# SUPREME COURT OF YUKON

Citation: *R v Asuchak*,
2022 YKSC 25

Date: 20220606
S.C. No. 21-01502
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

RONALD RAY ASUCHAK and HELEN PATRICIA TIZYA

APPLICANTS

Before Justice E.M. Campbell

| | |
|---|---|
| Counsel for the Respondent | Benjamin Eberhard |
| Counsel for the Applicant, Ronald Ray Asuchak | Norah Mooney |
| Counsel for the Applicant, Helen Patricia Tizya | Christiana Lavidas |

**REASONS FOR DECISION**

## OVERVIEW

[1] Ronald Ray Asuchak and Helen Patricia Tizya jointly face a number of charges of trafficking, possession for the purpose of trafficking, and simple possession of drugs contrary to the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19 ("*CDSA*"). They are also jointly charged with possession of currency, of a value not exceeding $5,000, knowing that it was obtained by crime, contrary to s. 354(1)(a) of the *Criminal Code,* R.S.C., 1985, c. C-46 (the "*Criminal Code*").

[2] On July 23, 2020, members of the Yukon RCMP were conducting team surveillance targeting street level drug trafficking in Whitehorse. Following observations made during that surveillance operation, the RCMP pulled over a Chevrolet Cobalt and arrested its occupants: Ronald Asuchak, the driver, and Helen Tizya, the front passenger.

[3] Mr. Asuchak and Ms. Tizya were informed of the reasons for their arrests, read their rights to counsel and to remain silent upon their arrests. Both indicated they understood and wanted to speak with counsel. However, they were not provided with the opportunity to speak with counsel until after they were transported to the Arrest Processing Unit ("APU") of the Whitehorse Correctional Center ("WCC") and strip searched. Ms. Tizya made a number of utterances before she was given the opportunity to speak with counsel.

[4] The police conducted a pat-down search on Mr. Asuchak and Ms. Tizya roadside after their arrests. A large bundle of cash and a crack pipe were found on Mr. Asuchak at the time. Cocaine was found on the back seat of the police vehicle that transported Ms. Tizya to the WCC. Mr. Asuchak and Ms. Tizya were also submitted to a strip search at the WCC. Fentanyl fell from Ms. Tizya during her strip search. In addition, cocaine was found in Ms. Tizya's jeans and jacket. Also, cocaine and small quantities of codeine and diazepam as well as cell phones and drug paraphernalia were seized from the Chevrolet Cobalt.

[5] Mr. Asuchak and Ms. Tizya have each filed an application pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*") seeking the exclusion of all the evidence gathered by the RCMP following their arrests as they contend it was obtained in violation of their rights to not be

arbitrarily detained pursuant to s. 9 of the *Charter* and to not be subject to unreasonable search and seizure pursuant to s. 8 of the *Charter.*

[6] In addition, Ms. Tizya seeks to have the evidence seized by the police during her strip search excluded, pursuant to s. 24(2) of the *Charter*, on the basis that the RCMP officers lacked reasonable grounds to conduct a strip search; that the strip search was conducted in an unreasonable manner; and that she was not provided with the opportunity to speak with counsel prior to being strip searched in violation of her rights under ss. 8 and 10(b) of the *Charter*.

[7] Ms. Tizya also seeks the exclusion, pursuant to s. 24(2) of the *Charter*, of the utterances she made after her arrest, which she alleges were elicited by the police before she was given the opportunity to speak with counsel, contrary to s. 10(b) of the *Charter*.

[8] Finally, Mr. Asuchak and Ms. Tizya seek a stay of proceeding or, in the alternative, a mistrial, pursuant to s. 24(1) of the *Charter,* based on late Crown disclosure of one officer's supplementary occurrence report, which they contend is contrary to their right to make full answer and defence pursuant to s. 7 of the *Charter*.

[9] Overall, I find that all the evidence gathered by the RCMP officers as a result of the applicants' arrests must be excluded pursuant to s. 24(2) of the *Charter.* The sheer number of inconsistencies between the police officers' testimonies regarding what they heard, observed, and said prior to the arrests as well as the nature of those inconsistencies negatively impact their credibility and reliability. The lack of reliable police evidence leads me to conclude that the officers did not, subjectively and objectively, have reasonable grounds to arrest the applicants. The applicants' arrests were therefore unlawful, making their detention arbitrary and in violation of the

applicants' rights under s. 9 of the *Charter.* Consequently, the searches performed by the police incidental to the applicants' unlawful arrests were unreasonable and contrary to s. 8 of the *Charter*.

[10] I am also of the view that the utterances made by Ms. Tizya to two RCMP officers were elicited by the police prior to giving her the opportunity to speak with counsel and, therefore, obtained in breach of her right to counsel protected by s. 10(b) of the *Charter*.

[11] Overall, I find that the evidence obtained by the police as a result of the unlawful arrests must be excluded pursuant to s. 24(2) of the *Charter*. Society has an interest in seeing that this case proceeds on its merits, and the items seized by the RCMP officers constitute reliable evidence crucial to the Crown's case. However, on balance, I am of the view that the seriousness of the *Charter* breaches coupled with the important impact they had on the *Charter*-protected interests of the applicants weigh in favour of excluding the evidence. I find that admitting the evidence would bring the administration of justice into disrepute.

[12] In addition, on its own, the violation of Ms. Tizya's s. 10(b) *Charter* right warrants the exclusion of the utterances she made in response to police questioning pursuant to s. 24(2) of the *Charter*. The law in this area is well established: the officers had the duty to refrain from questioning Ms. Tizya prior to giving her a reasonable opportunity to speak with counsel, as she had requested. They did not. The breach is concerning. The police's questions undermined Ms. Tizya's right to counsel. The statements she made were in response to police questions. The impact on Ms. Tizya's *Charter*-protected interests is important. The circumstances in which she made those utterances raise

questions about their reliability. On balance, I am of the view that the admission of Ms. Tizya's utterances would bring the administration of justice into disrepute.

[13] As I have determined that the evidence gathered as a result of the unlawful arrests of the applicants should be excluded pursuant to s. 24(2) of the *Charter*, I need not decide the specific ss. 8 and 10(b) *Charter* issues raised by Ms. Tizya with respect to her strip search.

[14] Finally, the late disclosure by the Crown of an officer's supplementary occurrence report did not breach the applicants' right to make full answer and defence pursuant to s. 7 of the *Charter*. The adjournment granted to the applicants after they received the officer's report was the appropriate redress to the late disclosure.

**1) Were the roadside arrests of Mr. Asuchak and Ms. Tizya unlawful and contrary to their rights to be protected from arbitrary detention pursuant to s. 9 of the *Charter?***

[15] The applicants contend that the police did not have reasonable grounds to arrest them and that, consequently, their arrests were unlawful and their detention was arbitrary and contrary to s. 9 of the *Charter*.

[16] The applicants and the Crown agree on the well established test to determine the legality of the applicants' arrests and the threshold to establish a violation of s. 9 of the *Charter*. They differ on their assessment of the testimonies of the RCMP officers and the conclusions to be drawn from it.

**Positions of the parties**

[17] The applicants submit that the officers lacked reasonable grounds to arrest them roadside, rendering their arrests unlawful and, therefore, arbitrary and contrary to s. 9 of the *Charter*.

[18] The applicants submit that Cpl. Hutton's subjective belief that he had reasonable grounds to arrest the applicants, as occupants of a vehicle he suspected was involved in a drug transaction, is not objectively justifiable. The applicants submit that Cpl. Hutton directed other members of the surveillance team to pull over the vehicle they occupied and arrest them, prior to arresting the alleged drug buyer and seizing cocaine from him. The applicants submit that Cpl. Hutton only had suspicions that they were involved in drug trafficking at the time he directed that they be pulled over and arrested, and the cocaine he subsequently found on the alleged buyer cannot retroactively enhance the suspicions he had when he directed the arrests.

[19] The applicants submit that the police officers who testified on the *Charter* applications all provided different accounts of the timing and substance of the information that was relayed over the radio prior to their arrests. According to the applicants, the lack of contemporaneous notes and the inconsistencies in the police evidence are serious and should raise concerns about the credibility and reliability of the police officers' testimonies. The applicants submit that the evidence from the police lacks reliability to an extent that makes it difficult to determine what Cpl. Hutton observed and when he observed it, in relation to the timing of his direction to arrest them.

[20] The applicants submit that, even if I were to find that Cpl. Hutton directed the arrests after he located the drug on the alleged buyer, he still did not have reasonable grounds to arrest them because he acknowledged during his testimony that the thought of the alleged buyer being the seller crossed his mind prior to the arrests of the applicants, therefore putting the strength of his subjective belief into question.

[21] Crown counsel concedes that the applicants were detained by police as a result of their arrests after their vehicle was stopped roadside.

[22] However, Crown counsel submits that the RCMP officers had reasonable grounds to believe the applicants were in possession of cocaine for the purpose of trafficking prior to arresting them.

[23] Crown counsel submits that, in assessing the officers' reasonable grounds to arrest, I must look at the totality of the circumstances and not examine each fact or observation made by any one of the officers in isolation.

[24] Crown counsel submits that the evidence, as a whole, reveals that:

(i) Cpl. Hutton formed his reasonable grounds to arrest the applicants when he arrested the suspected buyer and seized a small quantity of cocaine from him;

(ii) shortly thereafter, he communicated to Cst. Newbury that the applicants could be pulled over and arrested for trafficking in cocaine, and

(ii) Cst. Newbury relayed that information via radio to the other members of the surveillance team.

[25] Crown counsel submits that the evidence reveals the officers subjectively believed they had reasonable grounds to arrest the applicants for trafficking in cocaine and possession for the purpose of trafficking in cocaine.

[26] Crown counsel submits that based on the totality of the circumstances, which includes:

(i) the observations made by the officers themselves and the information they received from others;

(ii) the rapidly evolving situation in which they were acting; and

(iii) the experience of the police officers involved in this case,

the officers' subjective grounds to believe that the applicants were or had recently been in possession of cocaine for the purpose of trafficking and had been trafficking in cocaine are objectively justifiable.

[27] Crown counsel submits that, as a result, the applicants were lawfully arrested pursuant to s. 495 of the *Criminal Code*, and, consequently, there was no violation of the applicants' s. 9 *Charter* right to not be arbitrarily detained.

**Facts**

[28] The facts relevant to the RCMP officers' grounds to arrest the applicants are as follows. On July 23, 2020, Cpl. Mitchell Hutton, Cpl. Martin Fry, Cst. Geremy Newbury, Cst. Neil Gillis, Cst. Joseph Benedet and Cst. Joe Miller, who were assigned to the Crime Reduction Unit ("CRU") of the Whitehorse RCMP, conducted police surveillance targeting street level drug trafficking in Whitehorse.

The officers participating in the surveillance wore plain clothes and drove covert police vehicles. They communicated with one another via police radio. Their radio communications were not recorded.

**Cpl. Hutton**

[29] Cpl. Hutton made the observations that led to the roadside arrests of the applicants. He was alone in his covert vehicle when he made the observations.

[30] Cpl. Hutton is an experienced officer who has been with the Yukon RCMP since the beginning of his career, approximately 14 years ago. He worked with the Drug Section for two years. He was also with the Federal Investigations Unit for three-and one-half years, where he was tasked almost exclusively with conducting drug investigations. In addition, most of his work with the CRU was focused on street level

drug investigations. Cpl. Hutton estimates that he has participated in over 200 investigations related to possession of drugs for the purpose of trafficking. Cpl. Hutton has testified in several drug trials and has been qualified to give expert opinion evidence with respect to cocaine trafficking before the court in the Yukon.

[31] Cpl. Hutton testified that police mostly observe in Whitehorse “dial-a-dope” drug trafficking whereby individuals drive around town with their cell phones taking phone calls or orders from customers who they then meet in specific locations to conduct a drug transaction prior to moving on to the next customer.

[32] Not long before making the observations that are at issue in this case, Cpl. Hutton positioned his vehicle in the vicinity of 5131 5th Avenue, Whitehorse. He did so based on a few anonymous tips he had received regarding drug trafficking activities in and around that building. In cross-examination, Cpl. Hutton acknowledged that this information was also consistent with a resident of the building being engaged in drug trafficking.

[33] At approximately 8:40 p.m., Cpl. Hutton observed a male exiting the front of the building. The male walked to the sidewalk on 5th Avenue and looked in both directions. The male then put his hoodie over his head and looked in both directions again. According to Cpl. Hutton, the male appeared to be looking for someone. While acknowledging that the male’s behaviour at that point was not necessarily out of the ordinary, Cpl. Hutton pointed out that he had seen individuals behaving in that particular way a number of times in the past when attempting to locate their drug dealer.

[34] The male walked south around the building, then eastbound on Wood Street towards a silver Chevrolet sedan. From where he was, Cpl. Hutton could observe the driver of the sedan to be a white male with white hair. He could also see that there was

a front passenger in the vehicle. However, his viewpoint did not allow him to make any observation of that passenger.

[35] Cpl. Hutton observed the male on foot squatting down somewhat and reaching down the front of his pants with his right hand. The male then started walking again. His hands came together, then separated. The male's left hand was clenched and his right hand was open. Cpl. Hutton stated that, in the past, he has seen individuals walking with a clenched fist with either money or drugs in that hand for the purpose of buying or selling drugs. The male's hands then came together again. Cpl Hutton testified that the male appeared to be pushing something further into his left clenched fist with his right hand.

[36] Cpl. Hutton testified that this behaviour, in addition to the anonymous tips he had received, led him to believe that the male may have been approaching the car for the purpose of buying drugs and might have money in his clenched hand.

[37] Cpl. Hutton further observed the man walking up to the silver sedan and leaning into the driver's side of the vehicle. The male reached into the car with his left clenched fist and opened his hand. According to Cpl. Hutton, the man appeared to be dropping something into the driver's hand. Cpl. Hutton believed he saw something fall from the male's hand, but he could not say for certain. The man's left hand then remained in the car and slightly out of Cpl. Hutton's view. When the male pulled his hand out of the vehicle, his fist was clenched again. The male then turned around and started walking back towards the building. While doing so, the male put his left hand into a left-side pocket at waist level. When his hand came out, it was open again. Cpl. Hutton testified that what he had just observed looked very similar to drug transactions he had observed in the past.

[38] Cpl. Hutton then positioned himself to see the licence plate of the vehicle and confirmed with Cpl. Fry it was the same vehicle they had discussed in the morning. Cpl. Hutton testified to having a general discussion with Cpl. Fry earlier that day about a number of possible targets for drug trafficking offences. During that conversation Cpl. Fry had informed him that Mr. Asuchak had been seen driving a silver Chevrolet sedan with the licence plate HZA99.

[39] Cpl. Hutton testified that he knew Mr. Asuchak had been the subject of investigations in the past. However, he had never dealt with Mr. Asuchak or had any conversation with him prior to July 23, 2020.

[40] Cpl. Hutton estimates that he was half a block away from 5131 5th Avenue, or approximately 30 metres, when he made his observations through the window of his vehicle, and that he was closer when the male approached the silver Chevrolet sedan on Wood Street. I note that Cpl. Hutton stated that he is not very good at estimating distances. It was daytime and bright out when Cpl. Hutton made his observations.

[41] Cpl. Hutton informed the other members of the surveillance team via radio that he intended to arrest the suspected buyer and requested that the other members attend the area to conduct surveillance on the silver sedan. While Cpl. Hutton testified that he did not recall the exact words he said over the radio, he was definitive in his answer that he did not tell the other officers to arrest the occupants of the vehicle before he arrested the buyer. Cpl. Hutton testified that this was the type of surveillance operation the CRU team conducted regularly at the time and their practice was to confirm that the alleged buyer had drugs prior to taking any action on the trafficker.

[42] Cpl. Hutton then approached the suspected buyer and arrested him for possession of a controlled substance. As soon as Cpl. Hutton arrested him, the male

asked “Do you want it?” Cpl. Hutton said “yes”. The male pulled out what looked like a folded Canadian Tire money bill and placed it into the hand of the officer. Cpl. Hutton asked him what it was and the male stated it was a gram of “soft”, which, in Cpl. Hutton’s experience means powdered cocaine. The male confirmed he had just purchased it with two fifty dollar bills. The arrest took place at approximately 8:45 p.m.

[43] Cpl. Hutton testified that Cst. Newbury arrived around that time. Cpl. Hutton had a very short conversation with Cst. Newbury. He told Cst. Newbury that he had found drugs on the buyer, and that the surveillance team could stop the silver sedan and arrest its occupants for trafficking. Cpl. Hutton believed Cst. Newbury relayed that information to the other members over the radio.

[44] Cpl. Hutton was clear during his testimony to the effect that he did not go back on the police radio to confirm he had found drugs on the buyer or to direct the arrest of the occupants of the vehicle. Cpl. Hutton stated that he only went back on the radio later to inquire whether the team had stopped the vehicle. Once he received confirmation they had, he released the buyer because it is not his practice to lay simple possession charges. Cpl. Hutton explained that he detained the buyer until he had confirmation that the police had stopped the vehicle to prevent any possibility of the buyer alerting the occupants of the vehicle about the police operation. Cpl. Hutton further stated that the pat-down search he conducted on the buyer upon his arrest did not reveal anything that would be consistent with trafficking activities. Cpl. Hutton stated that it is not his practice to conduct or authorize a strip search for individuals arrested for simple possession. Cpl. Hutton did not take a statement from the buyer. Cpl. Hutton confirmed he was aware the buyer had a criminal record. However, he testified that he did not rely on what the buyer said to him to form his reasonable grounds that the occupants of the silver

sedan were involved in drug trafficking. He relied on his observations and the drug he seized from the buyer.

[45] After releasing the buyer, Cpl. Hutton drove to the bottom of Two Mile Hill where he arrived at approximately 9:05 p.m. Upon arrival, he saw that other members of the surveillance team had pulled over the silver sedan he had earlier observed. Cpl. Hutton did not have any interactions with the occupants of the vehicle roadside. He does not recall at what point or how he learned the identity of the occupants of the vehicle. Cpl. Hutton testified that he wrote his notes regarding his observations either just after releasing the buyer or upon his arrival at the bottom of Two Mile Hill

**Cst. Newbury**

[46] Cst. Newbury has been an RCMP officer since 2007. He began his career with the RCMP in Manitoba where he served as a general duty officer for ten years and, after, as a member of the Federal Investigations Unit for approximately three years. Cst. Newbury was then transferred to the Yukon where he has been assigned to the Federal Investigations Unit in Whitehorse for approximately two years. Cst. Newbury has participated in many traffic stops, while on general duty policing in Manitoba, where drugs, usually marijuana, were found. He has also taken a number of courses related to drug investigations over the years, including a Drug Investigative Technique Course. Cst. Newbury testified that there are basic key indicators of street level drug trafficking involving motor vehicles such as, short duration encounters between the occupants of two vehicles or the occupants of a vehicle and a pedestrian, hand-to-hand contact during the short encounters, individuals putting their hand inside a vehicle and removing it quickly, individuals constantly looking side to side, and the use of older vehicles that are usually dirty inside.

[47] Cst. Newbury testified that, on July 23, 2020, he was in his covert surveillance vehicle near the Whitehorse RCMP detachment when he heard Cpl. Hutton say on the police radio that he had witnessed a hand-to-hand drug transaction between a "grey Chevy Cobalt" and a man on the side of the road on 5th Avenue. Cpl. Hutton added that he was going to make an arrest. Cst. Newbury does not recall if Cpl. Hutton mentioned whether the vehicle he saw was Ron Asuchak's vehicle. Cst. Newbury testified that it was clear and bright out at the time he heard the radio announcement.

[48] As he was the closest to Cpl. Hutton's location, Cst. Newbury hurried to assist with the arrest. It took him approximately one minute to drive to Cpl. Hutton's location. However, by the time he arrived, Cpl. Hutton had already arrested the individual. Cpl. Hutton told him that the individual had bought soft cocaine powder from Ron Asuchak, and Cpl. Hutton authorized the arrest of Mr. Asuchak.

[49] Cst. Newbury testified he went on the radio to relay that information to the other members of the surveillance team. While he does not remember the exact words he pronounced, Cst. Newbury testified that, at that point, he would have communicated via radio to the other members of the surveillance team that the buyer was positive for drugs and that Ron Asuchak could be arrested for drug trafficking. Also, he would have provided a description of the vehicle of interest, a "grey Chevy Cobalt" with licence plate number HZA99, if it had not already been done.

[50] Cst. Newbury does not recall if he communicated over the radio that Ron Asuchak was the driver of the vehicle. However, at the very least, he would have described the occupants of the vehicle as a Caucasian male driver and a First Nation female passenger. Cst. Newbury stated that the information he provided to the team over the radio came directly from Cpl. Hutton.

[51] Cst. Newbury testified that, subsequently, the surveillance team located the target vehicle on 4th Avenue. Cst. Newbury drove to that location and saw that the vehicle had pulled into a parking lot just past the intersection of 4th Avenue and 2nd Avenue, where 4th Avenue turns into Two Mile Hill. Cst. Newbury drove past the vehicle and effected a U-turn. While doing so, Cst. Newbury observed that the occupants of the vehicle had their heads, eyes, and hands down. Cst. Newbury testified that it looked as though they were "fiddling" with something. However, he acknowledged that he could not see what they were doing inside the vehicle. Cst. Newbury testified that the police's main concern at the time was that the occupants were disposing or hiding drugs they had on them.

[52] Cst. Newbury testified that, when the target vehicle pulled out of the parking lot back onto Two Mill Hill, the members of the surveillance team got in position, activated the lights on their vehicles, slowed the target vehicle down and stopped it at the bottom of Two Mile Hill. He added that no physical contact occurred between the police vehicles and the target vehicle. The police blocked traffic for a short period of time while they were proceeding with the stop and the arrests. Cst. Newbury described the traffic as busy on Two Mile Hill at the time.

[53] Cst. Newbury stopped his police vehicle beside the target vehicle. He drew his firearm, walked to the driver's door, opened it, and arrested the driver, whom he identified as Ronald Asuchak, for trafficking in cocaine. Cst. Newbury took Mr. Asuchak out of the vehicle and placed handcuffs on him. While doing so, Cst. Newbury realized that Mr. Asuchak had mobility issues, so he retrieved Mr. Asuchak's crutch from the vehicle for him. They then walked slowly to Cst. Benedet's police vehicle, which was parked nearby. During that time, Cst. Newbury told Mr. Asuchak, from memory, that he

had the right to contact a lawyer and to remain silent. Cst. Benedet also gave Mr. Asuchak his *Charter* rights by memory when they arrived at his police vehicle. Mr. Asuchak stated he understood and wanted to speak to a lawyer.

[54] Cst. Newbury explained that Mr. Asuchak was not afforded the opportunity to speak with counsel roadside because the arrest had taken place on a busy road and there were concerns for the safety of all those involved, as well as for the public using the road, if they remained there. According to Cst. Newbury, the goal was to escort Mr. Asuchak to the WCC where he would be provided with an opportunity to speak with counsel. Cst. Newbury confirmed that Mr. Asuchak was cooperative throughout the process.

[55] Cst. Newbury does not know which officer dealt with the passenger, Ms. Tizya, because his focus was on Mr. Asuchak at the time. However, he remembers observing Ms. Tizya brushing what appeared to be cocaine off her clothes or her seat onto the ground while he was arresting Mr. Asuchak. He also recalls hearing Cpl. Fry ordering her to stop.

[56] According to Cst. Newbury, approximately 10 minutes elapsed between the moment he first heard Cpl. Hutton on the radio and the moment the vehicle was stopped at the bottom of Two Mile Hill. Cst. Newbury testified he was uncertain whether it was Cpl. Fry or Cpl. Hutton who ordered the “take down”.

**Cpl. Fry**

[57] Cpl. Fry has been a member of the RCMP since 2005. From August 2005 to December 2008, he was assigned to general duty policing in the Halifax area. From December 2008 to December 2015, he was assigned to specialized units in the Halifax area (Street Crime Enforcement Unit, Integrated Drug Unit and Integrated Guns and

Gangs Unit) where a significant portion of his responsibilities included the enforcement of the *CDSA*.

[58] Cpl. Fry was assigned to the Federal Investigations Unit in Whitehorse from December 2015 to February 2021. The Federal Investigations Unit is responsible for all aspects of federal policing in the Yukon. The enforcement of the *CDSA* forms most of the work of that unit. He has been assigned to the Historical Case Unit of the Yukon RCMP since February 2021 investigating missing persons and historical homicides.

[59] In the spring of 2020, he was seconded to the CRU for a few months. The mandate of that unit at the time was the investigation of drug trafficking offences.

[60] Cpl. Fry was alone in an unmarked police vehicle in downtown Whitehorse when he heard Cpl. Hutton notify over the radio that he had observed a drug transaction between an individual and Mr. Asuchak, and that he had arrested the buyer. The information was that Mr. Asuchak was driving the same vehicle he previously had been seen driving up the driveway of a location where the RCMP were executing a search warrant.

[61] Cpl. Fry had a brief conversation with Cpl. Hutton over the radio. Cpl. Hutton explained to him that he was confident he had observed a drug transaction, he identified the vehicle involved and he identified Mr. Asuchak. Cpl. Fry confirmed with Cpl. Hutton that he was certain he had witnessed a drug transaction and his grounds. Cpl. Hutton said over the radio that he wanted the vehicle stopped. According to Cpl. Fry, the plan, from then on, was to stop the vehicle and arrest the occupants. Cpl. Fry did not recall when he became aware that the buyer was in possession of cocaine.

[62] After his conversation with Cpl. Hutton, Cpl. Fry first observed the target vehicle travelling north past the Yukon Inn. The second time he saw the vehicle, it was parked

at the corner of 2nd Avenue and Two Mile Hill. Cpl. Fry alerted the other members of the surveillance team to that effect. He did not see what the occupants of the vehicle were doing at the time. Cpl. Fry stated that, based on his past knowledge of Mr. Asuchak, he believed that the driver looked like him. In addition, Cpl. Fry has no reason to believe that the driver had changed between the moment he first saw the vehicle and when it was stopped at the bottom of Two Mile Hill.

[63] Cpl. Fry is one of the officers who participated in the roadside stop of the vehicle at the bottom of Two Mile Hill. He did so by pulling his police vehicle in front of the Chevrolet Cobalt after it had already come to a stop to prevent it from moving forward. Cpl. Fry then approached the passenger side of the target vehicle. He opened the passenger side door and saw that the front passenger, Ms. Tizya, was brushing off what he thought was cocaine on her pants onto the floor of the vehicle. Cpl. Fry told her she was under arrest for possession for the purpose of trafficking in cocaine and trafficking in cocaine. Cpl. Fry testified that Ms. Tizya said: “its not cocaine, its donuts”. Cpl. Fry replied that she was not brushing off donuts and to stop what she was doing. Cpl. Fry observed what he believed to be cocaine scattered all over the interior of the vehicle, particularly, in the front driver seat and the front passenger seat.

[64] After arresting Ms. Tizya, Cpl. Fry immediately turned her over to Cst. Gillis who provided her with her *Charter* rights and police caution. Cpl. Fry did not have any further interactions with Ms. Tizya or Mr. Asuchak.

[65] Cpl. Fry confirmed that Cst. Gillis was nearby when he arrested Ms. Tizya. However, Cpl. Fry is unable to recall whether Cst. Gillis arrived at the same time he was approaching the vehicle.

**Cst. Miller**

[66] Cst. Miller has been a member of the RCMP for 12 years. He started his career with the RCMP in the Northwest Territories where he was posted for seven years prior to transferring to the Yukon RCMP in August 2016. He has been assigned to the Major Crimes Unit of the Yukon RCMP since February 2019. In the spring of 2020, he was seconded for a few months to the CRU.

[67] On July 23, 2020, at approximately 8:40 p.m., Cst. Miller heard Cpl. Hutton say over the radio that he had witnessed what he believed to be a drug transaction on 5th Avenue, at a location just south of the RCMP Detachment. Cpl. Hutton provided a description of a small sedan vehicle bearing licence plate HZA99 with a male driver believed to be Mr. Asuchak. Cpl. Hutton indicated that the occupants of the vehicle were now subject to arrest. Cpl. Hutton added that he was going to arrest the alleged buyer of drugs.

[68] Cst. Miller was alone in an unmarked police vehicle near the Prospector Trailer Park on the Alaska Highway when he heard Cpl. Hutton's radio communication. Cst. Miller immediately left his position to drive towards downtown Whitehorse. Cst. Miller recalls that while he was driving, the name of the buyer, who had been arrested, was mentioned on the radio. Cst. Miller does not recall hearing much more on the radio because his focus was on driving down Two Mile Hill to join the other members of the surveillance team to stop the vehicle and arrest its occupants.

[69] Cst. Miller estimates that it took him three to four minutes to drive from his initial position to the bottom of Two Mile Hill. As he was coming down Two Mile Hill, Cst. Miller heard Cpl. Fry announcing over the radio that the target vehicle was parked at the intersection of 2nd Avenue and 4th Avenue at a barber shop location.

[70] When he arrived on scene, Cst. Miller saw that the other officers were already pulling over the vehicle and proceeding with the arrests. Cst. Miller saw Ms. Tizya and Mr. Asuchak being removed from the vehicle by other police officers. However, he did not have any interactions with either of them. Cst. Miller assisted his colleagues by directing traffic, which he described as being very busy at the time, to ensure the safety of all of those on the road.

**Cst. Gillis**

[71] Cst. Gillis has been assigned to the Federal Investigations Unit of the Yukon for the past three years, which mandate includes the enforcement of the *CDSA*.

[72] Prior to that, he was assigned to four different RCMP postings in Saskatchewan over a period of nine years. His last posting in Saskatchewan was with the RCMP Federal Investigations Unit in Regina. During that time, he was on secondment for a period of three months to the Regina Police Service to assist with investigations regarding street level crime, drug enforcement and gun violence. Cst. Gillis would have been involved in roadside stops involving *CDSA* matters two dozen times prior to the summer of 2020. In the summer of 2020, Cst. Gillis was temporarily seconded to the CRU. At the time, the mandate of the CRU was to target street level drug trafficking.

[73] At approximately 8:30 p.m., on July 23, 2020, Cst. Gillis heard Cpl. Hutton say over the police radio that he had observed a vehicle being driven by Mr. Asuchak; that Mr. Asuchak was believed to be involved or known to be involved in *CDSA* activity within the Yukon; and that Cpl. Hutton was to commence surveillance on the vehicle driven by Mr. Asuchak.

[74] Approximately a minute later, Cst. Gillis heard Cpl. Hutton announce over the radio that he had observed a suspected buyer approached the vehicle and that he was going to arrest the individual.

[75] According to Cst. Gillis, the vehicle was described as a grey four-door sedan. Cst. Gillis did not make a note of the licence plate of the vehicle, which would also have been provided over the radio.

[76] Cst. Gillis was at the intersection of 2nd Avenue and 4th Avenue, coming down Two Mile Hill, when he heard Cpl. Hutton's second announcement. Cst. Gillis then saw the vehicle driven by Mr. Asuchak coming towards him on 4th Avenue. He identified the driver as Mr. Asuchak and observed that the front passenger was a First Nation female. Cst. Gillis recognized Mr. Asuchak from previous photos he had seen. Cst. Gillis then turned on a side street to await further instructions.

[77] Shortly after, Cst. Gillis heard Cpl. Hutton announce on the radio that he had located cocaine on the suspected buyer and that the vehicle had driven away from the area.

[78] Cst. Gillis then proceeded north on 4th Avenue. At some point, the target vehicle left the parking lot at the corner of 2nd Avenue and 4th Avenue, where it had been parked. Cst. Gillis turned on his lights and sirens and pulled behind the vehicle, which stopped right away.

[79] Cst. Gillis, wearing his police vest, walked to the passenger side of the target vehicle, as he had observed that Cst. Newbury had approached the driver's side of the vehicle. Cst. Gillis opened the front passenger door and arrested Ms. Tizya for trafficking in cocaine. He did not draw his sidearm while doing so. At the time, Cst. Gillis observed a white crystallized substance, which appeared to be crack cocaine, scattered

throughout the vehicle. Cst. Gillis testified that Cpl. Fry was beside him when he arrested Ms. Tizya. However, Cst. Gillis stated that he was the officer who told Ms. Tizya that she was under arrest.

[80] Cst. Gillis testified that his reasonable grounds to believe that the occupants of the vehicle were engaged in trafficking in cocaine came from the observations that had been relayed over the radio by Cpl. Hutton, and then by his own observations of the substance in the vehicle, which he believed to be crack cocaine.

**Cst. Benedet**

[81] Cst. Benedet has been a member of the RCMP since 2007. From 2007 to 2010 he was posted in Rankin Inlet, Nunavut. From 2010 to 2015, he was assigned to the RCMP drug section at the Toronto Pearson International Airport. Cst. Benedet has been posted with the Yukon Division of the RCMP since 2015. He has been assigned to the Federal Investigations Unit in Whitehorse since September 2017. Cst. Benedet was seconded to the CRU in Whitehorse from April to September 2020. The primary focus of the CRU at the time was the investigation of street level drug trafficking. Cst. Benedet was involved in approximately a dozen files during his posting with the CRU.

[82] On July 23, 2020, Cst. Benedet was conducting surveillance in an unmarked police vehicle when, at approximately 8:40 p.m., he heard Cpl. Hutton advise over the radio that he had observed a drug transaction and was going to arrest the suspected drug buyer.

[83] Cst. Benedet testified that he then heard Cpl. Hutton announcing over the radio that he had arrested and found drugs on the buyer. Cpl. Hutton also directed the surveillance team to pull over the suspect vehicle. Cst. Benedet recalls that the vehicle was described as a beige vehicle.

[84] The next radio communication Cst. Benedet heard was to the effect that the rest of the surveillance team had stopped the vehicle involved in the transaction on Two Mile Hill. When Cst. Benedet arrived at the bottom of Two Mile Hill, he parked his vehicle on the side of the road behind the others. He saw Cst. Newbury walking towards him with Mr. Asuchak. Cst. Benedet noticed that Mr. Asuchak had a mobility impairment. Cst. Benedet got out of his car and took over custody of Mr. Asuchak. He was advised that Mr. Asuchak had been arrested and it was requested that he provide him with his *Charter* rights. Cst. Benedet did so and ensured Mr. Asuchak understood. Mr. Asuchak requested to speak with counsel. Cst. Benedet testified that Mr. Asuchak spoke with counsel after he was strip searched at the APU.

[85] Cst. Benedet acknowledged that there is no mention in his notes or his supplementary occurrence report that he heard Cpl. Hutton announced over the radio that he had found cocaine on the buyer, and that it was Cpl. Hutton who directed the team to arrest the persons in the vehicle. However, Cst. Benedet testified that he has an independent recollection of hearing Cpl. Hutton make the announcement over the radio.

**Analysis**

[86] Section 9 of the *Charter* provides that everyone has the right to not be arbitrarily detained or imprisoned.

[87] A detention not authorized by statute or common law is arbitrary and contrary to s. 9 of the *Charter*. As stated by the Supreme Court of Canada in *R v Grant*, 2009 SCC 32 (“*Grant*”) at para. 54:

> … Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

[88] The authority of a police officer to arrest a person without a warrant is found at s. 495 of the *Criminal Code*.

[89] The applicants were arrested without a warrant for trafficking and possession for the purpose of trafficking in cocaine (a Schedule 1 substance), which are straight indictable offences pursuant to s. 5 of the *CDSA*.

[90] Section 495(1)(a) provides that peace officers have the authority to arrest someone without a warrant if they have reasonable grounds to believe that the person has committed or is about to commit an indictable offence.

[91] Therefore, the RCMP officers who directed the arrests or arrested the applicants must have had reasonable grounds to believe that they had committed or were about to commit an indictable offence(s) before making the arrests (*R v Storrey*, [1990] 1 SCR 241 ("*Storrey*") at 253).

[92] There are two components to the assessment of whether police officers have reasonable grounds to arrest. First, they must subjectively have reasonable grounds to believe that the person has committed or is about to commit an indictable offence. Second, those subjective grounds must be justified from an objective point of view (*Storrey* at 250-251).

[93] The objective component of the assessment requires that "a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest" (*Storrey* at 251). The reasonable person "… must be deemed to have the same level of experience as the police officer whose actions are being scrutinized; otherwise, the reasonable man would have no standard or guideline against which to measure the reasonableness of the officer's

belief (*R v Quillian* (1991), 122 AR 131 (QB) at para. 68)" (*R v Hanson*, [2009] OJ No 4152 (Ont Sup Ct) ("*Hanson*") at para. 59. See also *R v Tran*, 2007 BCCA 491 at para. 12).

[94] In addition, the court must look at the totality of the circumstances relied upon by the arresting officer or the officer who ordered the arrest when assessing the objective reasonableness of the subjective grounds for arrest. It is not appropriate to consider each fact in isolation (*R v Labelle*, 2016 ONCA 110 at para. 10). The court shall also take into consideration inferences that trained police officers are entitled to draw and deductions they are entitled to make. In addition, the objective assessment will include the dynamics within which the police officers acted (*Hanson* at para. 58).

[95] Finally, the reasonable grounds standard requires more than mere suspicion but less than the civil burden of proof on a balance of probabilities (*R v Francis*, 2015 BCPC 150 at para. 44 summarizing the legal principles set out in *Hunter v Southam Inc*, [1984] 2 SCR 145; *R v Debot*, [1989] 2 SCR 1140; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40).

[96] Six RCMP officers testified to participating in the police surveillance that led to the arrests of the applicants. Each officer had, to different extents, a different recollection of what they had heard, observed, or said prior to the arrests. While some inconsistencies are to be expected when a number of officers with different vantage points participate in a surveillance operation, the number and nature of the inconsistencies in this case raise serious concerns about the credibility and reliability of the evidence of the officers involved in the investigation.

[97] In this case, the grounds for arrest came from the observations of Cpl. Hutton. Cpl. Hutton definitively stated that he was not the officer who directed, over the radio,

the other members of the surveillance team to pull over the vehicle and arrest its occupants. Cpl. Hutton testified that what he relayed over the radio was, in essence, that he had witnessed what he believed was a drug transaction, that he intended to arrest the alleged buyer, and that he wanted his colleagues to conduct surveillance on the vehicle involved in that suspected transaction until he had confirmed further grounds. Cpl. Hutton was adamant that he did not tell the other officers that the vehicle could be stopped and its occupants arrested at that time. Cpl. Hutton testified that it is only after he arrested the buyer and confirmed he had drugs in his possession that he told Cst. Newbury, in person, that the vehicle could be stopped, and its occupants arrested, because he did not have reasonable grounds to arrest before then.

Cpl. Hutton added that Cst. Newbury is the one who would have relayed his information and direction over the radio.

[98] Cst. Newbury corroborates Cpl. Hutton's testimony in that regard. Cst. Newbury testified he heard Cpl. Hutton say over the radio that he had witnessed a drug transaction and that he was going to arrest the suspected buyer. Cst. Newbury testified that he attended Cpl. Hutton's location as soon as he could to assist with the arrest. However, when he arrived, Cpl. Hutton had already arrested the buyer and confirmed he had drugs on him.

[99] Cst. Newbury testified that he then communicated that information to the other officers over the radio. While he does not remember exactly what he said, Cst. Newbury testified that he would have indicated that the buyer was positive for drugs and that the driver could be arrested for drug trafficking. Cst. Newbury also testified that he would have provided a description of the vehicle if that had not already been done. While Cst. Newbury did not recall if he communicated, over the radio, that the driver of the

vehicle was Ron Asuchak, he stated that, at the very least, he would have described the occupants of the vehicle as a Caucasian male driver and a First Nation female passenger.

[100] What emerges from Cst. Newbury's constant use of the conditional tense during that aspect of his testimony is that he did not seem to remember what exactly he said over the radio. He nonetheless testified about what he assumed he would have said. In addition, while Cst. Newbury testified that he would have, at least, described the passenger of the vehicle as a First Nation female (which is information he could only have received from Cpl. Hutton at that point), Cpl. Hutton testified that, other than to see that there was a passenger in the vehicle, he was unable to make any observation of that passenger.

[101] In addition, it is concerning that none of the other members of the surveillance team testified to hearing Cst. Newbury, whom they all knew, make that critical announcement over the radio confirming that drugs had been found on the buyer and directing them to stop the vehicle and arrest its occupants. According to Cpl. Hutton and Cst. Newbury, this is information that all of the officers would have been waiting for. Instead, all the other members testified to hearing Cpl. Hutton providing that direction, over the radio, at one point or another.

[102] I also note that, in cross-examination, Cst. Newbury stated that he was unsure whether it was Cpl. Hutton or Cpl. Fry who directed the "take down". Cst. Newbury's response contradicts his earlier testimony that Cpl. Hutton is the one who told him that the vehicle could be stopped. While Cst. Newbury may have been referring to the specific moment when the officers got in position to pull over the vehicle, if he did, his testimony on that point was confusing. I note that the other officers involved in stopping

the vehicle did not recall a formal “take down” order being given at the time they all got in position to effect the stop.

[103] Cpl. Fry’s testimony corroborates in part Cpl. Hutton’s testimony, in that he recalled confirming over the radio with Cpl. Hutton that the vehicle Cpl. Hutton had observed was the one associated with Mr. Asuchak. Cst. Gillis also testified that the first radio announcement he heard from Cpl. Hutton was that he had observed a vehicle being driven by Mr. Asuchak.

[104] However, the remainder of Cpl. Fry’s testimony regarding the grounds for arrest contradict in large part Cpl. Hutton’s testimony. Cpl. Fry testified to hearing Cpl. Hutton announcing over the radio that he had observed a drug transaction between an individual and the driver of a vehicle, and that he had arrested the buyer. According to Cpl. Fry, Cpl. Hutton was not only confident he had observed a drug transaction, but he also described the vehicle involved in the transaction and identified Mr. Asuchak as the driver of that vehicle. Cpl. Fry also testified to having a short conversation with Cpl. Hutton over the radio at the time to confirm his grounds for arrest. Cpl. Fry testified that Cpl. Hutton stated over the radio that he wanted the vehicle stopped, and that, as a result, the plan going forward was to stop the vehicle and arrest its occupants.

[105] Cpl. Fry’s testimony is incompatible with Cpl. Hutton’s in many ways. First, Cpl. Hutton testified that he was not able to identify the driver of the vehicle at the time he made his observations, whereas Cpl. Fry testified that Cpl. Hutton confirmed over the radio that the driver was Mr. Asuchak. I note that Cpl. Hutton testified he had never dealt with Mr. Asuchak prior to that date. Second, Cpl. Hutton testified that he had not yet arrested the buyer when he announced, over the radio, that he had observed a drug transaction. In addition, Cpl. Hutton was certain he never directed, over the radio, that

the vehicle be pulled over and its occupants arrested. However, Cpl. Fry testified that Cpl. Hutton is the one who directed, over the radio, the stop and the arrests. Finally, the only conversation Cpl. Hutton testified to having with Cpl. Fry, over the radio and prior to the arrests, was to confirm that the vehicle he had observed was the same vehicle they had talked about that morning, which was associated with Mr. Asuchak. Yet, Cpl. Fry testified to having a conversation with Cpl. Hutton to confirm not only his observations but his grounds for arrest. I note that Cpl. Hutton testified that he only formed his reasonable grounds to arrest after he found drugs on the buyer.

[106] Cst. Gillis and Cst. Miller also contradict Cpl. Hutton in that they testified that it was Cpl. Hutton who gave the direction to stop the vehicle and that he did so, over the radio, before arresting the alleged buyer.

[107] Cst. Benedet also testified to hearing Cpl. Hutton over the radio giving the direction to arrest the occupants of the vehicle. However, he testified that Cpl. Hutton did so in his third radio announcement. According to Cst. Benedet, Cpl. Hutton first announced, over the radio, that he had observed a drug transaction and was going to arrest the buyer. He then came back on the radio to announce he had arrested the buyer and found drugs on him. Finally, it is in his third radio announcement that Cpl. Hutton directed that the vehicle be pulled over. While Cst. Benedet testified to having an independent recollection of hearing three separate radio announcements from Cpl. Hutton, only the first announcement made its way into his Supplementary Occurrence Report written on September 8, 2020. The only other radio announcement he mentions in that report is the one confirming that the vehicle has been stopped. That announcement is not attributed to any officer.

[108] The contradictions in the officers' testimonies therefore extend not only to the number of Cpl. Hutton's radio announcement(s) prior to the arrests of the applicants, but also to their content.

[109] In this case, there is no recording of the officers' radio communications prior to the arrests. The recording would have provided reliable evidence against which to assess the credibility and reliability of the officers' testimonies, and most importantly, of Cpl. Hutton's testimony with respect to his observations, the timing and content of his radio communication(s), and, ultimately, his grounds for arrest.

[110] As a result, the evidence I have before me to assess the grounds for arrest is the testimonies of officers contradicting one another on several important aspects of what they heard and communicated to others prior to the arrests of the applicants. I am of the view that these many contradictions regarding not only the number of radio communications but also their substance negatively impact the overall credibility and reliability of the police's evidence. Most importantly, these contradictions negatively impact the overall credibility and reliability of Cpl. Hutton's testimony on important points, such as: whether he communicated over the radio that he had identified Mr. Asuchak as the driver of the vehicle, whereas he testified under oath that he was unable to identify the driver at the time he made his observations; and whether he directed the other officers to stop the vehicle before he arrested the buyer, which he firmly denied under oath.

[111] I am also somewhat skeptical that Cpl. Hutton would have been able to observe every minute detail of the suspected buyer's movements – between the moment he exited the building on 5th Avenue and the moment Cpl. Hutton decided to arrest him, including the way both his hands were positioned (open, close or holding something) at

different times, while Cpl. Hutton was sitting in his car with the windows closed approximately half a block away from the suspected buyer (which Cpl. Hutton approximates to 30 metres) or somewhat less, when the suspected buyer approached the car. I note that the approximate distance from the suspected buyer is the only information Cpl. Hutton provided in his testimony regarding the location of his vehicle when he made the observations. I also note that Cpl. Hutton testified to making those observations without the help of binoculars or other tool that may have given him a closer view of what was happening.

[112] Overall, the lack of reliability and credibility of the police evidence is such that I find myself unable to accept and rely on Cpl. Hutton's evidence regarding the observations (and the timing of those observations) he testified to making prior to the arrests of the applicants, which form the basis of the grounds for arrest. Considering the lack of reliable evidence before me, I find that the arresting officers, and more particularly Cpl. Hutton, did not, subjectively and objectively, have reasonable grounds to believe that the applicants had committed or were about to commit the offences of trafficking in cocaine or possession for the purpose of trafficking in cocaine when they arrested them.

[113] As a result, I find that the arrests of the applicants were unlawful and in violation of their rights to not be arbitrarily detained pursuant to s. 9 of the *Charter*.

**2. Were the police's warrantless searches of the applicants' persons, of their surroundings and of the vehicle they occupied, unreasonable and contrary to s. 8 of the *Charter*?**

[114] Following the arrests of the applicants, the RCMP officers conducted a warrantless search of the applicants, their surroundings, and the vehicle they occupied

at the time of their arrests. While the legality of the searches conducted by the officers is at issue in this case, what the police actually found and seized is not in dispute.

**Positions of the parties**

[115] The applicants submit that all the searches conducted incidental to or following their unlawful arrests are unreasonable and in violation of their s. 8 *Charter* right.

[116] The Crown submits that the search of each applicant and any property in which they claim a privacy interest were lawful as they were incidental to valid and lawful arrests, and they were carried out in a reasonable manner.

**Facts**

[117] Shortly after arresting Mr. Asuchak, and before leaving him in the custody of Cst. Benedet, Cst. Newbury performed a cursory pat-down search on Mr. Asuchak, for safety reasons, prior to his transport to the WCC. Cst. Newbury found a wallet containing a bundle of cash ($4,635) from the front left pocket of Mr. Asuchak's pants. He also found a crack pipe on Mr. Asuchak.

[118] After Ms. Tizya exited the police vehicle, Cst. Alice Cote, who transported Ms. Tizya to the WCC and conducted her strip search, seized 4.74 grams of cocaine (a substance listed in Schedule 1 of the *CDSA*) wrapped in transparent plastic on the back seat of the police vehicle where Ms. Tizya was seated during her transport to the WCC. A video showing an empty back seat prior to Ms. Tizya's arrival, Ms. Tizya wiggling around during her transport, and a white substance wrapped in transparent plastic appearing on the back seat as Ms. Tizya exits the vehicle, was filed as an exhibit on the application.

[119] In addition, Cst. Cote seized a small quantity (3.4 grams) of fentanyl (a substance listed in Schedule 1 of the *CDSA*) that fell from Ms. Tizya's person during the strip search.

[120] Cpl. Hutton found a small quantity (0.73 gram) of crack cocaine in one of the pockets of Ms. Tizya's jeans that Cst. Cote had seized during the strip search because they were covered with a white substance she believed to be cocaine. Cst. Cote also found one piece of suspected crack cocaine (0.18 gram) in Ms. Tizya's jacket.

[121] Cst. Benedet took the applicants' fingerprints after their arrests.

[122] In addition, the police seized the Chevrolet Cobalt at the time of the applicants' arrests and transported it to the RCMP detachment to be searched. The vehicle was moved prior to the search being conducted due to safety concerns arising from constant traffic on Two Mill Hill. A video of the interior of the vehicle was made prior to the search and filed as an exhibit on the application.

[123] Cpl. Hutton seized a cell phone that was ringing from the Chevrolet Cobalt before it was towed to the RCMP. Cpl. Hutton answered three phone calls before turning the cell phone off. He testified to the content of those phone calls on this application.

[124] Also, in the Chevrolet Cobalt, the officers found and seized cocaine (approximately 20 grams), small quantities of codeine (10 tablets) and diazepam (18 tablets), as well as two cell phones, and drug paraphernalia. Codeine is listed in Schedule 1 and diazepam in Schedule 4 of the *CDSA*.

[125] All the items found and seized by the RCMP as a result of the searches incidental to arrest were properly documented. Photographs of the items found were taken and filed on this application. The substances seized were weighed and samples

sent for analysis. The certificates of analyst confirming the nature of the substances seized were filed on this application.

**Analysis**

[126] A warrantless search is presumptively unreasonable. In such a case, it is incumbent on the Crown to prove on a balance of probabilities that the search was reasonable. A search will be reasonable if it meets all of the following three conditions:

(i) it is authorized by law;

(ii) the law itself is reasonable; and

(iii) the manner in which the search is carried out is reasonable (*R v Collins*, [1987] 1 SCR 265 at 278; *R v Golden*, 2001 SCC 83, at para. 44).

[127] In this case, the searches of the applicants' persons, of their surroundings, and of the Chevrolet Cobalt were conducted by the officers without a warrant. The Crown relies on the officers' common law power of search incidental to arrest as the legal authority for the searches.

[128] However, for a search incidental to arrest to be authorized by law for the purpose of s. 8 of the *Charter*, the arrest itself must be lawful. A search incidental to an unlawful arrest is unreasonable and in violation of s. 8 of the *Charter* (*R v Caslake,* [1998] 1 SCR 51 at para. 13, and *R v Stillman*, [1997] 1 SCR 607 at para. 27).

[129] As I have found that the arrests of the applicants were unlawful, it follows that all the searches conducted incidental to their unlawful arrests are unreasonable, including the strip searches, and in breach of the applicants' right pursuant to s. 8 of the *Charter*.

**3. Were the utterances made by Ms. Tizya after her arrest obtained by the police contrary to her right to counsel pursuant to s. 10(b) of the *Charter* ?**

[130] After Ms. Tizya's arrest but prior to speaking with counsel, as she had requested, Ms. Tizya made a number of utterances to Cst. Gillis and Cst. Cote. Ms. Tizya contends that those utterances were in response to police questioning that was in violation of her right to retain and instruct counsel without delay pursuant to s. 10(b) of the *Charter*.

**Facts**

[131] Cst. Gillis testified that, after he told Ms. Tizya she was under arrest, she exited the passenger side of the suspect vehicle. He then placed her in handcuffs and took her to his unmarked police vehicle, which was parked directly behind the Chevrolet Cobalt. Cst. Gillis, who was wearing his police vest, reiterated that she was under arrest for possession for the purpose of trafficking in cocaine and trafficking in cocaine, and informed her of her right to counsel and right to remain silent. He cautioned her that everything she said could be used in evidence against her. Ms. Tizya indicated that she understood and wished to speak to a lawyer whose name she provided to Cst. Gillis.

[132] Cst. Gillis testified that he then had a general conversation with Ms. Tizya. He testified that he asked her why she thought she had been pulled over by the police. Ms. Tizya mentioned something to the effect that she was in the wrong car with the wrong person. She added that she was a user not a seller. Cst. Gillis testified that they talked about her family after that.

[133] Approximately ten minutes after Cst. Gillis read Ms. Tizya her rights, Cst. Cote arrived to transport Ms. Tizya to the WCC. Cst. Gillis informed Cst. Cote that Ms. Tizya had been placed under arrest, summarily searched, and read her *Charter* rights and

police caution. Cst. Gillis gave Cst. Cote the name of the lawyer Ms. Tizya wanted to contact.

[134] Cst. Gillis testified that he did not have any further dealings with Ms. Tizya after she left with Cst. Cote. According to Cst. Gillis, Ms. Tizya was cooperative throughout her arrest.

[135] In cross-examination, Cst. Gillis stated that he thought his questioning of Ms. Tizya was appropriate. He did not believe there was anything wrong with his conversation and questioning of Ms. Tizya after she indicated a desire to speak with counsel.

[136] Cst. Cote testified that she travelled to the scene of the applicants' arrests in a marked police vehicle after Cpl. Hutton requested that she assist with the transport of a female accused. She arrived at the bottom of Two Mile Hill at approximately 8:55 p.m. Upon arrival, she spoke with Cst. Gillis and Cst. Newbury. Cst. Gillis told her that the accused's name was Helen; that she had been arrested for possession for the purpose of trafficking or trafficking, chartered and warned; and that Cst. Cote would have to further search her at the APU. Cst. Cote did not recall what, if anything, Cst. Newbury said at the time. Cst. Cote testified that Cst. Gillis told her that Ms. Tizya wanted to speak with a lawyer. Cst. Cote stated that she intended to provide Ms. Tizya with the opportunity to speak with counsel at the APU. Cst. Cote did not recall whether Ms. Tizya was handcuffed when she arrived at the scene of the arrests.

[137] Cst. Cote testified to performing a quick pat-down search of Ms. Tizya's pockets roadside for officer safety prior to transporting her to the WCC. While conducting the pat-down search, Cst. Cote asked Ms. Tizya if she had any drugs on her. Cst. Cote did

not testify to any answer, or lack thereof, Ms. Tizya may have given her. Cst. Cote did not locate anything on Ms. Tizya at the time.

[138] Cst. Gillis searched the back seat of Cst. Cote's police vehicle and confirmed it was empty. Cst. Cote and Cst. Gillis then escorted Ms. Tizya to the back of the police vehicle.

[139] A video from Cst. Cote's police vehicle was entered as an exhibit on the application. The video shows that the back of the police vehicle was empty prior to Ms. Tizya entering the vehicle. The video then depicts Ms. Tizya's movements during her transport. She is seen wiggling around and successfully removing one of her hands from the handcuffs and putting it under her clothing before replacing it back in the handcuffs during her transport to the WCC, which only took a few minutes. Cst. Cote testified that she did not recall having any general conversation with Ms. Tizya while transporting her to the WCC. The video then depicts Ms. Tizya exiting the vehicle with the help of Cst. Cote and an APU guard, upon arrival at the garage of the APU. The video also shows a white substance wrapped in transparent plastic appearing behind Ms. Tizya as she exits the vehicle. Finally, the vehicle depicts Cst. Cote showing the wrapped substance to Ms. Tizya and asking her about it. Cst. Cote testified that she believed the white substance was drugs. Cst. Cote asked Ms. Tizya what it was, where she had it on her body, and if she had anything else on her. Cst. Cote testified that she asked that question to Ms. Tizya because she did not want Ms. Tizya to take any drugs with her inside the APU. Cst. Cote added that the substance was not well wrapped and if Ms. Tizya was concealing something similar inside her body she could overdose. Cst. Cote did not testify to any response Ms. Tizya may have given her at the time. However, the interaction between Ms. Tizya and Cst. Cote can be heard on the video.

[140] Cst. Cote testified that when she arrived at the APU, she noticed that Ms. Tizya's blue jeans had white powder smeared on her right leg coming from her pocket. Cst. Cote testified that she drew Ms. Tizya's attention to the white powder she had observed and asked her what it was. Again, Cst. Cote did not testify to the answer Ms. Tizya may have given her at the time. Cst. Cote testified to then performing a strip search on Ms. Tizya in a separate area of the APU and seizing her jeans, underwear, and a quantity of fentanyl that fell off Ms. Tizya during that strip search. Cst. Cote testified that Ms. Tizya was provided with a new pair of pants before she was brought back to the general area of the APU where she was lodged in cell before she spoke to counsel. Cst. Cote testified that she did not have any further contact or dealings with Ms. Tizya after lodging her in cell and that Cpl. Hutton is the one who facilitated Ms. Tizya's right to counsel after the strip search. Cst. Cote did not testify to any other question she may have asked Ms. Tizya after that, including during the strip search.

[141] Cst. Newbury testified to the reasons that motivated the officers' decision to wait until the applicants were transported to the WCC to give them an opportunity to speak with counsel. Cst. Newbury testified that Mr. Asuchak was not afforded the opportunity to speak with counsel roadside because the arrests had taken place on a busy road and there were concerns for the safety of those involved and of the public if they remained on the road. The goal was to escort Mr. Asuchak to the WCC where he would be provided with an opportunity to speak with counsel.

[142] Mr. Asuchak was transported to the WCC in a marked police vehicle by Cst. Simon Roy shortly after Cst. Roy's arrival on scene at approximately 8:55 p.m. Prior to departing for the WCC, Cst. Roy warned Mr. Asuchak that anything he would say could

be used in evidence in court against him. Cst. Roy's evidence was admitted through an Agreed Statement of Facts.

[143] The evidence also reveals that Mr. Asuchak was not given the opportunity to speak with counsel until he was strip searched at the WCC.

**Positions of the parties**

[144] Counsel for Ms. Tizya submits that the utterances she made after her arrest were in direct response to Cst. Gillis' and Cst. Cote's questions. Counsel for Ms. Tizya submits that Cst. Gillis and Cst. Cote violated Ms. Tizya's right to counsel by eliciting evidence from her prior to allowing her to speak with counsel after her arrest, contrary to s. 10(b) of the *Charter*.

[145] Crown Counsel submits that the RCMP officers involved in the arrests of the applicants immediately advised each of them of their right to counsel in accordance with s. 10(b) of the *Charter* and ensured that they understood. Crown counsel submits that any delay in the implementation of Ms. Tizya's right to counsel was reasonable in the circumstances of this case. Crown counsel submits that there is no evidence that any officers elicited evidence from Ms. Tizya until she had had a reasonable opportunity to speak with counsel.

**Analysis**

[146] In *R v Willier*, 2010 SCC 37 at para. 28, McLachlin C.J., as she then was, and Charron J., summarized the purpose of s. 10(b) of the *Charter as* follows:

> … [it] provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy. The purpose of s. 10(*b*) is to provide detainees an opportunity to mitigate this legal disadvantage.

[147] In addition, the right to silence protected by s. 7 of the *Charter* and the right to counsel protected by s. 10(b) of the *Charter* work hand in hand "to ensure that a suspect is able to make a choice to speak to the police investigators that is both free and informed" (*R v Sinclair*, 2010 SCC 35, at para. 25).

[148] Section 10(b) of the *Charter* imposes three positive duties on police officers that arise immediately upon detention or arrest:

> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger). [*R v Bartle*, [1994] 3 SCR 173 at 192]

[149] Ms. Tizya has the onus of proving on a balance of probabilities that her right to counsel has been violated.

[150] Upon arrest, Ms. Tizya was informed of the reasons for her arrest. She was also informed of her right to silence as well as her right to retain and instruct counsel, including the existence and availability of legal aid and duty counsel, very shortly after her arrest, and, in any event without delay. The evidence also reveals that Ms. Tizya understood her situation and her rights, and that she requested to speak with counsel immediately after she was informed of her *Charter* rights.

[151] I accept the officers' explanation that they had determined it would be safer for all involved to transport the applicants to the WCC, which, I note, was just a few minutes away, where they could speak with counsel in private, rather than trying to

accommodate a private conversation in a covert police vehicle roadside – where they were blocking a lane of traffic on a busy road with steady traffic. I also acknowledge that the applicants remained roadside for a relatively short period of time in the circumstances, approximately 10 minutes, in covert police cars, until regular RCMP vehicles arrived to transport them to the WCC. The video from Cst. Cote's police vehicle reveals that the actual transport of Ms. Tizya from Two Mile Hill to the WCC only took a few minutes. I accept that, at some point after the applicants' arrests, Cpl. Hutton found a cell phone in the Chevrolet Cobalt, while it was still roadside at the bottom of Two Mill Hill. This cell phone could have been used to provide the applicants with the opportunity to speak with counsel. However, I am satisfied that based on the safety concerns raised by the location of the arrests, the fact that the first police vehicles on site were covert vehicles, and the short period of time involved in transporting the applicants to the WCC, the decision to provide the applicants with the opportunity to speak with counsel at the APU meets the requirement that they be afforded the opportunity to speak with counsel without delay. As the statements at issue were made between the time Ms. Tizya was arrested and at or around the time of her arrival at the APU, it is not necessary for me to comment on the decision of the officers to wait until after they had conducted the strip search to allow the applicants to speak with counsel.

[152] In any event, the real issue raised by Ms. Tizya in relation to the utterances she made concerns the officers' duty to refrain from eliciting evidence from her until she had had a reasonable opportunity to speak with counsel.

[153] It is well established that police officers must ceased questioning or otherwise refrain from eliciting evidence from a detainee until they have been provided with a reasonable opportunity to speak with counsel, if they request to do so, unless there are

urgent circumstances that do not exist here (*R v Manninen*, [1987] 1 SCR 1233 ("*Manninen*")).

[154] Here, as acknowledged by Cst. Gillis, Ms. Tizya clearly asserted her right to speak with counsel after her arrest. She even gave him the name of counsel with whom she wanted to speak. Therefore, the police had a duty to refrain from questioning Ms. Tizya until she had been afforded a reasonable opportunity to speak with counsel.

[155] However, almost immediately after Ms. Tizya expressed a desire to speak with counsel, and prior to giving her the opportunity to do so, Cst. Gillis initiated what he described as a general conversation with her, while waiting for her transport to the WCC. The first question he asked, which Ms. Tizya answered, was directly related to the reasons for her arrest and the police investigation. There is no doubt that Cst. Gillis' initial question was aimed at gathering inculpatory information from Ms. Tizya. This constitutes a clear breach of Cst. Gillis' duty to refrain from questioning Ms. Tizya until she had been given a reasonable opportunity to speak with counsel, and a clear infringement of s. 10(b) of the *Charter*. This is not a case where it could be argued that Ms. Tizya waived her right to counsel by answering Cst. Gillis' question (see *Manninen* at 1244).

[156] Cst. Cote's later questioning of Ms. Tizya also infringed her right to counsel pursuant to s. 10(b) of the *Charter*. Ms. Tizya was in the custody of Cst. Cote when Cst. Cote performed a pat-down search on her and asked her whether she had drugs on her. In addition, the evidence reveals that Cst. Cote knew Ms. Tizya wanted to speak with counsel and had not been given to opportunity to exercise her right to counsel by that point.

[157] In light of the evidence adduced on this application, it cannot be said that Cst. Cote's questioning of Ms. Tizya, as to whether she had drugs on her at the time of performing a pat-down search on her roadside, was related to concerns for the officer's safety. Again, I am of the view that the aim was to gather inculpatory information from Ms. Tizya and further the police investigation.

[158] While there may well have been safety concerns arising out of Cst. Cote's discovery of what she believed was drugs on the back seat of her police vehicle – where Ms. Tizya was seated – upon arrival at the WCC; and while Cst. Cote's discovery may have provided grounds to further search Ms. Tizya's person; there were no urgent circumstances that justified questioning Ms. Tizya about the nature of that substance, where it came from, and if Ms. Tizya's had more drugs concealed on her, when she was still waiting to speak with counsel.

[159] While the evidence on the *Charte*r application does not reveal whether Ms. Tizya answered all of Cst. Cote's questions, I am of the view that, taken together, and in the context of the ongoing investigation, Cst. Cote's questions were aimed at eliciting inculpatory information from Ms. Tizya.

[160] Therefore, I find that the above-mentioned questioning by Cst. Gillis and Cst. Cote infringed Ms. Tizya's right to counsel under s. 10(b) of the *Charter*.

**4. Did the strip search of Ms. Tizya violate her *Charter* rights under ss. 8 and 10(b) of the *Charter*?**

[161] Considering my findings below regarding the combined effects of the violations to the applicants' ss. 8, 9 and 10(b) *Charter* rights on the admissibility of the evidence gathered by the police as a result of the unlawful arrests of the applicants, I do not

intend to address the specific issues raised by Ms. Tizya under ss. 8 and 10(b) of the *Charter* with respect to her strip search.

**5. Should the evidence obtained in breach of ss. 8, 9 and 10(b) of the *Charter* be excluded pursuant to s. 24(2) of the *Charter*?**

**Positions of the Parties**

[162] The applicants submit that the violation of their rights pursuant to ss. 8, 9 and 10(b) (for Ms. Tizya) warrant an order excluding the evidence pursuant to s. 24(2) of the *Charter*.

[163] The applicants submit that the violation of their *Charter* rights are serious and led to a lengthy period of detention.

[164] Ms. Tizya also submits that the police's attempts to elicit evidence from her prior to giving her the opportunity to speak with counsel elevate the overall seriousness of the ss. 8 and 9 *Charter* breaches in her case. Ms. Tizya concedes that the s. 10(b) *Charter* breach resulting from Cst. Cote's and Cst. Gillis' questioning does not amount to bad faith but, instead, appears to be due to lack of training. She submits that lack of training is still a concern that must be factored into the analysis.

[165] The applicants submit that the police's behaviour undermines the interests that the *Charter* rights at issue seek to protect.

[166] The applicants acknowledge that society has an interest in the adjudication of trafficking charges and that the evidence seized after their arrests is reliable and important to the Crown's case. However, the applicants submit that it is equally important to have a justice system where the police learn, obey, and respect *Charter* rights.

[167] The applicants submit that the seriousness of the police conduct combined with the strong impact of the breaches on their *Charter*-protected interests make an overwhelming case for the exclusion of the evidence. The applicants submit that the admission of the evidence obtained as a result of the *Charter* breaches would bring the administration of justice into disrepute.

[168] Crown counsel submits that, if the Court finds that any of the applicants' *Charter* rights were breached by the conduct of the police, those breaches do not warrant the exclusion of the evidence under s. 24(2) of the *Charter*.

[169] Crown counsel submits that all the officers acted in good faith during the investigation.

[170] Crown counsel submits that the "truth seeking function of the criminal trial process" is better served by the admission of the evidence seized incidental to arrest. Crown counsel submits that the drugs, money, and drug paraphernalia seized is reliable evidence that is at the center of the Crown's case. Crown counsel submits that the items seized existed entirely independently of any *Charter* breach. Also, Crown counsel submits that the spontaneous utterances and warned statements made by the applicants are significant evidence of their involvement in the trafficking of illegal drugs.

[171] In addition, Crown counsel submits that society has a real interest in prosecuting offences involving possession of deadly drugs for the purpose of trafficking.

[172] Crown counsel concedes that, if the Court were to find that the applicants' arrests were not based on reasonable grounds, the searches of the applicants, of the Chevrolet Cobalt, and the more invasive strip searches, even if conducted in a reasonable manner, had a significant impact on the applicants considering their high expectation of privacy in the areas searched.

[173] However, Crown counsel submits that any impact on the Applicants' *Charter* protected interests that weighs in favour of excluding the evidence should be balanced by the fact that the officers did not demonstrate a deliberate disregard for those rights. Crown counsel submits that, taken as a whole, the officers' conduct would not negatively impact the public's confidence in the administration of justice and the rule of law. The Crown submits that a balancing of all the relevant factors militates in favour of admission of the evidence.

**Analysis**

[174] Section 24(2) of the *Charter* provides that:

> Where, in proceedings under section (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 circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[175] In this case, there is no question that there is a connection or relationship between the infringement of the applicants' rights to not be arbitrarily detained under s. 9 of the *Charter* and their right to not be submitted to unreasonable search and seizure under s. 8 of the *Charter*, and the finding of the evidence that the applicants are seeking to have excluded. There is also a direct connection between the officers' questioning of Ms. Tizya in breach of her right to counsel pursuant to s. 10(b) of the *Charter* and her responses to their questions.

[176] The remaining question is whether the admission of the evidence obtained by the officers as a result of the applicants' arrests would bring the administration of justice into disrepute.

[177] The onus is on the applicants to demonstrate on a balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute.

[178] As stated in *Grant* at para. 68:

> … The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[179] There are three lines of inquiries to consider when assessing and balancing "the effect of admitting the evidence on society's confidence in the justice system":

(i) the seriousness of the *Charter*-infringing state conduct;

(ii) the impact of the breach on the *Charter*-protected interests of the accused; and

(iii) society's interest in the adjudication of the case on its merits. [*Grant* at para. 71]

**(i) The seriousness of the *Charter*-infringing state conduct**

[180] This line of inquiry requires an evaluation of the seriousness of the state conduct that led to the *Charter* breaches. As stated in *Grant* at para. 72:

> … The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[181] The main concern is to preserve public confidence in the rule of law and its processes; it is not to punish the police (*Grant* at para. 73).

[182] Deliberate or reckless police conduct in violation of established *Charter* standards tend to support the exclusion of evidence whereas inadvertent or minor violations may minimally impact public confidence in the justice system. Urgent or

extenuating circumstances may lessen the seriousness of the police conduct at issue. Good faith on the part of police officers will reduce the need for the Court to distance itself from police conduct. Ignorance of *Charter* standards should not be rewarded. Negligence or willful blindness cannot be equated to good faith (*Grant* at paras. 74-75).

[183] I found that the inconsistencies between the police officers' testimonies regarding the grounds for arrest were such that I was left with no reliable evidence upon which I could determine whether they possessed reasonable grounds to arrest the applicants. As a result, I concluded that, subjectively and objectively, the officers lacked reasonable grounds to believe the applicants had committed or were about to commit the offence of trafficking or possession of trafficking in cocaine when they arrested them.

[184] The lack of reasonable grounds for arrest with respect to the ss. 8 and 9 *Charter* breaches is, on its own, an indicator that the conduct of the state is serious.

[185] In addition, I am of the view that the concerns raised by the inconsistent testimonies of the police officers on the grounds for arrest must also factor into the assessment of the seriousness of the ss. 8 and 9 *Charter* breaches, as those concerns go beyond a finding of lack of reasonable grounds, they reflect the lack of confidence of the Court in the police evidence with respect to this issue. This is not a technical or a minor breach. I am of the view that this is a serious breach.

[186] In addition, based on my finding regarding the unreliability of the police evidence on the grounds for arrest, I am unable to find there were exigent circumstances that attenuate the breach in this case.

[187] I now turn to the seriousness of the violation of Ms. Tizya's right to counsel protected by s. 10(b) of the *Charter*. It is surprising and concerning that more than thirty five years after the Supreme Court of Canada held that s. 10(b) of the *Charter* includes

a duty on the part of the police to refrain from questioning or otherwise try to elicit evidence from a detainee who has expressed a desire to speak with counsel until they have been provided with a reasonable opportunity to do so, a police officer with more than 10 years of service would not find it problematic to ask Ms. Tizya why she thought she had been pulled over prior to giving her the opportunity to speak with counsel. This question was clearly aimed at eliciting inculpatory evidence from Ms. Tizya, almost immediately after she had been arrested and had indicated a desire to speak with counsel. This initial breach is worsened by the fact that the next officer Ms. Tizya encountered did essentially the same thing, by asking her incriminating questions not just once but twice, despite being aware of the fact that Ms. Tizya wanted to speak with counsel. As I have already stated, there was no urgency or exigent circumstances that warranted that type of questioning prior to implementing Ms. Tizya's right to counsel. I accept that part of Cst. Cote's questioning upon their arrival at the WCC may have been motivated by health concerns for Ms. Tizya. However, questioning Ms. Tizya on the nature of a substance the officer had already seized, and which the officer suspected to be drugs, had more to do with establishing Ms. Tizya's knowledge of the nature of that substance than concerns for her safety. I also accept that in certain circumstances concerns for an officer's safety may justify certain type of questioning prior to conducting a pat-down search. However, Cst. Cote did not testify to any specific safety concerns relating to Ms. Tizya potentially having drugs on her person prior to effecting the pat-down search roadside. Nonetheless, as conceded by the applicants, the evidence does not reveal bad faith on the part of the two officers. Instead it reveals a lack of knowledge or training. However, lack of knowledge or training regarding well-established *Charter* standards cannot be used to minimize the conduct of the police

officers. As a result, I am of the view that the violation of Ms. Tizya's s. 10(b) *Charter* right falls also towards the serious end of the spectrum.

**(ii) The impact of the breaches on the *Charter*-protected interests of the applicants**

[188] Crown counsel concedes that the searches of the applicants, including the more invasive strip searches and the search of the Chevrolet Cobalt, even if conducted in a reasonable manner, had a significant impact on the applicants considering their high expectation of privacy in the areas searched. This is a fair concession with the minor caveat that the search of the vehicle raises a lower expectation of privacy than the search of their persons and, more specifically, the intrusive strip search the applicants were submitted to in violation of their ss. 8 and 9 *Charter* rights.

[189] I also note that the applicants were held overnight prior to appearing before a justice of the peace the next day. Mr. Asuchak remained in custody for a few days prior to being released on conditions. Ms. Tizya was released on conditions at her first appearance in court.

[190] The drugs, drug paraphernalia, money and cell phones seized by the police would not have been discovered but for the arrests and searches, which were in breach of the applicants' *Charter* rights. In addition, there is nothing in the evidence that could allow me to conclude that Ms. Tizya would have said anything incriminating to the police after her arrest had the officers refrained from questioning her. I note however that Cst. Cote was not questioned on Ms. Tizya's responses to her questions.

**(iii) Society's interest in an adjudication on the merits**

[191] As stated in *Grant* at paras. 79-81:

> Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry

> relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.
>
> The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the *Charter*'s affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.
>
> This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[192] The material items (drugs, drug paraphernalia, cell phones, money) seized from the applicants' person and the Chevrolet Cobalt constitute reliable evidence that is central to the Crown's case. This militates in favour of their admission in evidence.

[193] The context in which Ms. Tizya responded to the officers' questioning raises some concerns with respect to the reliability of her statements that would militate in favour of the exclusion of her utterances to Cst. Gillis and Cst. Cote.

[194] The offences before the Court are serious considering the nature of the drugs seized, fentanyl in particular, which is widely recognized has a very dangerous drug even in small quantities. However, in *Grant*, the Supreme Court of Canada cautioned about including and weighing considerations relating to the seriousness of the offence before the court under this line of inquiry as follows:

> [84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

**Weighing the three lines of inquiries**

[195] The decision to admit or exclude the evidence at issue is based on a weighing of all the circumstances of the case "encapsulated" in the three lines of inquiries. Based on all those circumstances, the Court must then determine, on balance, whether the admission of the evidence obtained as a result of the *Charter* violations would bring the administration of justice into disrepute. As stated in *Grant* at paras. 85-86:

> To review, the three lines of inquiry identified above — the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and the societal interest in an adjudication on the merits — reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by Charter breach would bring the administration of justice into disrepute.
>
> In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the Stillman self-incrimination test. We believe this to be required by the words of s. 24(2). …

[196] On balance, I find that the concerns raised by the ss. 8 and 9 *Charter* breaches and their seriousness combined with the significant impact they had on the applicants' rights to liberty and privacy, favour the exclusion of the evidence gathered as a result of the applicants' arrests despite the reliability and importance of the items seized to the Crown's case. I am of the view that the admission of the evidence gathered by the police officers as a result of the applicants' unlawful arrests would bring the administration of justice into disrepute. Therefore, the evidence shall be excluded.

[197] I am also of the view that, even on its own, the s. 10(b) *Charter* breach warrants the exclusion of Ms. Tizya's utterances in response to the questioning of Cst. Gillis and Cst. Cote. I come to this conclusion based on the seriousness of the breach on Ms. Tizya's right to counsel, the impact it had on her at the time she was detained and the circumstances under which they were elicited from her, which raise some concerns

regarding the reliability of her answers, the content of which is not before the court in its entirety.

**6. Does the late disclosure of an officer's supplementary occurrence report constitute a breach of the applicants' rights to make full answer and defence guaranteed by s. 7 of the *Charter*? If so, should a stay of proceedings or, in the alternative, a mistrial be ordered pursuant to s. 24(1) of the *Charter*?**

[198] The applicants argue that the discovery and disclosure of Cst. Benedet's supplementary occurrence report several days into the hearing of their *Charter* applications constitute a breach of their right to make full answer and defence guaranteed by s. 7 of the *Charter* that warrants a stay of proceedings, or in the alternative, a mistrial pursuant to s. 24(1) of the *Charter*.

**Facts**

[199] Cst. Benedet was the second to last RCMP officer to testify at the hearing of the *Charter* applications. Early in his testimony, Cst. Benedet referred to a supplementary occurrence report he had completed in September 2020 regarding his involvement in this matter. It quickly became apparent that his report had never been disclosed to the Crown and the applicants. I therefore granted Crown counsel's request for a brief recess to obtain a copy of Cst. Benedet's report, review it, and provide a copy to the applicants. The hearing resumed, approximately thirty minutes later, after the report had been disclosed to the applicants. At that time, counsel for Mr. Asuchak and counsel for Ms. Tizya requested an adjournment to review the report and consider their options. Crown counsel did not oppose the request and I granted the adjournment.

[200] The parties were back before me two days later. At that time, counsel for Mr. Asuchak and counsel for Ms. Tizya requested a further and longer adjournment to amend their clients' *Charte*r applications to include a breach of their clients' rights to

make full answer and defence based on late disclosure and to seek correlating remedies. I granted the adjournment despite Crown counsel's opposition.

[201] The applicants filed amended *Charter* applications seeking a stay of proceedings or, in the alternative, a mistrial on the basis that the late disclosure of Cst. Benedet's report violates their rights to make full answer and defence protected by s. 7 of the *Charter*.

[202] The hearing resumed a few weeks later with the continuation of Cst. Benedet's examination-in-chief. Cst. Gillis, the last police officer to testify on the *Charter* applications, testified after Cst. Benedet on that date. Counsel for the applicants did not seek permission to re-examine the officers who had testified prior to receiving additional disclosure from Cst. Benedet, and the evidentiary portion of their applications ended.

[203] Cst. Benedet testified that he completed his supplementary occurrence report on September 8, 2020. He described the content of his report as a more detailed narrative of his involvement in the events of July 23, 2020. He added that the information contained in his report comes from his independent recollection of events at the time he wrote the report, supplemented by the handwritten notes he took on the day of the applicants' arrests. Cst. Benedet acknowledged he had worked on the bail package prepared by the RCMP for the Crown after the arrests of the applicants, and, as a result, would have seen other officers' notes and reports prior to writing his supplementary occurrence report.

[204] Cst. Benedet testified that the way he proceeded in this matter did not depart to any real extent from his practice in other files. He testified that he tries to take as many handwritten notes as possible contemporaneously to his involvement in a matter. He then writes a supplementary typewritten report as soon as feasible. Cst. Benedet

testified that the purpose of writing a supplementary report is to add information he remembers that does not appear in his handwritten notes, and to clarify or expand on something that already appears in his notes in an abbreviated or short form.

[205] Cst. Benedet testified that he did not start working on his report before September 8, 2020, because of his caseload and other work priorities. He added that the police file in this matter is managed within the Police Reporting Occurrence System ("PROS"). He therefore had to go into the electronic file to type his report and add it to the file.

[206] Cst. Benedet testified that, depending on the file, the lead investigator may request that the report be printed and provided to them, or that the report be left in PROS for the lead investigator to print. Cst. Benedet did not recall what instructions he received with respect to his documents on this file. However, he added that his report has been in PROS since it was created in September 2020. Cst. Benedet testified that, in his experience with PROS, including his experience as lead investigator on other files, the system does not automatically send a message to the lead investigator when a document is uploaded to an electronic file.

[207] Cst. Benedet testified that, in preparation for his testimony, he printed his report directly from PROS. He did not understand why his report had not been disclosed as it should have been part of the documents provided to Crown and defence. Cst. Benedet stated that he could not speak to any further disclosure process followed in this case.

[208] While he was not called back to testify on the amended *Charter* applications, Cpl. Hutton confirmed, in his testimony, that he was in charge of the disclosure in this case.

[209] A document entitled “Record of Running disclosure”, attached as an exhibit to the affidavit of Daria Jordan, Legal Assistant Supervisor for the Director of Public Prosecution, reveals that several documents were disclosed by the Crown to the defence in this matter from August 12, 2020, to June 15, 2021, inclusively. According to that document, some police supplementary occurrence reports were disclosed in August 2020. Additional supplementary occurrence reports and most of the officers’ notes, including those of Cst. Benedet, were disclosed in November 2020, after Cst. Benedet’s report had been completed. However, Cst. Benedet’s supplementary occurrence report does not appear on the list of materials disclosed by the Crown to the defence.

[210] Cst. Benedet’s report is a page and a half long and sets out Cst. Benedet’s involvement in this matter before and after the arrests of the applicants.

[211] The preliminary inquiry for this matter proceeded on April 30, 2021.

**Positions of the parties**

[212] The applicants submit that the disclosure of Cst. Benedet’s report came very late in this matter: six days into the hearing of the *Charter* applications, and after a preliminary inquiry was held.

[213] The applicants submit that the right to make full answer and defence guaranteed by s. 7 of the *Charter* includes the right of an accused to have the full case to meet before entering pleas and addressing the Crown’s case. The applicants argue that the additional information contained in Cst. Benedet’s report has greatly affected the strategy of the defence with respect to their s. 9 *Charter* applications, which is at the centre of the defence’s case, in a way that cannot be remedied, resulting in an unfair trial for the applicants.

[214] The applicants say that they were unaware, based on the disclosure they had received, that Cst. Benedet had evidence to provide with respect to the grounds for arrest because his handwritten notes did not contain any information in that regard. Had the applicants been aware of that information, they may have asked to hear from Cst. Benedet at the preliminary inquiry and may also have asked different questions to the other police witnesses who testified at the preliminary inquiry and prior to Cst. Benedet on their *Charter* applications.

[215] In addition, the applicants submit that the testimony of Cst. Benedet reveals that the RCMP does not have a notification process in place to alert the lead investigator or the officer in charge of disclosure that additional material subject to disclosure has been added to the electronic file. The applicants submit that this situation raises serious concerns as it demonstrates that the Whitehorse RCMP has no safety net in place to ensure this type of failure did not occur in this file and does not occur again. The applicants also submit that they requested all officers' notes and reports in a timely manner in this case.

[216] The applicants submit that the timing and significance of the late disclosure has not only greatly impacted their right to make full answer and defence, but, coupled with the concerns arising from the lack of RCMP process to ensure that disclosure takes place in a timely manner, or at all, has prejudiced the integrity of the judicial system. Defence counsel submits that, as a result, this is one of the "clearest of cases" where the prejudice to the applicants can only be remedied by granting a stay of proceedings or, in the alternative, a mistrial as suggested by counsel for Mr. Asuchak. The applicants submit that a stay of proceedings would send a message to the RCMP that it needs to

have a notification process in place to ensure disclosure is provided to the accused in accordance with the Crown's constitutional obligations.

[217] Counsel for Mr. Asuchak also alleged a breach of her client's s. 11(d) *Charter* right based on late disclosure in Mr. Asuchak's amended *Charter* application. However, counsel did not advance this argument in submissions. As a result, I do not intend to address it in my decision.

[218] Crown counsel concedes that the late disclosure of Cst. Benedet's report constitutes a breach of the applicants' right to disclosure. However, Crown counsel submits that late disclosure of a single police report does not constitute a breach of the applicants' right to make full answer and defence protected by s. 7 of the *Charter*.

[219] In addition, Crown counsel submits that to be entitled to a remedy pursuant to s. 24(1) of the *Charter*, the applicants must show actual prejudice to their ability to make full answer and defence. Crown counsel submits that the applicants' argument that the late disclosure affected their strategy on a key legal issue, and that they may have requested that Cst. Benedet be called as a witness at the preliminary inquiry and may have conducted their cross-examination differently at the preliminary inquiry and on these pre-trial applications had they received the report in a timely manner, are bald assertions of prejudice without any factual foundation. Crown counsel also submits that the applicants' assertions that the trial has become unreliable and unfair are also without foundation.

[220] Crown counsel submits that should a s. 7 *Charter* violation be found, the appropriate remedy is an adjournment, which has already been provided to the defence, to enable the applicants to reassess their trial tactics and line of questioning, if

necessary. In sum, Crown counsel submits that this is not the clearest of cases warranting a stay of proceedings.

**Analysis**

[221] An accused's right to full disclosure is one of the components of the right to make full answer and defence protected by s. 7 of the *Charter*. However, a violation of the right to disclosure does not automatically result in a breach of an accused's right to make full answer and defence (*R v Dixon*, [1998] 1 SCR 244 ("*Dixon*") at para. 24).

[222] Crown counsel concedes that Cst. Benedet's supplementary occurrence report was relevant and subject to Crown disclosure. Indeed, Crown counsel disclosed the report to the applicants shortly after receiving it from the officer. Crown counsel also concedes that the late disclosure of Cst. Benedet's report breached the applicants' right to full disclosure.

[223] Therefore, the question that arises in this case is whether the breach of the applicants' right to full disclosure amounts to a violation of their right to make full answer and defence protected by s. 7 of the *Charter*.

[224] An accused has the burden to demonstrate, on a balance of probabilities, a breach of their right to make full answer and defence to be entitled to a remedy under s. 24(1) of the *Charter* (*R v Barra*, 2021 ONCA 568 at para. 138). To do so, the accused must demonstrate that there is a reasonable possibility that the late disclosure could affect the outcome of the trial or the overall fairness of the trial process. As stated by Cory J. in *Dixon* at para. 34:

> … [T]he reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non disclosed evidence or

> reasonably possible avenues of investigation that were closed to the accused as a result of the non disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.

[225] Cory J., described the reasonable possibility threshold as follows, at para. 36:

> … In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

[226] In addition, when assessing the issue of trial fairness, it is important to remember that an accused person is entitled to a trial that is fundamentally fair not the fairest of all possible trials. The assessment of whether a trial is a fair trial must be made not only from the perspective of the accused but also of the community and, when applicable, the complainant (See comments of McLachlin J. (as she then was) and Iacobucci J., for the majority in *R v Mills*, [1999] 3 SCR 668 at 718; McLachlin J. in *R v O'Connor*, [1995] 4 SCR 411 at 517; *R v Harrer*, [1995] 3 SCR, 562).

[227] In this case, the late disclosure of Cst. Benedet's report occurred early in the testimony of Cst. Benedet at the hearing of the pre-trial *Charter* applications. It is not disputed that counsel for the applicants had requested the notes and reports of all the officers involved in this case in a timely manner.

[228] The evidence reveals that Cst. Benedet's supplementary occurrence report contains information regarding his involvement prior to the arrests whereas his handwritten notes only disclose his post-arrest involvement. I would therefore agree with the applicants that Cst. Benedet's notes on their own give the impression that he was not involved in the police surveillance and that he had no information to provide regarding what happened prior to the arrests and the grounds for arrest. However, I am

of the view that the evidence does not reveal that the late disclosure was anything other than a human error in this case. In addition, the evidence before me does not reveal any systemic failure on the part of the RCMP, despite the lack of a built-in automatic notification process in PROS to provide relevant materials to the Crown for disclosure. The evidence of Cst. Benedet reveals that the officers are aware of the lack of automatic notification process in PROS and work around this issue by discussing how new materials subject to disclosure are to be brought to the attention of or provided to the lead investigator or the officer in charge of disclosure.

[229] The new information contained in the supplementary occurrence report consists of the fact that, on the day of the arrests, Cst. Benedet was working in plain clothes and his task, as part of the CRU team, was to conduct street level drug surveillance. It also includes the timing and content of the radio communications he heard while in his surveillance vehicle and a short description of Mr. Asuchak at the time Cst. Newbury turned over custody of Mr. Asuchak to Cst. Benedet roadside.

[230] While the applicants did not have the benefit of receiving Cst. Benedet's report prior to his testimony at the pre-trial application stage of this matter, the fact that there was conflicting police evidence regarding the timing and content of the officers' radio communications prior to the arrests was well known to the applicants. They had already received disclosure of the handwritten notes and supplementary occurrence reports of all the other officers involved in the surveillance as well as the handwritten notes of Cst. Benedet prior to the commencement of the preliminary inquiry. In fact, the applicants' s. 9 *Charter* argument on the lack of grounds for arrest is in good part based on the issue of conflicting police evidence. In that sense, the additional information contained in Cst. Benedet's report does not differ from the information that had already

been disclosed to the applicants. In addition, I agree with Crown counsel that it is not sufficient for the applicants to contend generally that their strategy may have been different, that they may have called Cst. Benedet to testify at the preliminary inquiry, and that they may have asked different questions in cross-examination at the preliminary inquiry and during their pre-trial *Charter* applications had they known about Cst. Benedet's pre-arrest evidence, without anything more specific to substantiate their alleged prejudice.

[231] In addition, after receiving the late disclosure, the applicants were granted a lengthy adjournment to consider their strategy and review Cst. Benedet's newly disclosed report prior to the continuation of his testimony at the pre-trial applications and the commencement of his cross-examination. I also note that when the hearing of the *Charter* applications resumed, the applicants did not request that other police officers be recalled as witnesses on the amended *Charter* applications.

[232] Based on the above, I am of the view that the applicants have failed to demonstrate a reasonable possibility that the late disclosure of Cst. Benedet's report could affect the outcome of the trial or the overall fairness of the trial process. Consequently, I find that the applicants have failed to demonstrate, on a balance of probabilities, that the late disclosure has impaired or breached their right to make full answer and defence pursuant to s. 7 of the *Charter*.

[233] In any event, I am of the view that the lengthy adjournment granted to the applicants after they received Cst. Benedet's report to review it, consider their strategy and adjust, if necessary, their cross-examination tactics prior to resuming the hearing of their *Charter* applications and before commencing their cross-examination of Cst. Benedet, provided an appropriate and just redress to the late disclosure.

**CONCLUSION**

[234] All the evidence obtained by the police as a result of the applicants' arrests in violation of their ss. 8 and 9 *Charter* rights, as well as Ms. Tizya's utterances obtained in violation of her s. 10(b) *Charter* right, shall be excluded pursuant to s. 24(2) of the *Charter*.

[235] The late disclosure of an officer's supplementary occurrence report does not amount to a breach of the applicants' rights to make full answer and defence protected by s. 7 of the *Charter*. The adjournment granted to them after the report was disclosed was the appropriate remedy to the late Crown disclosure.

_____

CAMPBELL J.