 [40] This same principle was recently noted by the Ontario Court of Appeal in *R. v. Riley*, 2017 ONCA 650. There, at para. 316, the Court noted that when considering alleged derivative evidence under s. 24(2), a trial judge is required to "[examine] the entire relationship between the *Charter* breach and the impugned evidence, including the strength of the causal and temporal connection". The judge must also consider "whether the events were part of a single transaction": at para. 316.

47 [41] From the Crown's perspective, to import the s. 24(2) "purposive enquiry" into the excision analysis would fundamentally change the nature of the rule.

48 [42] The Crown also submits that however the scope of the excision rule may be defined, by this Court or others, where the accused brings a facial (as opposed to sub-facial) challenge to a search warrant, it is only facts that are "readily and obviously identifiable from the four corners of the affidavit as having been obtained in a manner" violative of a *Charter* right that are subject to excision. [Emphasis added.] In other words, the connectedness or interdependence between the constitutional infringement and the facts subject to excision must be apparent from the face of the ITO.

49 [43] The accused has put two cases before me in support of a broad-based approach to excision: *R. v. Newman*, 2014 NLCA 48 and *R. v. Ahmad*, [2009] O.J. No. 6159 (Ont. Sup. Ct.).

50 [44] In *R. v. Newman*, police were found to have illegally obtained a statement from the detained accused. The *Charter* violations perpetrated in taking the statement were described by the trial judge as "egregious, flagrant and deliberate": at para. 46. During this process, police obtained information from the accused that led them to a witness whose evidence was subsequently included in an ITO: at para. 45.

51 [45] In a subsequent review of a dwelling house warrant arising out of the ITO, the trial judge excised the evidence of the witness. He did so after examining the "entire relationship between the impugned information and the *Charter*-infringing

conduct", and concluding there was an "overwhelming temporal and causal connection" between the information provided by the witness and violations of the accused's *Charter* rights: *R. v. Newman* at para. 46.

52 [46] In the view of the trial judge, the witness's information was obtained as part of "one, single transaction" and it would "defy common sense and good policy" to allow evidence gathered from the witness to be used in obtaining a warrant when the "sole source of the police's knowledge", the statement provided by the accused, was itself not available for the purpose of assessing the ITO: at para. 46.

53 [47] The judge's approach to excision was upheld on appeal:

> 47 ... relying on the decision in *R. v. Goldhart*, [1996] 2 S.C.R. 463 (S.C.C.), the Crown submits that Ms. Tilley's evidence should not have been deleted from the information to obtain the warrant because Mr. Newman has not challenged the admissibility of Ms. Tilley's evidence at trial. This submission is not persuasive for two reasons. First, the trial judge concluded that the means by which Ms. Tilley was identified as a possible witness for purposes of obtaining the search warrants was part of a single transaction. In the circumstances, Ms. Tilley's evidence could not be separated from Mr. Newman's inadmissible statement to which it was undoubtedly linked. Second, the fact that Ms. Tilley may have been identified as a possible witness later in the investigation cannot be relied upon in assessing the information to obtain a search warrant. Only the information available to the authorizing justice of the peace could be considered in assessing the validity of the warrant. [Emphasis added.]

54 [48] In *R. v. Ahmad*, police obtained wiretap authorizations under the *Criminal Code*. To secure these authorizations, the affiant relied, at least in part, on information received from the Canadian Security Intelligence Service ("CSIS"). A portion of the material provided by CSIS came from wiretaps that it obtained, as an investigative agency, under its own enabling legislation.

55 [49] In support of a review of the *Criminal Code* authorizations, the accused sought production of the authorizations obtained by CSIS, the affidavits in support and the ensuing intercepts. The Crown argued that the sought-after material was not relevant to the review.

56 [50] Because of the sensitive and privileged nature of the material contained within the CSIS documentation, the Crown notified the defence that it would not rely on any of the CSIS materials in defending the *Criminal Code* authorizations and, as a result, it would concede on a review of the *Code* authorizations that "any

ground in the [supporting] RCMP affidavits which were the product of CSIS interceptions should be excised": *R. v. Ahmad* at para. 21.

57 [51] From the Crown's perspective, if it would not be relying on the CSIS materials in response to any s. 8 challenge on the *Code* authorizations, the background information surrounding the CSIS materials was irrelevant.

58 [52] For the purpose of the production application, the trial judge examined the *Code* authorizations and their supporting materials to assess what portions of these materials would be captured by the Crown's concession and excised.

59 [53] To make this determination, the judge examined all information that arose directly out of the CSIS intercepts, as well as information that was potentially "derivative" of them: *R. v. Ahmad* at paras. 29-31. Crown Counsel agreed, for the purpose of the exercise, that its proposed excision should include "anything that could reasonably be identified as immediately derivative of a CSIS wiretap, such as surveillance that would not otherwise have taken place": at para. 32. Using this concession as a guiding framework for the ensuing analysis, the judge ultimately concluded that the excision should cover "all that can reasonably be identified as a CSIS interception, or derivative of a CSIS interception and which would not otherwise have been obtained": at para. 33. [Emphasis added.]

60 [54] I appreciate the point made by counsel for Mr. Ferguson in referencing *R. v. Newman* and *R. v. Ahmad*. In both cases, the excision rule was spoken of and applied in relatively broad terms.

61 [55] However, I do not consider it necessary, in the circumstances of this case, to analyse the breadth of the excision rule and determine whether, as a matter of law, it appropriately captures not only information or facts that were obtained in the immediate face of a breach, but everything within the ITO that is potentially derivative of the breach. Or, using the language of s. 24(2) of the *Charter*, I need not determine and make pronouncement on whether the excision rule automatically extends to all facts that are temporally, contextually and/or causally connected to the established infringement.

62 [56] This is because whatever the outside parameters of the rule might be, as informed by the "obtained in a manner" jurisprudence, or otherwise, I agree with the Crown that within the context of a facial challenge to a warrant, where the only evidence on the s. 8 *voir dire* is the warrant and its supporting ITO, application of the excision rule is necessarily limited by the "four corners of the affidavit".

63 [57] In other words, on a facial challenge to a warrant, excision is only mandated to the extent that a relationship between the established breach and the information or facts sought to be removed from the ITO for the purpose of review is readily apparent from the face of the affidavit. Going beyond that would require

the reviewing judge to speculate on the existence of a derivative relationship and/or the degree of interconnectedness between impugned facts and the established *Charter* breach.

64 [58] As I will explain later, in the case before me, the ITO provides no facial indicia of a derivative relationship between information I have found obtained from the accused in direct and immediate violation of his s. 10 rights (which will be excised), and the remainder of facts sought to be removed by the accused for the purpose of review.

65 [59] In this sense, *R. v. Newman* is distinguishable. There, the validity of the dwelling house warrant was tested (or challenged) by way of sub-facial review and a full evidentiary *voir dire*.

66 [60] This is readily apparent from the trial ruling on the warrant, reported at *R. v. Newman*, [2012] N.J. No. 409 (Sup. Ct.). The judge noted at para. 9:

> The accused now seeks to have the search warrant for his residence as well as the subsequent warrants relying on it to seize items declared invalid as having been issued and executed in violation of his Section 8 *Charter* rights and to have any items or exhibits seized declared to have been improperly obtained. <u>The parties agree that the evidence in all the prior decisions</u> and my reasons are to be considered by me in my determination of this application. The parties also filed an Agreed Statement of Facts in the matter which is attached hereto as Appendix "A" ... [Emphasis added.]

67 [61] The evidentiary context of the *voir dire* in *R. v. Newman* allowed the trial judge to fully explore the relationship between the allegedly derivative evidence and the *Charter* infringements. It was through this examination that he found an "overwhelming temporal and causal connection" between the information provided by the witness that he excised from the ITO and violations of the accused's *Charter* rights: 2014 NLCA 48 at para. 46. He was able to conclude, from the evidence, that the witness statement and the *Charter* breaches formed part of a "single transaction": 2014 NLCA 48 at para. 47.

68 [62] The circumstances before me are profoundly different.

69 [63] *R. v. Ahmad* is also distinguishable. First, it is a disclosure ruling, not one involving an application for excision that is predicated on an established breach of a *Charter* right within the context of a facial review. Second, and more importantly, the Crown conceded in *R. v. Ahmad* that "anything that <u>could reasonably be identified as immediately derivative</u> of a CSIS wiretap, such as surveillance that would not otherwise have taken place", should be excised: at para. 32. [Emphasis

> added.] This was a material concession, presumably informed by and specific to the sensitivity of the information sought by the defence.
>
> **70** [64] In my view, *R. v. Ahmad* does not stand for the stand-alone proposition that the excision rule automatically captures all potentially derivative facts. The Court did not engage in a full analysis of the issue and for the purpose of the question put before me, I find *R. v. Ahmad* to be of little assistance.

[232] I agree with the conclusion of the Newfoundland Court of Appeal in *R. v. Newman,* 2014 NLCA 48, that excision can be broader than the evidence directly attributable to the *Charter* breach and, like the Court in *Newman,* I am able to consider the connection between the breach and potentially derivative facts. Unlike the circumstances before Justice DeWitt-Van Oosten in *Ferguson,* I have evidence from the *voir dire* that allows me "to fully explore the relationship between the allegedly derivative evidence and the *Charter* infringements".

[233] I have sufficient evidentiary context to assess the temporal and causal connection between the breaches and the information contained in the ITO. I have also heard extensive submissions on discoverability. As such, I am in a position to identify those parts of the ITO that are immediately derivative of *Charter* offending conduct and assess whether it would have been discovered without the breach.

[234] The portion of the investigation at issue here was very short. All the allegedly derivative evidence was obtained within about 12 hours of the first *Charter* breach and within a much shorter period from subsequent breaches. So, there is a strong temporal connection. The testimony and reasonable inferences from that testimony also establishes a strong causal and contextual connection between the breaches and much of the potentially derivative evidence. These concepts will be discussed in more detail in my s. 24(2) analysis.

[235] I have concluded that derivative evidence that would not have been discovered other than as a result of the breach(es) will be excised (*R. v. Newman, supra.*; *R. v. Ahmad,* [2009] O.J. No. 6151 (Ont. Sup. Ct.); and discussion in *R. v. Ferguson, supra*.)

[236] Therefore, the following information should be excised from the ITO in support of the Warrant for room #327 at the Future Inn:

- Subparagraph 15.3 - 15.13 (except name "Darcy Bailey", CPIC & PROS) - directly obtained as a result of the s. 10(b) violation of Mr. Bailey;

- Subparagraphs 15.14 - 15.16 (except name “Dangis Seinauskas”, CPIC & PROS) - directly obtained as a result of the s. 10(b) violation of Mr. Seinauskas;

- Paragraph 15 - 21 (including subparagraphs) - derivative of s. 10(b) violation of Mr. Bailey and not discoverable;

- Paragraph 22 (including subparagraphs) - directly resulting from ss. 8 & 9 breaches of Mr. Lambert and Mr. Bailey;

- Any reference to “Future Inn” or “room number 327 in Paragraph 23 - derivative of s. 10(b) violation of Mr. Bailey and not discoverable and directly resulting from ss. 8 & 9 breaches of Mr. Lambert as a result of unlawful arrest and search incident to unlawful arrest;

- Paragraphs 24 - 25 (including subparagraphs) - presence at Future Inn derivative of s. 10(b) violation of Mr. Bailey and not discoverable and directly resulting from ss. 8 & 9 breaches of Mr. Lambert as a result of unlawful arrest and search incident to unlawful arrest; and,

- Subparagraphs 27.4 - 27.9 - directly resulting from s. 9 breaches for unlawful arrest and continued detention and breach of s. 10(b) for Mr. Bailey.

[237] What remains cannot meet the threshold for issuance of the Search Warrant.

b. Over Seizure and Plain View Exception

[238] The search warrant (Ex. 30) authorized the search of #327 at the Future Inn for “suitcases, duffle bags, garbage” in relation to charges of conspiracy to import cocaine and importing cocaine. The warrant provided to the Justice of the Peace sought authority to also search for “any other items not associated to the hotel room”, however, that part of the warrant was removed by the Justice of the Peace.

[239] The Search Warrant was prepared by Sgt. Glode and executed on June 10, 2018 by Sgt. Mason, D/Cst. Fairbairn and other members of Halifax Regional Police. In addition to the luggage that was listed in the warrant, Sgt. Mason made the decision to also seize coats, toiletries, an invoice and electronic devices.

[240] The common law and s. 489(2) of the *Criminal Code* provide a power to seize items that are in "plain view" if the police officer is lawfully present in the place and believes on reasonable grounds the item has been used in the commission of an offence or will afford evidence in respect of an offence. The incriminating nature or evidentiary value of the item must be immediately apparent.

[241] Sgt. Mason testified that when she entered #327 with the warrant, she saw a folded invoice on the floor immediately inside the door. The invoice was in the name of Matthew Lambert. There was baggage on the floor and on the beds. A number of electronic devices (cell phones, chargers and a laptop in a case) were on the beds. Small personal items were in the bathroom. She seized everything.

[242] She testified that she seized the electronic devices because in her experience they are used to communicate which is of special significance in a conspiracy charge where communication between the conspirators is important. She testified that she believed that other information of evidentiary value could also be retrieved such as locations, tracking information, Wi-Fi usage. The evidentiary significance of the devices was obvious to her without "going through" the items.

[243] In cross-examination she testified that, as Sgt. Glode's supervisor, she had reviewed the ITO before it was submitted. It was also her practice to read a search warrant before executing it and she recalled reading the warrant for room #327 at the Future Inn. She acknowledged that she was aware that the Justice of the Peace had crossed out the words "any other items not associated to the hotel room", but did not agree that this signified that she was not permitted to seize anything else. She testified that she understood that she still had to make a determination when in the location based on what was there and could afford evidence. She acknowledged that electronic devices were not listed in the search warrant or referred to in the ITO. She testified that, if she had drafted the ITO, she would have asked to search for electronic devices but she did not recommend that Sgt. Glode add them. She testified she was surprised to see the cell phones in the hotel room as in her experience it is more usual for people to keep them on their person.

[244] The Invoice in Mr. Lambert's name was in plain view and its evidentiary value is obvious. I am satisfied by the evidence of Sgt. Mason that the electronic devices

also fell within the "plain view" doctrine. She was lawfully in the place in that she was present under a search warrant that was valid at the time. The electronic devices were immediately visible to her. Given her experience, she subjectively believed they would afford evidence of the offences under investigation. In all the circumstances, but especially in the context of a conspiracy charge, that belief was reasonable.

[245] As such, the seizure of the Invoices and electronic devices was reasonable and not a breach of s. 8 of the *Charter*. The Crown concedes that the toiletries and coats were not lawfully seized under the plain view doctrine.

6. Subsequent Judicial Authorizations – s. 8

[246] The Crown concedes that after excision, the subsequent judicial authorizations cannot meet their respective threshold for issuance. Those searches are, therefore, warrantless and *prima facie* unreasonable. The Crown does not seek to justify them, so they result in breaches of s. 8 of the *Charter*.

[247] During the hearing (July 25, 2019), I was provided with a book of 18 Authorizations and ITOs (Tab A – Q). The Crown does not seek to rely on evidence obtained pursuant to six of the Authorizations (Tab L – Q). Those that resulted in evidence the Crown does seek to rely on are as follows:

1. Search Warrant for Escalade (A);
2. Search Warrant for Navigation System for Escalade (A);
3. Production Order for Future Inn (B);
4. Production Order #1 for Jail Calls (C);
5. Search Warrant for Electronic Devices Seized in Halifax (D);
6. Production Order #2 for Jail Calls (E);
7. Search Warrant #1 for 5711 Colville Road (F);
8. Authorization to Intercept Private Communications (G);
9. Search Warrant for 4204-4900 Lennox Lane (H);
10. Search Warrant for Storage Unit (I);
11. Search Warrant for 5161 Rowantree Road (J); and,
12. Search Warrant #2 for 5711 Colville Road (K).

[248] Not all Applicants would have standing to challenge every authorization, but each would have standing to challenge some. For many of the Authorizations, there is little dispute about standing. Counsel disagree on whether Mr. Seinauskas had standing to challenge the warrants to search the Escalade and its navigation system.

[249] In the relatively recent decision of *R. v. Marakah*, [2017 SCC 59, paras. 10 – 12), the Supreme Court summarized the proper approach to determine standing to assert a s. 8 breach. The first step is to determine whether the claimant has a reasonable expectation of privacy in the subject matter of the search. This means that the person subjectively expected it would be private and this expectation was objectively reasonable. That determination must be based on the "totality of the circumstances" and guided by four "lines of inquiry" (para. 11):

1. What was the subject matter of the alleged search?

2. Did the claimant have a direct interest in the subject matter?

3. Did the claimant have a subjective expectation of privacy in the subject matter?

4. If so, was the claimant's subjective expectation of privacy objectively reasonable?

[250] The subject matter of the searches are the vehicle and its navigation system. Mr. Seinauskas was not in the vehicle when it was seized and did not own it.

[251] Mr. Seinauskas' interest in the vehicle is that he drove it during a trip from Montreal to Halifax and was seen loading items into it and was a passenger in it on the day it was seized (evidence on *voir dire* and ITO). The Crown will rely on Mr. Seinauskas' connection to the vehicle, his presence in the vehicle with co-accused during the drive from Montreal and in Halifax, to help prove the conspiracy and his membership in it.

[252] Mr. Seinauskas did not testify on the *voir dire*, so I have no direct evidence of his subjective expectation.

[253] In *R. v. Belnavis*, [1997] 3 SCR 341, at para. 23, the Court commented on circumstances where non-owners / passengers might have a reasonable privacy interest in a vehicle: a spousal relationship between the owner-operator and the passenger; or, where two people were on an extended journey and were sharing driving and expenses.

[254] In this case, I am satisfied based on the evidence that Mr. Seinauskas travelled in the vehicle from Montreal to Halifax, shared the driving during that period, and was seen loading items into the vehicle on the day it was seized, that he had a reasonable expectation of privacy in the vehicle and its navigation system.

[255] I am satisfied that Mr. Bailey has standing in relation to: the Search Warrant for the Escalade (presence and direct interest in items in the vehicle); the Search Warrant for the navigation system (presence and use over long trip); the Production Order for Future Inn (named target); the two Production Orders for Jail Calls (named target), the Search Warrant for the Halifax Electronic Devices (named as owner of the property); the Authorization to Intercept Communications (named target); Search Warrant for 5161 Rowantree Road (named as owner), and, the Search Warrant for 4204-4900 Lennox Lane (named as sub-lessee);

[256] I am satisfied that Mr. Seinauskas has standing in relation to: the Search Warrant for the Escalade (potential interest in items in the vehicle and driver during long trip); the Search Warrant for the navigation system (use over long trip); the Production Order for Future Inn (named target); the two Production Orders for Jail Calls (named target); the Search Warrant for the Halifax Electronic Devices (named as owner of the property); the Authorization to Intercept Communications (named target); and, the Search Warrant for the Storage Unit (named in lease for unit).

[257] I am satisfied that Mr. Lambert has standing in relation to: the Search Warrant for the Escalade (driver and direct interest in items in the vehicle); the Search Warrant for the navigation system (driver); the Production Order for Future Inn (named target); the two Production Orders for Jail Calls (named target), the Search Warrant for the Halifax Electronic Devices (named as owner of the property); the Authorization to Intercept Communications (named target); and, the two Search Warrants for 5711 Colville Road (owner).

Exclusion of Evidence under Section 24(2)

[258] Because of scheduling problems, submissions on some alleged breaches and the *Garofoli* hearing relating to all but the first search warrant were not complete until after the trial had begun. To accommodate counsel, I provided them with my preliminary admissibility reasons with the understanding that if I found further breaches, I would reassess the seriousness of the breaches I had already considered in light of the cumulative effect of all the *Charter*-infringing conduct.

[259] These reasons include that reconsideration.

Breaches

[260] To summarize, I found the following breaches in relation to each accused:

Darcy Bailey:

- ss. 7 & 10(a) & (b) resulting from detention at the pontoon boat
- ss. 9 & 8 resulting from unlawful arrest, detention and search incident to unlawful arrest at vehicle stop
- s. 8 resulting from seizure of vehicle and contents after Sgt. Glode knew he no longer had subjective grounds
- s. 10(b) resulting from delayed implementation of right to counsel
- s. 10(b) resulting from failure to hold off questioning at the roadside.
- s. 10(a) & (b) resulting from equivocal waiver and lack of understanding of right to counsel at police station.
- s. 8 resulting from insufficiency of grounds (after excision) to support search warrant for room #327 at Future Inn and seizure of items not specified in warrant
- s. 8 resulting from insufficiency of grounds (after excision) to support subsequent judicial authorizations

Dangis Seinauskas:

- s. 7 & 10(a) & (b) resulting from detention at the pontoon boat
- ss. 8, 9, & s. 10(a) & (b) resulting from insufficiency of grounds for arrest, police entry into hotel room to arrest without *Feeney* warrant, and failure to immediately advise of right to counsel
- s. 8 resulting from insufficiency of grounds to support search warrant for room #327 at Future Inn and seizure of items not specified in warrant

- s. 8 resulting from insufficiency of grounds (after excision) to support subsequent judicial authorizations

Matthew Lambert:

- ss. 9 & 8 resulting from unlawful arrest and search incident to unlawful arrest at vehicle stop
- ss. 9 & 8 resulting from continued detention and seizure of vehicle and contents after Sgt. Glode knew he no longer had subjective grounds
- s. 8 resulting from insufficiency of grounds to support search warrant for room #327 at Future Inn and seizure of items not specified in warrant
- s. 8 resulting from insufficiency of grounds (after excision) to support subsequent judicial authorizations.

Legal Framework for s. 24(2)

[261] Section 24(2) requires that evidence be excluded if it meets two requirements: (1) the evidence was "obtained in a manner" that infringed the *Charter* (the threshold determination); and, (2) admission of the evidence "would bring the administration of justice into disrepute (the evaluative determination) (*R. v. Robertson,* 2019 BCCA 116, at para. 50; *R. v Plaha* (2004), 188 C.C.C. (3d) 289).

[262] In this case, early *Charter* breaches tainted subsequent investigative steps and each Applicant's *Charter* rights were breached over the course of the investigation, but each breach did not directly involve all Applicants. This complicates the analysis at both the threshold stage and the evaluative stage. At the threshold stage, the circumstances require me to consider the scope of the "obtained in a manner" requirement, including the question of whether an accused can seek exclusion of evidence obtained through breach of the *Charter* rights of a different accused. At the evaluative stage, the circumstances complicate the discoverability analysis and the determination of how to use the cumulative effect of multiple breaches.

<u>Threshold Stage - "Obtained in a Manner"</u>

[263] The threshold question for application of s. 24(2) is whether the evidence that is sought to be excluded was "obtained in a manner" that infringed a *Charter* right.

The Crown and defence did not agree on how that question should be answered in the context of a multi-accused trial. I have made the following general conclusions:

1. For each item or category of evidence, the threshold question is "was the evidence obtained in a manner that infringed the *Charter*?

2. At that threshold stage, each Applicant must be treated individually in the sense that an Applicant cannot ask for exclusion of evidence against him on the basis that it was obtained in a manner that infringed another Applicant's rights.

3. For each Applicant who satisfies the threshold stage, I must move on to the evaluative stage and apply the *Grant* factors to determine admissibility.

[264] I reached those conclusions for the reasons that follow.

[265] In *R. v. Pino,* 2016 ONCA 389, Laskin, J.A. provided guidance as to how courts should approach this requirement (para. 72):

- The approach should be generous, consistent with the purpose of s. 24(2)

- The court should consider the entire "chain of events" between the accused and the police

- The requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct

- The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections

- But the connection cannot be either too tenuous or too remote.

[266] The Applicants argue that each piece of evidence here was derivative of one or more *Charter* breaches such that the entire investigation was "built on unconstitutionally obtained evidence" (Applicants' Brief, April 8, 2019, at para. 149). I have concluded that the information from Mr. Bailey and Mr. Seinauskas during their initial interaction with police was unconstitutionally obtained. I also

concluded that police were not entitled to rely on that information for grounds for the subsequent arrests of the Applicants or the search warrant for the hotel room. As a result, I found *Charter* breaches at each stage of the subsequent investigation. Some were "stand alone" breaches in that they involved new *Charter*-infringing conduct and others were "consequential" or "secondary" breaches in that they were the result of earlier *Charter*-infringing conduct. Because of these findings, in this case, much of the evidence can be linked directly to a *Charter* breach. Where it cannot, the relationship between the breach and the evidence has to be carefully reviewed to determine whether the evidence derives from the breach.

[267] It is clear from *Pino* and other decisions (*R. v. Mack,* 2014 SCC 58, para. 38; *R. v. Wittwer*, 2008 SCC 33, para. 21) that the relationship between the breach and the evidence does not have to be immediate or strictly causal. As the Court said in *Mack*, "[e]vidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct." (para. 38). It is also clear that when deciding whether evidence is derivative of a *Charter* breach, the "entire relationship" between the evidence and the breach from which it is said to have flowed must be examined, including the strength of the connection and whether the events were part of a single transaction. (*R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40; and, *R. v. Riley*, 2017 ONCA 650, at para. 316).

[268] The Applicants here also argue that an individual Applicant can rely on the breach of another Applicant's rights to seek exclusion of evidence. In doing so, they rely on: *R. v. Lauriente,* 2010 BCCA 72; *R. v. Robertson, supra,* ; *R v Sivarasah and Baregzay*, 2017 ONSC 3597; *R v Cartwright and Patrick*, 2017 ONSC 6858; and, *R v Merritt*, 2017 ONSC 2245. I do not agree. In my view, at the threshold stage, each Applicant must be treated individually in the sense that a specific Applicant can only seek exclusion of evidence on the basis that it was obtained in a manner that infringed his rights.

[269] I reach that conclusion because I do not agree with the Applicants' interpretation of these cases. In my view, these decisions say that breaches of the rights of others can be considered in assessing the cumulative effect of multiple *Charter* breaches at the evaluative stage, but do not say that breaches of the rights of others can be used by an Applicant to satisfy the threshold "obtained in a manner" requirement. In *Lauriente*, the trial judge concluded that the individual *Charter* rights of each of the three accused had been breached, that the "obtained in a manner" requirement had been met because there was a sufficient nexus between the evidence and the individual breaches, and that the cumulative effect of all breaches

against all accused could be used to assess the seriousness of the individual breaches. On appeal, the Crown argued that the trial judge had misapplied or failed to consider standing. Prowse, J.A., writing for the appeal court, found no error. He confirmed that each accused had "standing" to seek s. 24(2) relief because their individual rights had been breached (at para. 26). He did not say that each accused had "standing" to seek relief based on the breach of the other accused's rights. He then went on to assess the connections found by the trial judge between the breaches of each of the Respondent's rights and the evidence that had been excluded (paras. 35 - 40) and concluded that it was implicit in the trial judge's reasons that "she found that there was a sufficient nexus between the evidence obtained as a result of the search and the breaches of the respondents' *Charter* rights to trigger a s. 24(2) analysis" (at para. 41). Justice Prowse then went on to say that the threshold question remains the same, whether any of the breaches of the Respondent's rights is sufficiently linked to the evidence sought to be excluded to trigger s. 24(2) (para. 36).

[270] I interpret Prowse, J.A. as essentially saying that once an accused establishes a breach of his individual *Charter* rights, he has met the standing requirement to seek a remedy. Thereafter, the issue ceases to be one of standing and become a question of whether the individual Applicant can meet the threshold "obtained in a manner" requirement. Answering that question requires the Court to assess the connections between the evidence sought to be excluded and a breach of <u>that</u> Applicant's rights.

[271] The decisions in *Robertson, Sivarasah and Baregzay*, *Cartwright and Patrick*, and, *Merritt*, all apply *Lauriente* to the evaluative stage not to the threshold stage. In each case, the courts found a connection between the evidence the applicant sought to exclude and a breach of <u>that</u> applicant's *Charter* right(s) sufficient to satisfy the "obtained in a manner" requirement.

[272] I have concluded that each Applicant in this case has "standing" to seek s. 24(2) relief because I have found breaches of each of their individual rights. Based on my reading of *Lauuriente*, the cases that rely on it and the pre-existing s. 24(2) jurisprudence, the proper approach is for me to assess each piece of evidence or category of evidence for which a specific Applicant seeks exclusion and determine whether there is a "causal, temporal, or contextual, or any combination of these connections" (*Pino*) to a *Charter* breach in relation to <u>that</u> Applicant. If so, as long as the connection is not too tenuous or remote, the threshold "obtained in a manner" requirement is met and I must move on to the evaluative stage and apply the factors

identified in *R v. Grant, supra,* to determine admissibility of the evidence in question.

Evaluative Stage - the *Grant* Analysis

[273] The Applicants bear the burden to establish, on a balance of probabilities, that the admission of evidence would bring the administration of justice into disrepute.

[274] In 2009, in *Grant, supra,* and *R v. Harrison,* 2009 SCC 34, the Supreme Court of Canada revised the analysis for exclusion of evidence under section 24(2) of the *Charter*. In doing so, it provided an overview of the general purpose and principles of s. 24(2) as well as clarifying the criteria for exclusion of evidence under that section.

[275] A number of general principles can be taken from *Grant* (*supra.*, paras. 65 – 70):

1. The purpose of s. 24(2) is to maintain the good repute of the administration of justice;

2. "Administration of justice" includes the rule of law and upholding *Charter* rights in the system as a whole;

3. Admission or exclusion must be considered with a view to the long-term, prospective, and societal consequences on the integrity of, and public confidence in, the justice system;

4. The distinction between conscriptive and non-conscriptive evidence is much less relevant; and,

5. Trial fairness is to be viewed as an "overarching systemic goal" rather than as a distinct stage of the 24(2) analysis.

[276] Against the backdrop of these general principles, the Court set out the three factors that should be considered in determining whether the admission of evidence would bring the administration of justice into disrepute (*Grant, supra.,* at para. 71):

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.

[277] The Court in *Grant* and subsequent courts have provided guidance as to how these factors should be applied.

[278] When considering this first factor, courts should consider whether admitting the evidence would send the message that the Court condones the state misconduct by allowing it to benefit from the fruit of the misconduct. The concern in this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes (*Grant, supra.,* para. 72). The Court recognized a spectrum of misconduct including inadvertent or minor violations at one end and willful or reckless disregard on the other. The more deliberate or serious the conduct, the greater the risk that the public's confidence would be undermined and the greater need for the Court to dissociate itself from that conduct. The Court also noted that extenuating circumstances or good faith could attenuate the seriousness of the misconduct or reduce the need for the Court to dissociate itself (*Grant, supra.,* paras. 74 and 75).

[279] Analysis of the second factor, the impact of the breach on the accused, requires the Court to evaluate the interests engaged by the infringed right and the degree to which that right has been violated within a spectrum of intrusiveness (*Grant, supra.,* at para. 77).

[280] Under the third factor, society's interest in adjudication, the Supreme Court said that society's interests include determining the truth, bringing offenders to justice, and maintaining the long-term integrity of the justice system. The issue to be determined under this factor is "whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence, or by its exclusion?" (*Grant, supra.,* at para. 79). Factors including the reliability of the evidence at issue, the importance of the evidence to the prosecution's case and the seriousness of the offence are all relevant under this factor.

[281] Finally, the Supreme Court instructs lower courts to balance these factors to arrive at an answer to the ultimate question suggested in *Grant* and *Harrison:* what is the broad impact of the admission of the evidence on the long-term repute of the justice system? (*Grant, supra.,* at para 70 and *Harrison, supra.,* at para. 36). As was stated in *Harrison* (*supra.,* 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 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.

Cumulative Effect of Multiple Breaches

[282] When assessing admissibility under s. 24(2), the triggering breach must be assessed in the context of the entire investigation and the conduct of the police throughout the investigation is relevant to the inquiry (*R. v. Chaisson*, 2006 SCC 11, at para. 7; *Grant, supra.,* at para. 75; *Harrison, supra.,* at para. 34; *R. v. Boutros,* 2018 ONCA 375, at para. 26; *Lauriente, supra.,* at para. 30; *Robertson, supra.,* at para. 52; *R. v. Spence,* 2011 BCCA 280, at para. 51; and, *R. v. Fan,* 2017 BCCA 99, at paras. 72-73). Breaches that might not warrant exclusion when considered individually, could bring the administration of justice into disrepute if part of a serious pattern of disregard of *Charter* rights.

[283] When assessing whether there is a "pattern of disregard", the cumulative impact of all *Charter* breaches can be considered, including breaches of rights of other applicants and breaches that did not directly result in the discovery of evidence (*Fan, supra.,* at paras. 72-73; *Lauriente, supra.,* at para. 27; *Robertson, supra.*; *Spence, supra.,* at para. 51; and *Boutros, supra.,* at para. 26).

[284] In assessing whether there is such a pattern and, if so, how serious it is, I should consider the breaches in the context of the entire investigation, including, its duration, the number of breaches, their individual seriousness, whether they involve new *Charter* infringing conduct ("stand-alone breaches") or flow from previous breaches ("secondary" or "consequential" breaches), and, situations where police showed a respect for *Charter* interests.

Derivative Evidence and Discoverability Following *Grant*

[285] The Court in *Grant* also provided guidance as to how to apply these factors to derivative evidence, particularly physical evidence that is discovered as a result of an unlawfully obtained statement (*Grant, supra.,* at paras. 116 - 128). The Court recognized that this is an especially challenging category of evidence (para. 116). The Court said that while discoverability is still useful, it is not determinative of admissibility. Rather, in deciding whether derivative evidence would bring the

administration of justice into disrepute, the Court should assess it under the three factors discussed above, taking into account its "self -incriminatory origin" as well as its "status as real evidence" (*Grant, supra.,* at para. 123). Under the first factor, the Court should examine the police conduct in obtaining the statement that led to the real evidence (*Grant, supra.,* at para. 124). Under the second factor, the Court should consider the extent to which the Applicant's *Charter* right was impinged and the "self-incriminatory character of the evidence", but the discoverability of the derivative evidence may also strengthen or attenuate the self-incriminatory aspect of the evidence (*Grant, supra.,* at para. 125). Under the third factor, the Court should consider that the fact that the derivative evidence is real or physical will cause less concern for reliability (*Grant, supra.,* at para. 126). Finally, when weighing or balancing the three factors, the Court provided this advice (*Grant, supra.,* at para. 127):

> …where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

[286] The Court also cautioned lower courts to be alert for situations where police deliberately breach *Charter* rights to obtain statements that they know will be inadmissible in order to find derivative evidence. That type of evidence should be excluded (*Grant, supra.,* at para. 128).

[287] In *R. v. Côté,* 2011 SCC 46, the Supreme Court considered the post-*Grant* discoverability analysis. In deciding whether evidence was discoverable, courts should not speculate and "where it cannot be determined with any confidence whether evidence would have been discovered in absence of the *Charter* breach, discoverability will have no impact on the s. 24(2) analysis" (para. 70). The test has subsequently been described as "would have" been discovered, not "could have" been discovered (*R. v. Witen*, 2011 ONSC 2671).

[288] A finding that evidence was discoverable does not necessarily lead to its admission but is a relevant factor under the first two *Grant* factors (*Côté, supra.,* at paras. 70 - 74). Under the first, the seriousness of the police conduct, if police could have obtained the evidence constitutionally, their reasons for not doing so will be relevant. A "casual attitude" or "deliberate flouting" of *Charter* rights will aggravate the seriousness of the conduct, whereas good faith or a legitimate reason will probably lessen its seriousness. Under the second factor, the impact on the accused

is greater if the state action could not have occurred legally and may be lessened if it could have.

Application of the Principles to the Facts

[289] I will assess each piece or category of evidence with its associated breach(s) individually in chronological order and then consider the cumulative effect of the breaches and determine the impact on the individual admissibility determinations.

[290] For certain pieces of evidence, the Crown advised that it either did not seek to rely on it at trial or conceded that it should be excluded if certain breaches were found:

- Information provided by Mr. Bailey to Sgt. Astephen at roadside;
- Information provided by Mr. Lambert at roadside; and,
- Statement provided by Mr. Seinauskas.

1. Information from Mr. Bailey and Mr. Seinauskas on Pontoon Boat

[291] Because their statements were not proven voluntary, they cannot be used at trial, so a s. 24(2) analysis is not necessary with respect to the statements themselves. I will however consider the *Grant* factors for these breaches to inform the s. 24(2) analysis when I address potential derivative evidence.

2. Observations and Collection of Evidence in the Time Between the Taking of the Statement at the Pontoon Boat and the Arrest of Mr. Bailey and Mr. Lambert

Threshold Stage - "Obtained in a Manner"

[292] The Applicants seek exclusion of all observations made and evidence discovered as a result of the unconstitutionally obtained statements from Mr. Bailey and Mr. Seinauskas. They argue that the statement tainted the entire subsequent investigation, however, at this stage, I will examine only the time period up to the arrest of Mr. Bailey and Mr. Lambert. This includes: observations at Black Rock Beach by CBSA and RCMP around 2:00 p.m.; the observations made by CBSA and RCMP at Future Inn and while following the Escalade back to Black Rock Beach; and, the observations by RCMP, HRP and CBSA investigators as well as the

evidence collected at Black Rock Beach approximately between 6:00 p.m. and 7:00 p.m.

[293] The first issue is to determine whether and to what extent this evidence satisfies the threshold "obtained in a manner" requirement. This phase of police investigation does not involve any new *Charter* breaches. Therefore, the question is whether it is derivative of the earlier breaches of ss. 7 and 10(a) & 10(b). Mr. Lambert cannot establish any connection between this evidence and any breach of his *Charter* rights so cannot satisfy the threshold "obtained in a manner" requirement.

[294] Applying the principles from *Pino* and the other decisions noted above, I have concluded that the threshold requirement is met for Mr. Bailey and Mr. Seinauskas for most of the observations made and evidence collected during this period. I accept that there isn't a direct causal relationship between the specific information obtained from Mr. Seinauskas and the subsequent observations and discovery of evidence. However, the breach of his rights is inextricable from the breach of Mr. Bailey's rights and the information provided by him. Mr. Seinauskas and Mr. Bailey were together at the time of the breach. If Mr. Seinauskas had been advised of his s. 10(b) rights, this would also have informed Mr. Bailey who might have made different decisions. As such there is at least a contextual link between the evidence and the breach of Mr. Seinauskas' *Charter* right and they were part of the same transaction.

[295] There is overlap between the analysis to determine whether certain observations are derivative of the *Charter* breach and the discoverability analysis. Therefore, because I have concluded that both Mr. Seinauskas and Mr. Bailey meet the threshold requirement for most of the subsequently obtained evidence, I will deal with specific pieces when I address discoverability.

Evaluative Stage - the *Grant* Analysis

Factor 1 - Seriousness of the Breach

[296] These observations and the collection of evidence do not engage any new *Charter*-infringing state conduct. Therefore, the police conduct at issue is the conduct in obtaining the statement that led to these observations and the collection of evidence.

[297] In *Grant*, at paras. 89 - 98, the Court discussed the admissibility of statements and said that application of the three factors will support "the presumptive general,

although not automatic, exclusion of statements obtained in breach of the *Charter*" (at para. 92). The Court noted the long history of strongly constraining police conduct in obtaining statements (at para. 93). There is no doubt that the right to counsel is a significant right, the breach of which will generally be viewed as serious. It has been clear since *Suberu*, decided in 2009, that investigative detention triggers the police duty to advise the detainee of his s. 10 rights (*supra.*, at para. 2). If the police here knew they were detaining Mr. Bailey and Mr. Seinauskas, and failed to advise them of their rights to counsel, I would view the breach as very serious. However, I have concluded that the breach arose out of a failure of the police to recognize the impact their conduct might have on a reasonable person. The Supreme Court has acknowledged that the point at which an encounter becomes a detention is not always clear (*Grant,* at para. 133; and *Suberu,* at para. 29). Further, as was noted in *R. v. Cole,* 2012 SCC 53 and *R. v. Aucoin*, 2012 SCC 66, the law surrounding detention is evolving.

[298] Similarly, while the obligation to caution a suspect is not new, the assessment of grounds and the line at which a suspicion becomes a reasonable suspicion is subject to interpretation.

[299] I do not believe the police conduct here was a deliberate disregard for *Charter* rights. Their mistake in not recognizing a detention meant that they did not identify the need to provide Mr. Bailey and Mr. Seinauskas with their s. 10 rights. That mistake was made in a context where there is no clear definition of psychological detention and the law is evolving. As such, their mistake was not negligent and does not demonstrate unacceptable ignorance of *Charter* norms.

[300] Their mistake in not recognizing that their level of "suspicion" met the threshold that would trigger the need for the police caution was also made in a context where the rule may be clear, but its application is not.

[301] In these circumstances, I would place the gravity of the police conduct in the low to medium range on the spectrum.

Factor 2 - Impact on the *Charter*-protected Interests of the Accused

[302] Under this factor, the analysis must begin with recognizing that violations of ss. 7, and 10(a) & (b) have a serious impact on the interests of an accused. As the Court said in *Grant,* when discussing the impact of a breach of s. 10(b) (at para. 95):

> The failure to advise of the right to counsel undermines the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination. These rights protect the individual's interest in liberty and autonomy. Violation of these fundamental rights tends to militate in favour of exclusion.

[303] Under this factor, I have to consider the extent to which the breach actually undermined the accused's interests in this case, recognizing that there may be circumstances where the generally recognized impact is lessened. I accept that, in this case, Mr. Bailey appeared eager to talk at the beginning and may have been trying to deflect police suspicion by providing information about a business venture. However, I cannot say that the statement would have been made notwithstanding the *Charter* breach or that the impact on the accused is lessened by any other circumstance.

[304] Discoverability comes into play in assessing both the seriousness of the police conduct and the impact of the breach on the accused

[305] Under the second factor, I have to consider the "self-incriminatory character of the evidence" and, as I stated above, the impact of the breaches is serious. For derivative evidence, perhaps more than for other types of evidence, the impact of the original breach can be strengthened or lessened by discoverability.

[306] I'll review the evidence in sequence. Starting with the observations made by CBSA. At 1:33 p.m., Cpl. Campbell called CBSA IO Brian Gillespie to advise him that there were divers in the water at Black Rock Beach. As a result of that information, he instructed CBSA IO Amanda Vissers to look for evidence of divers around the Arica. She was on the lower deck or bridge of the Arica observing the water and the pontoon boat for most of the day. She last saw the pontoon boat at approximately 12:43 p.m. She was subsequently informed that there might be two divers in the water so, at approximately 1:40 p.m., she started walking the lower deck to look for bubbles. She didn't see anything unusual so went back up to the bridge and, around 1:55 p.m., she saw the pontoon boat pass the Arica, heading in the direction of Point Pleasant Park. It then stopped about halfway between the Arica and Black Rock Beach. She made this observation from the bridge deck where she had been prior to receiving information about divers. In my view, without the information about the divers, she would have simply continued to observe the area from the bridge and would have seen the pontoon boat when it returned. Therefore, these observations were discoverable.

[307] CBSA IO Kenda White made observations from the Black Rock Beach parking lot between 1:40 p.m. and approximately 2:00 p.m. She was told to go there by IO Gillespie and arrived there after IO Gillespie received the call from Cpl. Campbell. However, I do not find that she was instructed to go there because of that information. Neither she nor IO Gillespie testified that this was the case and the evidence suggests that the plan for her to conduct surveillance was made before IO Gillespie received the information from Cpl. Campbell. Shortly after noon, she switched her marked car for an unmarked car because she would be conducting surveillance. Therefore, her observation of a pontoon boat pulling up to shore at 2:00 p.m. was discoverable.

[308] I cannot conclude with confidence that the observations made by Sgt. Glode and Cpl. Campbell between 2:00 p.m. and approximately 2:30 p.m. were discoverable. They went to Black Rock Beach because of the information from Mr. Bailey. Without that information, they knew the pontoon boat was heading away from downtown toward the outer harbour, but not that it was going to Black Rock Beach. They might have decided to go to the Arica at that point and the Arica was docked at Halterm, near the Black Rock Beach parking lot, but I don't have evidence as to whether that is the parking lot used by visitors to Halterm so I can't say whether they would have ended up in that parking lot. Even if IO Vissers and/or IO White had immediately communicated their observations to IO Gillespie and he passed it on to Sgt. Glode and Cpl. Campbell, I cannot say with confidence that they would have arrived at Black Rock Beach parking lot in time to make their observations of what was happening on the beach or follow the Escalade. By 2:10 p.m., the Escalade was leaving the parking lot. The earliest they could have been informed of IO Vissers' information would have been after 1:55 p.m. They could not have gotten to the parking lot in time to see what was happening on the beach and, because I cannot say where they would have been when they received the information, I cannot say they could have gotten to the parking lot before the Escalade left. Therefore, they could not have followed it back to the parking lot in downtown Halifax or made the observations there.

[309] Once they lost the Escalade, without the statement, they would not have known to go to the Future Inn, so neither they nor the CBSA investigators would have been in a position to observe the Escalade there or follow it back to Black Rock Beach so those observations are not discoverable.

[310] The next observations in the sequence are those made at Black Rock Beach between 6:00 p.m. and approximately 7:00 p.m. The Crown argues that, without the

statement or the preceding observations, it is reasonable to conclude that the police would have stayed in the area of Black Rock Beach or the Arica. In my view, that is speculative. In the alternative, the Crown argues that independent observations made by CBSA investigators would have resulted in the police returning to the beach around that time. Starting around 6:00 p.m., IO Vissers and IO White made observations from the Arica, including seeing a man putting on dive gear near a black SUV at the Black Rock Beach parking lot and seeing a diver in the water between the beach and the Arica. The Crown argues that these observations were independent so either not derivative or were discoverable and would have been passed on to police who would have returned to Black Rock Beach where they would have made all the same observations. I accept that this could have happened, but I cannot say it would have happened. I am not confident that IO Vissers and IO White would have been on the bridge or deck of the Arica between 6:00 p.m. and 7:00 p.m. without the observations made by the RCMP and their colleagues after 2:00 p.m. Assuming they were, and that they then called Sgt. Glode and Cpl. Campbell, without speculating, I cannot say what would have happened. It would depend on where they were when they received the information, what time they could have returned to Black Rock Beach, whether the CBSA and HRP investigators would have been called in to assist, whether they would have arrived in time to observe what was happening. As a result, I conclude that the observations made at Black Rock Beach between 6:00 p.m. and 7:00 p.m. were not discoverable.

[311] Therefore, discoverability does not lessen the impact of the infringement and this factor favours exclusion.

Factor 3 - Society's Interest in Adjudication of the Case on Its Merits

[312] Under the third factor, I have considered that the derivative evidence here is either real evidence with inherent reliability or observations by witnesses, the reliability of which can be tested at trial. Further, the derivative evidence was discovered as a result of a breach that I have concluded was not flagrant or deliberate. I have no concern that the police deliberately breached *Charter* rights in order to find derivative evidence. These observations and evidence are important to the Crown case. Therefore, this factor favours admission.

Balancing and Weighing

[313] The Crown conceded that, when these factors are balanced, the "statement" obtained from Mr. Seinauskas should be excluded because of the nature of the

breach, he clearly wished to exercise his right to silence and his statement is not integral to the Crown's case at trial. Therefore, its admission would bring the administration of justice into disrepute.

[314] With respect to Mr. Bailey's statement. I found that the police conduct did not demonstrate a willful or negligent disregard for *Charter* rights. Nor did it, in the circumstances, demonstrate unacceptable ignorance of the law. The second factor, the impact of the breach on Mr. Bailey's *Charter* protected right, favours exclusion. The third factor, society's interest, favours admission. The statement is important to the prosecution and the public interest in prosecution of these offences is high.

[315] Having considered the *Grant* factors relating to Mr. Bailey's statement and the additional factors relating to derivative evidence, subject to assessment of the cumulative impact of breaches, I would admit the evidence that derived from that breach.

3. Evidence Resulting from Search Incident to Arrest of Mr. Bailey and Mr. Lambert

Threshold Stage - "Obtained in a Manner"

[316] The Applicants seek exclusion of: the ID of Matthew Lambert; statements made by Mr. Lambert and Mr. Bailey; all items seized incident to arrest, including the vehicle and its contents; all information seized from electronic devices found as a result of the search incident to arrest; and all information provided by staff/management of the Future Inn.

[317] Some of these categories will be dealt with separately: statements at the police station; items or information discovered through subsequent search warrants; and information provided by Future Inn staff.

[318] The arrest of Mr. Bailey and Mr. Lambert and the initial search incident to arrest of them and the Escalade was a breach of their ss. 8 and 9 rights. Sgt. Glode was not entitled to rely on unconstitutionally obtained information from the statements at the pontoon boat so did not have subjective or objectively reasonable grounds to arrest. If I am wrong in my decision to remove unconstitutionally obtained information from Sgt. Glode's grounds for arrest, then I would still have found the arrest was unlawful because his subjective belief that contraband had come out of the water and been put in the Escalade was not objectively reasonable. The evidence resulting from these breaches includes the observations made by police

officers of the Future Inn card and the observations and photographs of the remaining contents of the vehicle.

[319] I conclude that all three Applicants can establish a sufficient connection between this evidence and a breach of their individual *Charter* rights to satisfy the threshold "obtained in a manner" requirement. Mr. Bailey and Mr. Lambert, because the evidence was obtained directly as a result of their unlawful arrest and Mr. Seinauskas, because the arrest, search and seizure were tainted by and part of the same transaction as the breach of his s. 10(b) rights at the pontoon boat, so was derivative.

[320] Once the vehicle was searched, Sgt. Glode knew that he was wrong in his belief that contraband had been removed from the water and put into the Escalade. He testified that without this belief, he would not have had grounds for arrest. Once, he realized he was wrong, he no longer had subjective grounds for the continued detention of Mr. Bailey and Mr. Lambert or to seize the Escalade or its contents.

Evaluative Stage - the *Grant* Analysis

Factor 1 - Seriousness of the Breach

[321] The use of unconstitutionally obtained and derivative evidence for grounds for arrest does not engage any new *Charter*-infringing state conduct. Therefore, part of the police conduct at issue at this point in the narrative is the conduct in obtaining the statement that led to the derivative evidence and the arrest.

[322] I accept that Sgt. Glode believed that something new came out of the water. However, that belief was not objectively reasonable in light of the evidence to the contrary. An unlawful arrest and search incident to arrest are generally serious breaches, however, it is important to consider the circumstances. Neither he nor Cpl. Campbell could see the beach and were relying on others to provide them with information. They were communicating using two different radios and cellular telephones with two HRP officers, two CBSA officers on the beach and more CBSA officers on the Arica. In that context, he received information that something was being removed from the water and the divers were moving quickly to the Escalade. He should have paused to consider whether the item being removed might be the propulsion device or asked the surveillance officers for more information. He should have considered whether it was reasonable to believe that the targets would remove contraband from the water in broad daylight, in front of people, after being seen on camera by the ROV and after being confronted by himself and Cpl. Campbell earlier

in the day. Instead he reacted immediately, directed that the vehicle be stopped, and the occupants arrested. I concluded that he honestly believed he had grounds to arrest. As such, I do not find that he acted with bad faith and, in the circumstances, do not find that he deliberately, flagrantly or negligently breached the *Charter* during the initial part of the arrest.

[323] I view the situation differently after he learned he was wrong about the contraband. At that point, he can no longer be said to have been acting with good faith. He knew he no longer had grounds for the arrest or seizure and, nonetheless, forged ahead. I have no evidence that he even turned his mind to whether the vehicle could be seized, and the men taken into custody, once he realized he was mistaken about the drugs. The continued detention of Mr. Bailey and Mr. Lambert, the Escalade and its contents was a serious breach.

Factor 2 - Impact on the *Charter*-protected Interests of the Accused

[324] There was virtually no impact on the *Charter* protected interest of Mr. Seinauskas. He was not present, was not arrested and there is no indication that he had a privacy interest in the contents that were immediately searched. The arrest and the continued detention had a considerable impact on Mr. Lambert and Mr. Bailey. They were both taken to HRP headquarters where they were held, Mr. Bailey while cold and wet, for hours before new evidence was obtained that might have provided reasonable grounds to continue to detain them.

[325] The unreasonable search of Mr. Lambert and Mr. Bailey and the search and then seizure of the vehicle and its contents engages privacy interests. Mr. Bailey and Mr. Lambert enjoy a high expectation of privacy in their person and belongings, however, there is a reduced privacy interest in a vehicle.

Factor 3 - Society's Interest in Adjudication on the Merits

[326] The evidence viewed and then seized from Mr. Lambert and the Escalade and the Escalade itself are all real evidence which is important to the Crown's case. In discussing this factor, the Court in *Grant* specifically noted that it is not determinative, should not be given disproportionate significance and must be considered in the context of the case as a whole. In *Grant* and *Harrison*, the Court confirmed that automatic admission of reliable evidence regardless of how it is obtained is inconsistent with the *Charter* and, specifically, inconsistent with the wording of s. 24(2) (*Grant,* paras. 81-84). While it is clear that the Supreme Court

did not intend to provide a framework where all reliable evidence would be admitted, this factor weighs in favour of admitting the evidence.

Balancing and Weighing

[327] To summarize my conclusions on the three factors with respect to the observations made during the search incident to arrest. The first factor, the seriousness of the breach marginally favours admission. The second factor, the impact of the breach on a *Charter* protected right, marginally favours exclusion. The third factor, society's interest, favours admission. Having regard to all the circumstances, I conclude that, prior to consideration of the cumulative impact of multiple breaches, admission of the observations made during the initial search of Mr. Bailey, Mr. Lambert and the vehicle, in these circumstances would not, on balance, have a negative impact on the long-term repute of the administration of justice. As such the application to exclude this information pursuant to s. 24(2) of the *Charter* is dismissed.

[328] I reach a different conclusion with respect to the seized items, including the Escalade and its contents (subject to further argument concerning subsequent search warrants). For this category of evidence, I conclude that the seriousness of the police conduct strongly favours exclusion and to admit the evidence in these circumstances would, on balance, have a negative impact on the long-term repute of the administration of justice despite the fact that police subsequently obtained judicial authorization to search the vehicle and devices. As such the application to exclude this evidence pursuant to s. 24(2) of the *Charter* is granted for Mr. Bailey and Mr. Lambert, subject to argument concerning the impact of subsequent search warrants. In light of the absence of impact on Mr. Seinauskas' *Charter* protected interests, I would not exclude the evidence against him.

4. Statements from Mr. Bailey at Roadside and at Police Station

Threshold Stage - "Obtained in a Manner"

[329] Mr. Bailey's s. 10(b) rights were breached at the roadside resulting from the delayed implementation of right to counsel and from the failure of police to hold off questioning. His s. 10(a) and (b) rights were breached at the police station as a result of his equivocal waiver and lack of understanding of his right to counsel. His response to the question at the roadside and his subsequent recorded statement were connected to these breaches so the threshold "obtained in a manner" requirement has been met. The Crown concedes exclusion of the roadside statement, but in order to

properly consider the cumulative impact of all breaches, I will address the circumstances of that breach.

Evaluative Stage – *Grant* Analysis

[330] I have previously summarized the comments from *Grant* that address unconstitutionally obtained statements.

Factor 1 – Seriousness of the *Charter* – Infringing Conduct

[331] After taking the unusual step of suspending Mr. Bailey's right to counsel, Sgt. Astephen then asked him a question. The obligation to hold off should be well known to police. As such, questioning Mr. Bailey while his rights were suspended, was at best negligent.

[332] Sgt. Astephen is an experienced officer who knew that suspending a detainee's right to counsel is an exceptional step. He articulated a reasonable basis for the initial decision to delay implementation of the right to counsel. The Crown concedes that the suspension of the right to counsel resulted in a breach after Mr. Seinauskas was arrested and the hotel room secured. However, I found the breach went beyond that. There is no indication that he advised the investigators that it had been done and, therefore, no steps were taken to minimize the delay in the implementation of rights. As such, the continuing delay beyond the roadside was not reasonable and was a serious breach.

[333] Mr. Bailey's response to D/Cst. Fairbairn that he did not want to speak with counsel at that time was not an unequivocal waiver. D/Cst. Fairbairn and Sgt. Nancy Mason, who was present, are both experienced officers who should have known this. Neither did anything to clarify the situation. According to Sgt. Glode, D/Cst. Fairbairn told him that Mr. Bailey had waived his right to counsel. He said this to Mr. Bailey near the beginning of the recorded interview. Mr. Bailey immediately corrected him by saying he had told D/Cst. Fairbairn that he didn't want to talk to a lawyer at that time. Sgt. Glode did not acknowledge that comment and proceeded as if it had not been made. He then read the secondary caution and "Prosper" warning to Mr. Bailey and asked him if he understood. Mr. Bailey immediately said "no". Again, Sgt. Glode did not acknowledge this response and proceeded as if it had not been made. I accept that Mr. Bailey was upset, assertive and wanted information. However, that is not unusual behaviour for a person who is under arrest. Sgt. Glode's obligations to ensure that Mr. Bailey understood his rights, was

clearly waiving them and knew he could assert them at any time are not new obligations and Sgt. Glode should have known them.

[334] His failure to comply with these obligations was not inadvertent or minor. It demonstrated a negligent or reckless disregard for *Charter* rights. As such the conduct is serious. It is lessened only by the fact that Sgt. Glode did read the secondary caution and the "Prosper" warning. I would place the gravity of the police conduct on the high end of the spectrum and conclude that this factor supports exclusion.

Factor 2 – Impact on the *Charter*-protected Interests of the Accused

[335] A violation of s. 10(b) has a serious impact on the interests of an accused. In this case, it is exacerbated by the fact that Mr. Bailey was told at the roadside that he would not be permitted to contact counsel but not told how long it would be. Then he was held for hours in wet clothing without knowing when he might talk to someone. I accept that Mr. Bailey was talkative during the recorded interview, but I cannot say that the statement would have been made notwithstanding the *Charter* breaches or that the impact is lessened by any other circumstance. Therefore, this factor strongly supports the exclusion of the statements.

Factor 3 – Society's Interest in Adjudication of the Case on Its Merits

[336] Exclusion of Mr. Bailey's statements would weaken the Crown case but would not, in and of itself, result in an acquittal. Due to the seriousness of the charges, the societal interest in having the case adjudicated on its merits is high. This factor marginally supports admission.

Balancing and Weighing

[337] Having regard to all the circumstances, I conclude that admission of Mr. Bailey's statement in these circumstances would, on balance, have a negative impact on the long-term repute of the administration of justice. As such the application to exclude his statement pursuant to s. 24(2) of the *Charter* is granted.

5. Statement from Mr. Lambert to Authorities

Threshold Stage – "Obtained in a Manner"

[338] I concluded that Mr. Lambert waived his right to counsel at the roadside so was not impacted by the delayed implementation that impacted Mr. Bailey. Mr. Lambert subsequently did exercise his right to counsel prior to providing a statement. As such, his statement is not directly connected to any breach.

[339] It is connected to the unlawful arrest and continuing detention. So, I will assume it meets the "obtained in a manner" threshold.

Evaluative Stage – *Grant* Analysis

[340] I have previously summarized the comments from *Grant* that address unconstitutionally obtained statements.

Factor 1 – Seriousness of the *Charter* – Infringing Conduct

[341] I have already discussed the relative seriousness of the *Charter* – infringing conduct that preceded the statement. I have concluded that the continuing detention was a serious infringement, however, once the drugs were found onboard the Arica, the detention ceased to be unlawful. In relation to the statement, seriousness of the breaches is mitigated because Mr. Lambert exercised his right to consult counsel prior to providing a statement.

Factor 2 – Impact on the *Charter*-protected Interests of the Accused

[342] Mr. Lambert was arrested and then transported to the police station. This had a serious impact on his *Charter* -protected interests. However, as noted above, the time-period during which the detention was unlawful was relatively brief.

Factor 3 – Society's Interest in Adjudication of the Case on Its Merits

[343] It is not clear what impact exclusion of Mr. Lambert's statement would have on the Crown's case.

Balancing and Weighing

[344] Having regard to all the circumstances, I conclude that admission of Mr. Lambert's statement in these circumstances would not, on balance, have a negative impact on the long-term repute of the administration of justice. As such, subject to assessment of cumulative impact, I would not exclude the statement.

6. Evidence obtained pursuant to search warrant for room #327 at the Future Inn

[345] The Crown is not seeking admission of the personal items and coats seized from the hotel room. The Applicants are seeking exclusion of all other items seized from the hotel room.

Threshold Stage – "Obtained in a Manner"

[346] I found a breach of s. 8 for all three Applicants resulting from insufficiency of grounds to support the search warrant. Therefore, the three Applicants satisfy the threshold "obtained in a manner" requirement for this evidence.

1. Seriousness of the Conduct

[347] The Information to Obtain the warrant was insufficient after unconstitutionally obtained information was excised.

[348] In *R. v. Rocha*, 2012 ONCA 707, Justice Rosenberg specifically addressed how to assess the seriousness of the *Charter*-infringing conduct when a search warrant had been obtained. I agree completely with his analysis:

> **28** Applying for and obtaining a search warrant from an independent judicial officer is the antithesis of wilful disregard of *Charter* rights. The search warrant process is an important means of preventing unjustified searches before they happen. Unless, the applicant for exclusion of evidence can show that the warrant was obtained through use of false or deliberately misleading information, or the drafting of the ITO in some way subverted the warrant process, the obtaining of the warrant generally, as I explain below, tells in favour of admitting the evidence. In this case, the police submitted the fruits of their investigation to a justice of the peace who granted the warrants. I have held that the warrant was properly granted in relation to the restaurant. The warrant should not have been granted in relation to the house, but it must be remembered that an independent judicial officer did authorize the search.

[349] Justice Rosenberg went on to say that it is not automatic that having a search warrant will favour admission of the evidence under the first criterion. Rather, he suggests that Courts should first look at the ITO and consider if it is misleading in any way. If it is, the Court should then consider where it lies on the continuum from the intentional use of false and misleading information at one end to mere inadvertence at the other end.

[350] In this case, there is no indication that the ITO contains false or misleading information. Most of the unconstitutionally obtained information that was included in the ITO arose out of the statements from the pontoon boat or the observations that were derivative of those statements. Sgt. Glode did not know when he included that information in the ITO that it had been obtained unconstitutionally and, in the circumstances, his failure to identify the *Charter* breach does not demonstrate negligence or an unacceptable ignorance of *Charter* norms. Similarly, I have concluded that his initial arrest and search incident to arrest at the vehicle stop was conducted in good faith and with an honest belief that he had grounds to arrest. As such, the inclusion of that information was not intentionally improper. He should have known that the statements from Mr. Bailey after his arrest were not constitutionally obtained. However, those were not significant to the issuance of the warrant.

[351] The *Charter*-infringing conduct at issue in this case is the search of a hotel room with a search warrant that I have concluded could not have been issued if unconstitutionally obtained information is removed. In fact, in the absence of the pontoon boat statement or the key card found during the search of Mr. Lambert incident to arrest, police would not have been able to identify a place to be searched. Given that only a small portion of the information in the ITO was obtained as a result of *Charter*-infringing conduct that should have been clear to police, I would place the *Charter*-infringing conduct on the low end of the spectrum of misconduct. As a result, I conclude that this factor weighs in favour of admitting the evidence.

2. Impact on the Accused

[352] There is no doubt that search of a hotel room, like a residence, falls at the most intrusive end of the spectrum, very close to the forcible taking of bodily substances. There is a high reasonable expectation of privacy in your own home (For example, see: *R. v. Silveira*, [1995] 2 S.C.R. 297).

[353] As such, this factor would tend to support exclusion of the evidence.

3. Society's Interests

[354] The evidence seized would be considered reliable evidence. As I said earlier, this must be considered in the context of the case as a whole and is not determinative. The evidence seized from the hotel room is central to the charges before me and the charges are very serious. As such, the societal interest in having the case adjudicated on its merits is high and clearly the truth-seeking function of the criminal trial

process is best served through admission of the evidence. This factor supports admission.

Balancing and Weighing

[355] To summarize my conclusions on the three factors. The first factor, the seriousness of the breach favours admission. The police conduct did not demonstrate a willful or negligent disregard for *Charter* rights. Sgt. Glode did not know at the time he was preparing the warrant that the ITO relied on unconstitutionally obtained information. While he should have known that some of it was, that is a small portion of the information in the ITO. The second factor, the impact of the breach on the Applicants' *Charter* protected right, favours exclusion. The search of a hotel room is a significant intrusion. The third factor, society's interest, favours admission. The reliability of the evidence, importance of the seized items to the prosecution and public interest in prosecution of these offences are high.

[356] Having regard to all the circumstances, I conclude, subject to consideration of the cumulative impact of all the breaches, that admission of the evidence in these circumstances would not, on balance, have a negative impact on the long-term repute of the administration of justice. As such the application to exclude evidence pursuant to s. 24(2) of the *Charter* is dismissed.

6. Evidence obtained from Subsequent Judicial Authorizations

[357] My comments relating to the Search Warrant for the Future Inn apply equally to most of the subsequent Judicial Authorizations. With respect to the first factor, they all fail because of excision of unconstitutionally obtained information without new *Charter* infringing conduct. They all benefit from the fact that judicial authorization was sought. With respect to the second factor, I recognize that they involve different levels of intrusion on privacy interests. Many were highly intrusive, involving searches of residences, interception of private communications and search of electronic devices. With respect to the third factor, most involve seizure of material that would be very important to the Crown's case.

[358] In general, for the reasons expressed above, I would not exclude the evidence obtained pursuant to these Authorizations.

[359] The exception is evidence flowing from the seizure of the Escalade. I would exclude that evidence against Mr. Lambert and/or Mr. Bailey. That would include anything that was not immediately observable at the roadside including the evidence

obtained as a result of the search of the vehicle's navigation system and the evidence obtained as a result of the search of the electronic devices.

[360] I have concluded that the seriousness of the *Charter* infringing conduct that resulted in the police having the vehicle and its contents in their possession was very serious and cannot be condoned by the Court. The fact that the police subsequently obtained search warrants does not compensate for that. The search of the cell phones, which were "smart phones", was a significant privacy intrusion (*R. v. Fearon*, 2014 SCC 77, at para. 96). The evidence seized would be considered reliable evidence and is important to the Crown's case. Having regard to all the circumstances, I conclude that admission of the evidence in these circumstances would, on balance, have a negative impact on the long-term repute of the administration of justice. As such the application to exclude evidence pursuant to s. 24(2) of the *Charter* is granted.

Cumulative Impact

[361] In *Grant*, at para. 75, the Supreme Court said that "evidence that Charter-infringing conduct was part of a pattern of abuse" was relevant when considering the seriousness of the *Charter*-infringing conduct because it would increase the need for the Court to dissociate itself from that conduct. In *Robertson*, *supra*, at para. 52, Fitch, J.A., writing for the Court, said the following about the cumulative effect of breaches in a case involving multiple accused:

> At the second or evaluative stage, the cumulative effect of multiple constitutional breaches in the course of an investigation, including those committed in relation to third-party investigative targets, is also a relevant consideration. As explained in R. v. Fan, 2017 BCCA 99 at paras. 72-73:
>
> > [72] The seriousness of a Charter breach is not determined in a vacuum. On the contrary, the cumulative effect of multiple breaches is a relevant consideration. Where a breach is part of a larger pattern of abuse or disregard for Charter rights, this exacerbates its seriousness: R. v. Bohn, 2000 BCCA 239 at paras. 45, 47; R. v. Lauriente, 2010 BCCA 72 at para. 27. Accordingly, when evaluating the seriousness of a breach for s. 24(2) purposes, a court should consider the cumulative effect of multiple breaches: Spence at para. 51.
> >
> > [73] A pattern of breaches tends to support exclusion because courts need to distance themselves from the behaviour: Grant at para. 75. However, a finding of cumulative breaches will not necessarily

> result in the exclusion of evidence under s. 24(2): R. v. Trieu, 2010 BCCA 540 at para. 93. Each case turns on its own facts.

[362] The initial investigative activity I examined occurred over a period of just over 24 hours. During that time, I found multiple *Charter* breaches against each of the three Applicants. They involve different rights and were committed by different officers. Some were serious and some were not. Some resulted in the seizure of evidence and some did not have any direct result. Some were "secondary" or "consequential" breaches that were found to be breaches because they incorporated earlier unconstitutionally obtained evidence as opposed to new *Charter*-infringing conduct.

[363] The investigative activity that came after that first 24-hour period and resulted in the Judicial Authorizations did not involve any new *Charter* infringing conduct.

[364] In my view, it is important to differentiate between the two types of breaches at this stage so as not to rely on the same *Charter*-infringing conduct more than once in deciding whether there is a pattern of abuse. The "stand alone" breaches include:

- ss. 7, 10(a) & 10(b) breaches relating to Mr. Bailey and Mr. Seinauskas at the pontoon boat;
- s. 9 and related s. 8 breach relating to the arrest of Mr. Bailey and Mr. Lambert resulting from insufficient grounds to arrest;
- s. 9 & s. 8 breaches resulting from the continued detention of Mr. Bailey and Mr. Lambert and the seizure of the vehicle and contents after Sgt. Glode knew he no longer had subjective grounds;
- s. 10(b) resulting from delayed implementation of right to counsel for Mr. Bailey;
- s. 10(b) resulting from failure to hold off questioning at the roadside for Mr. Bailey;
- s. 10(a) & (b) resulting from equivocal waiver and lack of understanding of right to counsel at police station for Mr. Bailey;
- ss. 8 & s. 10(a) & (b) resulting from police entry into hotel room to arrest Mr. Seinauskas without *Feeney* warrant and failure to immediately advise of right to counsel.

[365] As was the case in *Lauriente, supra,* here there were multiple breaches, "each step built on the one before, ultimately culminating in the obtaining and execution of the search warrant". As a result, I have to consider the impact of all the breaches to place the seriousness of the individual breaches in context, and, decide whether there is a pattern of disregard for *Charter* rights that could bring the administration of justice into disrepute.

[366] The quantity of breaches here is concerning and, as I have said, some are serious. However, overall, I would not describe the pattern as one of "serious disregard" or "abuse". As I have noted, some of the *Charter* – infringing conduct is serious and there is a need for the Court to distance itself from that conduct. However, that can and has been addressed through the exclusion of specific pieces of evidence. Therefore, consideration of the cumulative impact of all the breaches does not change my previous assessment of the seriousness of the individual breaches and I do not find that the pattern requires the Court to dissociate itself from the overall conduct or that it would bring the administration of justice into disrepute.

Conclusion

[367] In summary, my conclusions on admissibility are as follows:

1. Statement from Mr. Bailey at pontoon boat – I**nvoluntary so not admitted**

2. Statement from Mr. Seinauskas at pontoon boat – **Involuntary so not admitted**

3. Observations at Black Rock Beach in the early afternoon and while following the Escalade from the Future Inn back to Black Rock Beach, and observations and evidence collected at Black Rock Beach at 6:00 p.m. - 7:00 p.m. - **Admitted**

4. Items seized during search incident to arrest at vehicle stop
    a. Observations and photographs up to completion of initial search incident to arrest – **Admitted**
    b. Escalade and physical items seized incident to arrest - **Excluded for Mr. Bailey and Mr. Lambert**
5. Utterance of Mr. Bailey at traffic stop – **Excluded for Mr. Bailey**

6. Interview of Mr. Bailey - **Excluded for Mr. Bailey**

7. Interview of Mr. Lambert - **Admitted**

8. Items seized from Future Inn pursuant to search warrant

    a. luggage – **Admitted**

    b. electronic devices and invoice – **Admitted**

    c. clothing and toiletries - **Excluded** against all Applicants

9. Items seized pursuant to Subsequent Judicial Authorizations

    a. information obtained as a result of search of electronic devices in Escalade – **Excluded**

    b. evidence obtained as a result of other judicial authorizations – **Admitted**

Elizabeth Buckle, JPC.