

Citation: *R. v. Caicedo*, 2024 YKTC 18

Date: 20240614
Docket: 22-00746
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

CHRISTOPHER CAICEDO

Appearances:
Andreas Kuntz
Amy Steele

Counsel for the Crown
Counsel for the Defence

RULING ON *VOIR DIRE*

[1] Christopher Caicedo is before the Court for trial on a single count contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19, alleging that on or about March 21, 2023, he possessed cocaine for the purpose of trafficking.

[2] Mr. Caicedo asserts that his s. 8, 9, 10(a) and 10(b) *Charter* rights were violated by the RCMP and seeks the exclusion of certain evidence, including the cocaine seized during the investigation. The trial commenced with a *voir dire* to address the asserted *Charter* violations and counsel agreed to proceed with a blended *voir dire*. Crown called two RCMP officers on the *voir dire* and defence did not call any evidence.

[3] In this decision I will address the following:

1. Facts accepted by the Court.
2. Conflicting evidence of the RCMP officers.
3. Was Mr. Caicedo arbitrarily detained in breach of his s. 9 *Charter* rights?
 - a. Was Mr. Caicedo detained?
 - b. Was the detention arbitrary?
 - c. Did the RCMP have reasonable grounds to arrest Mr. Caicedo?
4. Was there a warrantless search of Mr. Caicedo in breach of his s. 8 *Charter* rights?
5. Was there a breach of Mr. Caicedo's s. 10 *Charter* Rights?
 - a. Was there a s. 10(a) *Charter* violation?
 - b. Was there a s. 10(b) *Charter* violation?
6. Section 24(2) *Charter* Analysis.

Facts accepted by the Court

[4] On March 21, 2023, at approximately 5:12 p.m., the Village of Carmacks, Yukon, RCMP received a call advising that there was an emergency at Jennifer Khan's residence. The caller, Ms. Khan's sister, advised that she received a text message from

Ms. Khan asking her to “call 911 for a check-up ASAP”. Ms. Khan was known to the RCMP as a victim of domestic violence by her on-again, off-again boyfriend, who, on this date, was on conditions to have no contact with her resulting from a recent assault. Ms. Khan was also known to RCMP for mental health and drug abuse issues and had many previous interactions with the two officers on shift when the call came in.

[5] Two uniformed RCMP members, Cst. Beauchamp and Cst. Woodman, attended at the residence of Ms. Khan, located in close proximity to the RCMP detachment, within minutes of the call being received. When they arrived at the house, Ms. Khan answered the door and appeared to the members to be distraught with bags under her eyes, a frightened look, open mouth, and shaking lower jaw. She only partially opened the door and appeared to the officers like she may have been attempting to shield the officers from seeing her boyfriend, who they suspected of being inside. The officers testified that based on their numerous respective prior interactions with Ms. Khan, they were concerned for her safety and asked if they could enter the home. Ms. Khan responded by inviting the officers inside the residence.

[6] The primary concern of the officers was that Ms. Khan’s emergency was in relation to her boyfriend, and they proceeded immediately to clear the house to confirm that he was not present for both Ms. Khan’s safety and the safety of the officers. As they cleared the house, Ms. Khan stated that there was a friend in the house, without further elaboration. As Cst. Woodman checked the bedrooms of the house, she located Mr. Caicedo in a bedroom, standing with his back to her and looking at his cell phone which was plugged into the wall outlet. When he looked up to see the officer, he appeared surprised.

[7] Mr. Caicedo was directed by Cst. Woodman to exit the room and to go and speak with Cst. Beauchamp. The officer required him out of the room to safely check the room for other individuals, including Ms. Khan's boyfriend. As Mr. Caicedo exited the room, Cst. Beauchamp was standing in the kitchen area, which was located down the hall from the bedroom. Cst. Beauchamp was approximately six feet from the end of the hallway standing in the kitchen area of an open concept kitchen and living room. He looked at Mr. Caicedo and told Mr. Caicedo to come and talk to him. Mr. Caicedo complied and walked over to Cst. Beauchamp.

[8] Mr. Caicedo was wearing a pullover hoodie sweater with a front pocket that was open on both sides and extended across the front of the sweater. As Mr. Caicedo exited the bedroom he passed Cst. Woodman in the hallway, who was standing out of his way to allow Mr. Caicedo to pass, at which point the officer could see into the front pocket of the sweater through an opening approximately two to three inches wide. Cst. Woodman saw a clear zip lock bag with what appeared to be a white "rock-like" substance that she considered to be crack cocaine. She could see it clearly enough to note that the crack cocaine that she could see was inside the clear zip lock bag and wrapped in a clear plastic wrap.

[9] As Mr. Caicedo approached Cst. Beauchamp, he had his hands in the front sweater pocket and the officer noticed a bulge in the pocket. While Mr. Caicedo was approaching Cst. Beauchamp, Cst. Woodman called to Cst. Beauchamp and pointed to her own eyes, then to her right side, signalling that she saw something in the pocket. Cst. Woodman then proceeded to clear the bedroom Mr. Caicedo came out of, and one additional bedroom.

[10] When Mr. Caicedo reached Cst. Beauchamp, the officer asked for his identification. Mr. Caicedo complied by reaching into his back pant pocket and retrieving his wallet. As he retrieved his wallet, and subsequently retrieved his identification out of the wallet, he was swaying slightly side to side and the officer could clearly see into the front pocket of his sweater through an estimated two-inch opening. In the pocket, Cst. Beauchamp observed a clear zip lock bag with an off-white, slightly yellow, rock-like substance that he immediately concluded was crack cocaine. The officer had recent experience with the seizure of crack cocaine in Carmacks and was certain at the time that what he saw in the sweater pocket was crack cocaine. Cst. Beauchamp immediately arrested Mr. Caicedo for the possession of cocaine, placed him in handcuffs, and retrieved the zip lock bag from the sweater. The bag held several individually wrapped large bundles of crack cocaine which were wrapped in a clear plastic wrap.

[11] Immediately after the arrest, Mr. Caicedo was advised of his right to counsel which he indicated he understood, and he advised that he wished to speak with a lawyer.

[12] With the assistance of Ms. Khan, the officers collected what they understood to be personal items of Mr. Caicedo from the bedroom he was originally located in including a black backpack, black puffy winter jacket, and a black cell phone with a charger. From the foyer of the residence, immediately adjacent to the location where Mr. Caicedo was arrested, they retrieved a fall jacket and some shoes.

[13] Mr. Caicedo was transported back to the detachment within minutes and searched before being secured at the detachment. During the initial search of his person and property, cash amounting to \$1,310, mostly in \$20 denominations, was located in his pants pocket, and another quantity of crack cocaine was located in the jacket retrieved from the foyer of the residence.

[14] The officers then proceeded to undertake several steps, including to check Mr. Caicedo for outstanding charges. He had outstanding charges and warrants from Ontario. The officers took the time to connect with police in Ontario to determine the intentions with respect to the warrants. They then documented, photographed, and weighed the drugs, prepared reports, determined the appropriate charge given the quantity of drugs seized, and made arrangements to transport Mr. Caicedo into custody in Whitehorse.

[15] At 6:18 p.m. Cst. Beauchamp re-arrested Mr. Caicedo for possession for the purpose of trafficking, advised him of his s. 10(b) *Charter* rights, and read him the police warning. Cst. Beauchamp then proceeded to access counsel of choice on his behalf, eventually connecting Mr. Caicedo to legal aid counsel.

[16] The crack cocaine seized from Mr. Caicedo's front sweater pocket at the time of arrest weighed 88 grams. The crack cocaine located in the jacket retrieved from the foyer of Ms. Khan's residence weighed 42 grams. Samples were taken from both seizures and forwarded to a laboratory for analysis which confirmed that they contained cocaine.

Conflicting evidence of the RCMP Officers

[17] Cst. Woodman, an RCMP member for 14 years, testified in a clear and concise manner, presenting as both credible and reliable in her testimony. In contrast, Cst. Beauchamp struggled at times in recalling certain details regarding the sequence of events of the investigation in the residence. His recollection was that Cst. Woodman was standing next to him when he first observed Mr. Caicedo walk out of the bedroom and into the hallway. Given the specific detail of Cst. Woodman's evidence regarding her observations of Mr. Caicedo in the bedroom, her certainty of the observations including the position of Mr. Caicedo in the bedroom, along with the overall reliability of her evidence, I prefer her evidence and accept her version of events regarding this aspect of the investigation, as set out in the facts.

[18] While Cst. Beauchamp did struggle with some detail when giving his evidence, I find that he was credible when detailing the specifics of his interactions with Mr. Caicedo and his observations leading to the arrest. His ability to clearly observe the crack cocaine was consistent with Cst. Woodman's observations of the crack cocaine on Mr. Caicedo while in the hallway.

Was Mr. Caicedo arbitrarily detained in breach of his s. 9 *Charter* rights?

Was Mr. Caicedo detained?

[19] Mr. Caicedo asserts that he was arbitrarily detained by the RCMP at the residence in violation of his s. 9 *Charter* rights. In submissions, Crown conceded that there was a psychological detention of Mr. Caicedo at the time that the RCMP required him to produce identification.

[20] Psychological detention was addressed by the Supreme Court of Canada in

R. v. Grant, 2009 SCC 32, at paras. 43 and 44:

43 Whether the individual has been deprived of the right to choose simply to walk away will depend, to reiterate, on all the circumstances of the case. It will be for the trial judge to determine on all the evidence. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law.

44 In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
 - (a) The circumstances giving rise to the encounter as they 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.

[21] I agree with the position of counsel that there was a psychological detention of Mr. Caicedo, noting that he appeared surprised to see a police officer at the bedroom door inside the residence, was directed by the officers to the kitchen area of the residence to speak with Cst. Beauchamp, and was required by Cst. Beauchamp to produce his identification without further explanation for the RCMP presence in the residence.

Was the detention arbitrary?

[22] Mr. Caicedo argues that police had limited information from Ms. Khan's sister regarding the nature of the emergency requiring police intervention at the residence, simply relying on the relayed contents of a text message. Accordingly, he argues that there was no evidence to conclude a crime had been committed and that the police entry into the home was unwarranted leading to his arbitrary detention.

[23] I note that the RCMP officers asked Ms. Khan if they could enter the residence and received permission to do so. They then proceeded to go through the home to satisfy themselves that there were no existing threats to the homeowner, or to the RCMP, before proceeding to sort out the issues that caused their attendance. They were aware of the homeowner's volatile relationship with her partner and were concerned that he was the cause for the request that they attend the residence.

[24] The RCMP members were not satisfied with the appearance of Ms. Khan at the door to conclude that she was safe. They were concerned that her partner was inside and that there was a continued concern for her safety.

[25] The Supreme Court of Canada addressed police authorities to respond to 911 calls in *R. v. Godoy*, [1999] 1 S.C.R. 311. Specifically, the Court addresses the circumstance where the nature of the distress is unknown at para. 16:

A 911 call is a distress call -- a cry for help. It may indeed be precipitated by criminal events, but criminal activity is not a prerequisite for assistance. The duties specifically enumerated in s. 42(1) of the *Act* may or may not be engaged. The point of the 911 emergency response system is to provide whatever assistance is required under the circumstances of the call. In the context of a disconnected 911 call, the nature of the distress is unknown. However, in my view, it is reasonable, indeed imperative, that the police assume that the caller is in some distress and requires immediate assistance. To act otherwise would seriously impair the effectiveness of the system and undermine its very purpose. The police duty to protect life is therefore engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined.

[26] While the call in the case before me was not a 911 call, but rather a call to the general line at the detachment in the community, the circumstances were similar to that of a 911 call. The call was made in a small northern community, where a call directly to the detachment would not be unusual given that a 911 call would be answered hundreds of kilometers away. Accordingly, I considered the call made in this case to be the equivalent of a 911 call (see: *R. v. Gillingwater*, 2006 YKTC 65; *R. v. Pireh*, 2018 ABPC 291).

[27] The Court in *Godoy* continues to address the possible scenarios of where a person answers the door at the residence upon arrival of the police at paras. 20 and 21:

20 One can imagine, for example, a person having a heart attack who dials 911 but cannot speak. Perhaps there is no one home to answer the door. Would a reasonable person expect that the police would take steps to ensure that the 911 caller was all right? I believe so. A further example

might be a situation where a home is burglarized and a resident is being held at gunpoint. Assuming a resident can actually make the 911 call, he or she might answer the door to the police under a threat of bodily injury should the police be allowed to enter. On the other hand, the person who answers the door might well be the intruder. I see no other use for an emergency response system if those persons who are dispatched to the scene cannot actually respond to the individual caller. I certainly cannot accept that the police should simply take the word of the person who answers the door that there is "no problem" inside.

21 Further, the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence. One of the hallmarks of this crime is its private nature. Familial abuse occurs within the supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response. The 911 system provides such a response. Given the wealth of experience the police have in such matters, it is unthinkable that they would take the word of the person who answers the door without further investigation. ...

[28] The Supreme Court of British Columbia followed the reasoning in *Godoy* in the decision of *R. v. Purchase*, 2011 BCSC 154, a case involving a third-party call to 911 regarding concern about a family member who was located at a separate location from the caller. The Court addresses the issue of arbitrary detention at paras. 106 to 108:

106 Mr. Purchase challenges the legality of his detention by the police. He says his detention was arbitrary, contrary to sections 7 and 9 of the *Charter*, and the police violated his right to counsel contrary to section 10(b) of the *Charter*. I have concluded Mr. Purchase's initial detention was, in the circumstances of this case, not arbitrary. In the circumstances, I cannot find the police actions unnecessary or excessive.

107 Evidence regarding what St. Sgt. Hermann discussed with Mr. Purchase is somewhat vague. St. Sgt. Hermann had no notes to go by. However, I am able to accept St. Sgt. Hermann advised Mr. Purchase the police were investigating a 911 call and the complaint a man had been threatened by an occupant of the residence. I accept Mr. Purchase was not a target suspect at that point. Notwithstanding that finding, should St.

Sgt. Hermann have immediately advised Mr. Purchase of his s. 10(b) right to instruct counsel without delay?

108 In *R. v. Grunwald*, 2010 BCCA 288 [*Grunwald*], our Court of Appeal considered the question whether an officer in similar circumstances must immediately advise a person of their right to counsel.

[27] In *Grant and Suberu*, the Supreme Court of Canada concluded that when a person is detained for investigation, the right to counsel is engaged and there is no limitation on that right pursuant to s. 1 of the *Charter*. This was an issue which had been left unresolved in *R. v. Mann*, 2004 SCC 52. However, in *Suberu*, McLachlin C.J.C. and Charron J., while finding that the right to counsel is engaged immediately on detention, explicitly held that the immediacy of the s. 10(b) obligation is subject to public safety concerns, other safety concerns, or to reasonable limitations prescribed by law and justified under the s. 1 of the *Charter*.

[29] After a thorough review of police authority in responding to a 911 call, and the resulting detention of individuals in the residence, including Mr. Purchase, the Court concluded in *Purchase* at para. 110 that “Mr. Purchase's initial detention was related to the police duty to protect life, and the initial restrictions placed on Mr. Purchase's liberty and his initial detention were reasonably necessary”.

[30] In the case of Mr. Caicedo, the RCMP were invited into the home by the homeowner who they believed to be an individual in distress in relation to suspected domestic violence. They immediately conducted a safety search of the residence before commencing an investigation into the purpose of the call for their attendance. At no point was there an objection by the homeowner to their actions.

[31] When Mr. Caicedo was located by the RCMP he was immediately directed to the kitchen area of the residence where there was a brief interaction with Cst. Beauchamp. As Mr. Caicedo retrieved his identification, the officer observed the crack cocaine and

immediately placed Mr. Caicedo under arrest. The detention of Mr. Caicedo was very brief leading up to his arrest and was justified as the RCMP investigated the cause of the emergency call for their attendance.

[32] I find that the detention of Mr. Caicedo at the residence prior to his arrest was not arbitrary as it was reasonably necessary in the circumstances and related to the RCMP duty to protect the life and safety of Ms. Khan.

Did the RCMP have reasonable grounds to arrest Mr. Caicedo?

[33] Mr. Caicedo was arrested by Cst. Beauchamp after a very brief exchange and the production of his identification. The arrest occurred moments after the officer clearly viewed the crack cocaine in Mr. Caicedo's front sweater pocket.

[34] The Supreme Court of Canada addressed arbitrary detention under s. 9 of the *Charter* in *R. v. Storrey*, [1990] 1 S.C.R. 241, wherein the Court addresses the requisite subjective belief of reasonable and probable grounds required at para. 14:

Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. ...

[35] The Court in *Storrey* goes on to adopt the reasoning in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at para. 15:

...The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police

are not called on before acting to have anything like a prima facie case for conviction...

[36] In this case, Cst. Beauchamp's testimony set out that at the point of the arrest he had made the following observations:

- There was a large bulge in the front pocket of Mr. Caicedo's hoodie sweater which drew the attention of Cst. Beauchamp out of concern for officer safety.
- Cst. Woodman alerted Cst. Beauchamp, through visual cues, to look at Mr. Caicedo's front pocket.
- Cst. Beauchamp could clearly see what he immediately identified as crack cocaine in Mr. Caicedo's front pocket, described as an off-white rock-like substance, which he described as having a yellow tint, in a clear zip lock bag.
- Cst. Beauchamp had recent experience with the seizure of crack cocaine in the community and was certain, based on that recent experience and his observations of the crack cocaine on Mr. Caicedo, that what he saw was crack cocaine.

[37] During cross examination, Cst. Beauchamp confirmed that he was one hundred percent certain that what he observed was crack cocaine, and he immediately arrested Mr. Caicedo for possession of cocaine. The evidence clearly demonstrated that Cst. Beauchamp held the requisite subjective belief.

[38] The Court in *Storrey* addressed the requirement that it must also be objectively established that there are reasonable and probable grounds for arrest at para. 16:

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, 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.

[39] Cst. Woodman testified to clearly seeing the same substance on Mr. Caicedo which she believed to be crack cocaine, but that she did not believe at the time she had reasonable grounds for arrest. She was not questioned on why she did not have the belief in that moment, and there is no evidence before the Court relating to her experience with crack cocaine. Without more, I find that her belief as to having grounds to arrest to be of little assistance to the Court. Her evidence that she could clearly see the crack cocaine does corroborate the evidence of Cst. Beauchamp that he had a clear view of the crack cocaine.

[40] I find that a reasonable person, standing in the shoes of Cst. Beauchamp having clearly viewed a substance that he concluded with certainty was crack cocaine, would have believed that reasonable grounds existed to make the arrest.

[41] Cst. Beauchamp had reasonable grounds, subjectively and objectively, to arrest Mr. Caicedo and I find that the arrest did not constitute an arbitrary detention. There was not a violation of Mr. Caicedo's s. 9 *Charter* rights when he was arrested.

Was there a warrantless search of Mr. Caicedo in breach of his s. 8 Charter rights?

[42] Mr. Caicedo argues that he was searched by Cst. Beauchamp when the officer looked inside his pocket and saw the zip lock bag containing crack cocaine. The officer testified that he could see the crack cocaine as Mr. Caicedo retrieved his identification from his back pocket and was swaying back and forth. The officer did not have to move or otherwise intrude on Mr. Caicedo to observe the crack cocaine.

[43] The Crown argued that the plain view doctrine applies in the circumstances of this case. The plain view doctrine was explained in the Supreme Court of British Columbia decision of *R. v. Gibson*, 2003 BCSC 1572, at para. 18:

I next consider the plain view doctrine. This rule of law permits the police to seize evidence that is in plain view if certain conditions are proved. As I read the authorities, the elements that are essential to the application of this doctrine are the following. (This is my paraphrasing.) First, that the police officer had lawful, prior justification for his or her intrusion into or presence at the place where the evidence was found. Second, that the police officer discovered the evidence inadvertently while in the course of exercising a lawful police power or performing a lawful police duty. Third, that the evidence was in plain view in the sense that it was detected through the unaided use of the police officer's senses. Fourth, that it must have been immediately apparent to the police officer that the evidence was probably connected with criminal activity.

[44] Given that the RCMP were responding to the equivalent of a 911 call and had been invited into the residence by the homeowner, they had the lawful, prior justification for their presence in the residence. The facts, as accepted from the officers, allow the conclusion that the crack cocaine in the pocket of Mr. Caicedo was discovered inadvertently while the officers were exercising their lawful police powers in response to the emergency call. I accept the testimony of Cst. Beauchamp that the evidence was in

plain view and detected through the unaided use of his senses. Cst. Beauchamp immediately concluded that the substance observed was crack cocaine and placed Mr. Caicedo under arrest.

[45] I find that the crack cocaine was in plain view, noting that both police officers observed it in the pocket of Mr. Caicedo, and that there was not a breach of Mr. Caicedo's s. 8 *Charter* rights.

[46] Mr. Caicedo did not advance a specific s. 8 *Charter* argument in relation to the cocaine discovered by the RCMP when they did an inventory of what they believed to be Mr. Caicedo's items they collected at Ms. Khan's residence. I note that the items were seized incident to arrest and find that the conduct of the RCMP did not result in a breach of Mr. Caicedo's s. 8 *Charter* rights (see: *R. v. Stairs*, 2022 SCC 11).

Was there a breach of Mr. Caicedo's s. 10 *Charter* Rights?

[47] Mr. Caicedo asserts that both his s. 10(a) and s. 10(b) *Charter* rights were violated by the RCMP.

Was there a s. 10(a) Charter violation?

[48] The evidence presented during the *voir dire*, and the factual findings by the Court, clearly set out that the interactions between Mr. Caicedo and the RCMP between the time they first came in contact with one another to the arrest was very brief. Starting from the time he was first observed in the bedroom of the residence to the time of his arrest, the elapsed time would have been under two minutes. His face-to-face

interactions with Cst. Beauchamp were fleeting, and Cst. Beauchamp's estimate of time from the observation of the crack cocaine to the arrest was five to ten seconds.

[49] On the evidence before the Court, I find that Mr. Caicedo was "informed promptly of the reason" for his detention and arrest and that there was not a breach of Mr. Caicedo's s.10(a) *Charter* rights (see: *R. v. Evans*, [1991] 1 S.C.R. 869).

Was there a s. 10(b) Charter violation?

[50] At the time of his arrest, Mr. Caicedo was immediately advised of his s. 10(b) *Charter* rights and read the police warning. In response to Cst. Beauchamp's questions, Mr. Caicedo responded that he understood his rights and wished to speak with a lawyer. The approximate time that Cst. Beauchamp commenced with the arrest was 5:18 p.m., and the time that Mr. Caicedo requested to speak to a lawyer was estimated at 5:22 p.m.

[51] The officers completed the search incident to arrest at Ms. Khan's residence, transported Mr. Caicedo to the detachment and proceeded to process him, which included a search of his person and property. The timing of these activities was not recorded, and Cst. Beauchamp estimated that the search was completed by 5:50 p.m. I find the delay in implementing Mr. Caicedo's s. 10(b) *Charter* right from the time of arrest to 5:50 p.m. to be reasonable and did not constitute a violation of those rights.

[52] No attempts were made by the RCMP to provide Mr. Caicedo with access to counsel until they re-engaged with him at 6:18 p.m. to arrest him for possession for the

purpose of trafficking. They then proceeded to provide him with access to counsel and he spoke with a lawyer at 6:35 p.m.

[53] According to Cst. Beauchamp the officers engaged in a variety of activities in relation to the investigation and Mr. Caicedo, which included connecting with police in Ontario to discuss their intentions regarding warrants from Ontario, weighing and recording the crack cocaine and other items seized, preparing reports, and assessing the appropriate charge in the circumstances. I categorize these actions taken as administrative in nature and that they do not justify a delay in providing Mr. Caicedo access to legal counsel.

[54] I find that the delay by the RCMP in providing Mr. Caicedo access to legal counsel from 5:50 p.m. to 6:18 p.m. constitutes a clear violation of Mr. Caicedo's s. 10(b) *Charter* rights.

Section 24(2) *Charter* Analysis

[55] Having found that there was a violation of Mr. Caicedo's s. 10(b) *Charter* rights, the remaining issue for determination is what, if any, remedy is appropriate. Mr. Caicedo seeks the exclusion of all evidence seized from his person and from the residence.

[56] Section 24(2) of the *Charter* reads:

Where, in proceedings under subsection (1) a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission

of it in the proceedings would bring the administration of justice into disrepute.

[57] The Court in *Grant* held that three factors are relevant to an assessment of whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute:

1. The seriousness of the *Charter*-infringing conduct;
2. The impact on the *Charter*-protected interests of the accused; and
3. Society's interest in adjudication on the merits.

Seriousness of the Charter-infringing Conduct

[58] The Supreme Court of Canada addressed the *Grant* analysis in *R. v. McColman*, [2023] S.C.J. No. 8. On this first line of inquiry, the Court notes at para. 58:

58 In evaluating the gravity of the state conduct at issue, a court must "situate that conduct on a scale of culpability": *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 43. As Justice Doherty observed in *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4, "the graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct": para. 23. To properly situate state conduct on the "scale of culpability", courts must also ask whether the presence of surrounding circumstances attenuates or exacerbates the seriousness of the state conduct: *Grant*, at para. 75. Were the police compelled to act quickly in order to prevent the disappearance of evidence? Did the police act in good faith? Could the police have obtained the evidence without a *Charter* violation? Only by adopting a holistic analysis can a court properly situate state conduct on the scale of culpability.

[59] In this case, the *Charter* violation was brief, spanning approximately 30 minutes, and occurred after the investigation was complete. Cst. Beauchamp did not appreciate the significance of the delay, but there is no evidence before the Court that he was

acting in bad faith. To the contrary, he wanted Mr. Caicedo to fully appreciate his legal jeopardy before talking to a lawyer, believing it to be in his best interest. Cst.

Beauchamp has been an RCMP member for six years, and his lack of education of the *Charter* is a concern, with his actions amounting to negligence.

[60] Given that no evidence was obtained in the investigation flowing from the *Charter* breach, I find this first line of inquiry moderately favours the inclusion of the evidence.

The Impact on the Charter-protected Interests of Mr. Caicedo

[61] The Court in *McColman* stated the following regarding this second line of inquiry at para. 66:

66 The second line of inquiry is aimed at the concern that admitting evidence obtained in violation of the *Charter* may send a message to the public that *Charter* rights are of little actual avail to the citizen. Courts must evaluate the extent to which the breach "actually undermined the interests protected by the right infringed": *Grant*, at para. 76. Like the first line of inquiry, the second line envisions a sliding scale of conduct, with "fleeting and technical" breaches at one end of the scale and "profoundly intrusive" breaches at the other: para. 76.

[62] In this case, the evidence collected by the RCMP on the offence before the Court was obtained prior to the breach of Mr. Caicedo's s. 10(b) *Charter* rights. There was no causal connection between the *Charter* breach and obtaining the evidence on the offence before the Court. The evidence was collected prior to departing Ms. Khan's residence, and the s. 10(b) *Charter* breach occurred approximately 30 minutes later at the detachment.

[63] Cst. Beauchamp discovered the second quantity of crack cocaine while processing Mr. Caicedo at the detachment, prior to the s. 10(b) *Charter* breach. The

seizure of the jacket had taken place at the residence and the RCMP were, at that point, in possession of the crack cocaine.

[64] I balance these factual findings against the importance of an individual's s. 10(b) *Charter* rights including the timeliness of access to counsel. The period that Mr. Caicedo sat in custody at the RCMP detachment and waited for the opportunity to speak to counsel, not knowing his jeopardy, what was going on regarding his custodial status, and what would happen next, is inexcusable.

[65] The impact of the *Charter* breach on Mr. Caicedo was not negligible.

Considering the stage of the investigation when the infringement occurred and the short duration of the breach, I find this second line of inquiry moderately favours the inclusion of the evidence.

Society's Interest in Adjudication on the Merits

[66] The Court in *McColman* stated the following regarding this third line of inquiry at para. 70:

70 Under this third line of inquiry, courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence, although this Court has recognized that the final factor can cut both ways: *Grant*, at paras. 81 and 83-84. While the public has a heightened interest in a determination on the merits where the offence is serious, it also has a vital interest in maintaining a justice system that is above reproach: para. 84.

[67] While there is an obvious impact upon the administration of justice in admitting evidence where there has been a breach of an individual's s. 10(b) *Charter* rights, admitting the evidence in this case would not damage the long-term repute of the

administration of justice. The evidence collected by the RCMP was reliable and crucial to the Crown's case. The offence of trafficking cocaine in small, remote northern communities is very serious. Additionally, no evidence was obtained in a manner that infringed or denied Mr. Caicedo's *Charter* rights.

[68] Given the reliability and importance of the evidence, as well as the seriousness of the alleged offence, I find this third line of inquiry strongly favours the inclusion of the evidence. Admitting the evidence would better serve the truth-seeking function of the criminal trial process and would not damage the long-term repute of the justice system.

Outcome of the Analysis

[69] When balancing these factors, all which lean towards the inclusion of the evidence, I find that considering all the circumstances, the evidence should not be excluded under s. 24(2) of the *Charter*.

PHELPS T.C.J.