SUPREME COURT OF YUKON

Citation: *R v Silverfox*, 2022 YKSC 14

Date: 20220318
S.C. No. 20-01513
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

CHARABELLE SILVERFOX and LYNZEE SILVERFOX

APPLICANTS

No information, evidence, submission or part of the Judge's decision with respect to this application that is before the Court, that are in relation to the factual allegations against Charabelle Silverfox and Lynzee Silverfox, shall be published in any document or broadcast or transmitted in any way before such time as the evidentiary part of the trial of the two accused starts. This publication ban has lapsed.

Publication of evidence taken at the preliminary inquiry is prohibited by court order pursuant to s. 539(1) of the *Criminal Code*. This publication ban is no longer in effect.

Before Chief Justice S.M. Duncan

Counsel for the Respondent — Leo Lane and William McDiarmid

Counsel for the Applicant, Charabelle Silverfox — Jennifer Cunningham

Counsel for the Applicant, Lynzee Silverfox — Jennifer Budgell

REASONS FOR DECISION
(Sections 7, 8, 9, and 10(b) *Charter* Application)

Introduction

[1] This is an application by the two accused persons, Lynzee Silverfox ("Lynzee") and Charabelle Silverfox ("Charabelle") (together the "applicants") for an order under s. 24(2) of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*") to exclude evidence obtained by police, on the basis of breaches of ss. 7, 8, 9, and 10(b) of the *Charter*.

[2] The applicants are jointly charged with first-degree murder, forcible confinement, and indignity to human remains in relation to the death of Derek Edwards in Pelly Crossing on December 13, 2017. The applicants are sisters.

[3] The applications arise from the following alleged *Charter* violations:

1. the unlawful arrests of the applicants on December 13, 2017 (ss. 8 and 9);
2. the unreasonable search and seizure at the police detachment of the applicants' clothing and hand swabs (s. 8);
3. the failure to advise the applicants of their right to counsel (s. 10(b));
4. the failure to comply with s. 503 of the *Criminal Code*, R.S.C., 1985, c. C- 46 (the "*Criminal Code*") to bring a person before a justice within 24 hours of their detention (s. 9); and
5. the failure to adhere to the requirements of s. 490 of the *Criminal Code* for further detention of seized items (s. 8).

[4] The admissibility of the following evidence is at issue as a result of these alleged *Charter* violations:

a. the police officers' observations of blood stains on Charabelle's clothing;

b. the police officers' observations of blood stains on Lynzee's clothing and hands;

c. the swabs taken of Lynzee's left and right hands;

d. Lynzee's t-shirt; and

e. Charabelle's t-shirt and socks.

[5] The Crown has conceded the following *Charter* violations:

a. the unlawful arrest of Charabelle (s. 9);

b. Charabelle's right to counsel due to the failure of the police to contact counsel on her behalf (s. 10(b));

c. Lynzee's right to counsel due to the failure of police to advise her of free duty counsel services (s. 10(b));

d. the applicants' rights to be free from unreasonable search and seizure due to seizure of their clothing on December 14, 2017 (s. 8);

e. the applicants' rights to be free from arbitrary detention due to police failure to bring them before a justice without delay (s. 9; s. 503 *Criminal Code*); and

f. the applicants' rights to be free from unreasonable search and seizure due to the police failure to adhere fully to the requirements for the detention of exhibits (s. 8; s. 490 *Criminal Code*).

[6] As a result, the Crown concedes the following pieces of evidence should be excluded under s. 24(2) of the *Charter*:

a. Charabelle's sweat pants seized December 14, 2017; and

b. Lynzee's socks and leggings seized December 14, 2017.

[7] The concessions made by the Crown resulting in the exclusion of evidence seized December 14, 2017 were not addressed by counsel and are not referred to in these reasons except in the order below.

[8] The swabs taken of Charabelle's hands will not be relied on at trial by the Crown so are not addressed here.

[9] The other *Charter* breaches conceded to by the Crown will be discussed in these reasons as the circumstances are relevant for the s. 24(2) determination.

[10] Counsel did not address s. 7 *Charter* breach in their arguments so I have not included any analysis of it here.

Overview of Facts

[11] The following sets out the background facts. More detailed facts are provided in the discussion of the breaches.

[12] Just before 6:00 a.m. on December 13, 2017, Constable Anderson, the on-call RCMP member at the Pelly Crossing detachment that morning, received a call that Derek Edwards was found deceased in the basement of Charabelle's residence in Pelly Crossing. Magdalene Silverfox, sister of the applicants, had called police to report it. There was limited information provided to Constable Anderson at that time.

[13] Constable Anderson called Constable Imrie and they went to the residence. As they pulled into the driveway, they received an update from RCMP communications, who advised that Magdalene Silverfox and Franklin Roberts had been at the residence, as well as the applicants and Vance Cardinal.

[14] The police officers saw no one outside the residence and no one was inside. The officers entered the house, saw blood on the floor in the living room area and went to

the basement. They identified the body of Derek Edwards lying on a tarp. The body had a large quantity of blood on it. Knives, a compound bow, and hunting arrows were near the body.

[15] Constable Anderson called the supervisor, Corporal Boone, who arrived at the house at approximately 6:30 a.m. The three RCMP members – Anderson, Imrie, and Boone – were the only officers at the Pelly Crossing detachment. They requested more RCMP resources to assist them from the Major Crimes Unit in Whitehorse.

[16] Constable Anderson remained at the residence to guard the scene. Corporal Boone and Constable Imrie left to look for Magdalene Silverfox and Franklin Roberts to interview them. While they were doing this, Corporal Boone and Constable Imrie arrested Tyler Blanchard for violating a court-ordered condition to abstain from alcohol. The police noticed blood on Tyler Blanchard's face, hands, and clothing. He was taken to the detachment, lodged in cells and his clothing was seized.

[17] The police also arrested Dion Edwards under the *Liquor Act*, RSY 2002, c.140, for being intoxicated in the street. He was wearing a woman's jacket he said belonged to Lynzee. The officers noticed blood on the jacket. He was brought to the detachment, lodged in cells and his jacket was seized.

[18] At approximately 10:40 a.m., Constable Anderson had an in-person conversation with Darren Johnnie, a member of the community, who advised that the applicants were "passed out" at Daniel Luke's residence and Marion Edwards, Derek Edward's sister, was on the front lawn and potentially threatening the applicants. Darren Johnnie wanted the police there to make sure nothing happened. He knew about the death of Derek Edwards.

[19] Constable Anderson testified he relayed this information to Corporal Boone. Corporal Boone testified Constable Anderson advised him someone had told him about a disturbance at Daniel Luke's residence. They believed the applicants were there and possibly drinking. Corporal Boone did not recall being told that Marion Edwards was there.

[20] Constable Imrie testified he understood that Constable Anderson called Corporal Boone about a possible disturbance at Daniel Luke's residence. He understood it was possible that the applicants were there and drinking. Constable Imrie knew that both of them were on conditions to abstain from alcohol – Lynzee – no consumption of alcohol and Charabelle – no consumption of alcohol if outside her residence.

[21] Corporal Boone and Constable Imrie went to Daniel Luke's residence. They did not see anyone outside the residence. They walked to the front door and knocked.

[22] Corporal Boone testified their purpose in attending the residence was to investigate the concern about a disturbance. Constable Imrie said their purpose in attending the residence was to "find out was what going on". He testified that if the applicants were inside and drinking he would have arrested them for the breach of their conditions. He testified the police had no plan if no one answered the door.

[23] When they went to the door, Constable Imrie was closest to the door and Corporal Boone was behind him. There is no evidence that they announced themselves as police.

[24] Lynzee answered the door. She was confrontational and upset. Constable Imrie noticed her speech was slurred and she smelled of alcohol. He told her she was under arrest for failing to comply with conditions for consuming alcohol. He immediately

handcuffed her at the door. He testified handcuffing of an intoxicated person was common practice for safety of the officers and the arrestee.

[25] Lynzee had no shoes or boots on her feet. Constable Imrie went inside the residence with her to get her boots and look for a jacket and then took her to the police vehicle. He also told her while inside the residence she was being arrested for failure to comply with her condition, that she had the right to remain silent, that anything she said could be used as evidence. He also asked her if she wanted to talk to a lawyer. She responded she could talk to her own lawyer.

[26] While this was occurring, Daniel Luke, the owner of the residence, appeared. Neither police officer was sure whether he appeared from the bedroom or at the front door of the house. Constable Imrie told Daniel Luke to get out of the house. Daniel Luke said “it’s my house” and then complied after the police said “we’re in the middle of something here”.

[27] Constable Imrie activated his audio recorder after he had arrested Lynzee at the door and placed her in handcuffs, which he said took about a minute.

[28] While Constable Imrie was occupied with Lynzee, Corporal Boone entered the residence. He had seen from the door Charabelle lying on a couch sleeping. Corporal Boone testified he first checked all the rooms in the residence to determine there was no one unsafe, injured, or being held against their will. He woke Charabelle up from her sleep and noted a strong smell of liquor and that she was agitated and belligerent. He arrested Charabelle for breach of her condition not to consume alcohol outside of her residence.

[29] The officers took both applicants to the Pelly Crossing RCMP detachment. At the detachment, the officers observed blood stains on the clothing and hands of the applicants. They advised both applicants they were suspects in the homicide investigation. The officers took swabs of Charabelle's hands and seized her shirt and socks. The officers also took swabs of Lynzee's hands and seized her shirt. Replacement clothing was provided to the applicants. The officers testified that exigent circumstances existed for the seizures. The applicants were in cells by approximately 11:15 a.m. on December 13, 2017.

[30] The applicants were advised of their *Charter* right to counsel at the residence and the detachment. The question of whether this was sufficient is disputed and further details are set out below.

[31] By approximately 11:15 a.m. there were four people in cells at Pelly Crossing – the applicants, Tyler Blanchard, and Dion Edwards. All were suspects in the homicide investigation. Later that day, another suspect in the homicide, Vance Cardinal, was also arrested. He was brought to the detachment at approximately 12:50 p.m.

[32] Other RCMP officers from the Major Crimes Unit in Whitehorse arrived at various times during the afternoon. Although the exact number is unclear from the evidence, there were likely an additional five or six officers.

[33] Constable Locke, a female RCMP officer, arrived in Pelly Crossing from Whitehorse with replacement clothing on the afternoon of December 13. She seized Charabelle's pants and Lynzee's leggings and socks on the afternoon of December 14.

[34] The applicants appeared by telephone before a justice of the peace approximately 26 hours after their arrest, on December 14 at 1:00 p.m., the usual time for bail hearings in court in Whitehorse each weekday.

[35] The RCMP obtained a search warrant to seize the applicants' clothing from police storage lockers in Pelly Crossing and Whitehorse on January 9, 2018. They failed to comply with the renewal of the detention orders as required by s. 490 of the *Criminal Code*.

Issue #1 a)- Was the Arrest of Lynzee Unlawful (ss. 8 and 9)

[36] The applicant Lynzee challenges her arrest on the basis of both ss. 8 and 9 of the *Charter*. She must prove a breach on a balance of probabilities.

[37] Section 8 states: "Everyone has the right to be secure against unreasonable search or seizure." Section 9 states: "Everyone has the right not to be arbitrarily detained or imprisoned."

[38] A warrantless arrest has subjective and objective elements. Section 495(1) of the *Criminal Code* describes the subjective requirement:

> A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence; or
>
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[39] The officer's subjective grounds for arrest must be justifiable from an objective point of view (*R v Storrey*, [1990] 1 SCR 241): that is, there must be reasonable and probable grounds for the arrest.

[40] The defence argues that the arrest of Lynzee by Constable Imrie was unlawful because he attended at Daniel Luke's residence for the purpose of determining if the applicants were drinking so they could be arrested for breach of conditions. This purpose of gathering evidence exceeded the authority provided to the police under the implied licence to knock at the door of a residence for a lawful purpose. The implied licence to knock is a waiver of the expectation of privacy and is limited to activities reasonably associated with the purpose of communicating with the occupant. The attempt to gather evidence by observing the applicants constituted a breach of s. 8.

[41] The defence further argues based on the decisions in *R v Feeney*, [1997] 2 SCR 13 ("*Feeney*") and *R v Le*, 2019 SCC 34 ("*Le*") that the arrest was unlawful because it occurred inside Daniel Luke's residence. Even if it started at the door, it was incomplete until after Constable Imrie went inside to assist Lynzee to get her boots and look for her jacket and provide her with cautions. *Feeney* states at para. 24 that a warrantless arrest inside a house is not permitted unless the police have reasonable grounds to believe the person sought is within the premises, they announce themselves properly, they believe there are reasonable grounds for arrest, and there are reasonable and probable grounds on an objective basis. There is an exception for exigent circumstances, which did not exist here. The defence says the police had no reasonable and probable grounds to arrest because they were told without confirmation that the applicants may be inside the residence and possibly were drinking. They had no other information

about the nature of the disturbance or whether anyone was at risk or in danger. Their entry into the home to arrest the applicants without grounds was an attempt to gather evidence against them and was unlawful as a breach of s. 8.

[42] The defence says s. 9 was also breached because the arrest occurred inside the residence, without reasonable grounds. This breach was confirmed by the fact that Daniel Luke said to the officers “it’s my house” while they were telling him to “get out”, and Daniel Luke did not invite them in nor consent to them being there. Nor did the applicants.

[43] The Crown says the arrest of Lynzee was lawful under s. 8 because the main purpose of the police in attending the residence and approaching the door was to respond to the disturbance call. The fact that there was a subsidiary purpose of seeing whether the applicants were arrestable for breaching their conditions does not vitiate the lawful purpose of approaching the door to knock.

[44] The Crown says in the alternative, if s. 8 was engaged because of the purpose for which the officers attended the residence, the defence has not established that Lynzee had a reasonable expectation of privacy at the door of Daniel Luke’s residence, based on the factors in *R v Edwards*, [1996] 1 SCR 128 (“*Edwards*”). She did not have standing to argue her s. 8 rights were breached.

[45] The Crown maintains the evidence is clear that Constable Imrie did not enter the residence to make the arrest. He arrested Lynzee while they were at the door of the residence. He went inside only after he arrested and handcuffed her, to find her boots and look for her jacket. As a result, *Feeney* and s. 529 of the *Criminal Code* do not apply, as the arrest did not occur inside a dwelling house.

[46] The Crown says as soon as Lynzee opened the door, Constable Imrie observed she was intoxicated and he knew this was a breach of her conditions. This provided him with reasonable grounds for arrest.

[47] The Crown agrees there were no exigent circumstances.

[48] The following questions arise:

a. Did the police officers in this case exceed the common law 'implied licence' to approach the door of the residence and knock? (s. 8)

b. Did the applicant Lynzee have a reasonable expectation of privacy? (s. 8)

c. Was the arrest in this case made in a dwelling-house? (ss. 8 and 9)

d. Were there grounds for arrest? (s. 9)

Analysis - Issue #1 a) Arrest of Lynzee

Purpose of s. 8

[49] The objective of s. 8 is to "protect individuals from unjustified state intrusions upon their privacy" (*Hunter v Southam Inc*, [1984] 2 SCR 145, at 160). Police conduct that interferes with a reasonable privacy interest constitutes a "search" within the meaning of s. 8.

[50] In this case, the first question is whether the police were entitled to knock on Daniel Luke's front door and make observations when the door was opened.

a. Did the police exceed their authority under the implied licence to knock?

[51] The Supreme Court of Canada in *R v Evans*, [1996] 1 SCR 8 ("*Evans*"), stated the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock. This implied licence ends at the door of the dwelling. Unless this implied invitation is rebutted by a clear

expression of intent, any privacy interest an individual may have in the approach to the door of their dwelling is waived.

[52] The implied invitation to knock extends only to what is necessary to communicate with the occupant of the dwelling. Where the conduct of the police goes beyond this, it amounts to an unauthorized intrusion into privacy interests. The intention of the police conduct is relevant to this inquiry. For example, in *Evans*, the police had received an anonymous tip that the accused were growing marijuana in their home. The police investigation, however, was fruitless. Before police closed their file, they decided to knock on the door of the residence and ask the occupants if they were growing marijuana. The police said they discussed amongst themselves that they might be able to smell marijuana when the door opened. This is what occurred and the police arrested the occupants immediately. The court found that one of the stated and planned purposes of knocking on the door was to try to smell marijuana, which would provide evidence for an arrest. This was an impermissible extension of the implied licence to knock.

[53] In this case, the defence argues that Constable Imrie's evidence that the police intended to go to Daniel Luke's residence to see if the applicants were breaching their conditions by drinking and potentially arresting them was analogous to the police in *Evans* attending the residence to sniff for marijuana. In other words, the stated purpose of knocking at the door of Daniel Luke's residence was to gather evidence to support a charge of failing to comply with conditions.

[54] I disagree with the defence characterization of what occurred. This case is distinguishable from *Evans* because here the police were called to the Daniel Luke

residence by a report from a citizen, Darren Johnnie. Mr. Johnnie was concerned about a disturbance due to Marion Edwards' presence outside the residence and the possible presence of the applicants inside. The police attended to investigate a disturbance call. This was confirmed in evidence and written on the prisoner reports.

[55] This is unlike the police in *Evans,* who of their own accord and unprompted by any specific external calls at that time, knocked on the door of the same house they had been investigating for growing marijuana, for the specific purpose of obtaining information from the occupants about the growing of marijuana in the house.

[56] Here, if the door had not been answered by anyone, Constable Imrie advised he had no plan and did not know what they would have done. The fact that he made observations once the door opened consistent with Lynzee's breach of conditions did not invalidate the police lawful purpose for going to the door to communicate with the occupants in response to a disturbance call.

[57] Corporal Boone was clear in his testimony that their reason for attending at Daniel Luke's residence was to answer the call about the disturbance relayed to him from Darren Johnnie via Constable Anderson. He admitted they were interested in finding the applicants, but they were responding to the disturbance call. This is consistent with his evidence that upon entry into the residence he checked all the rooms in the house to ensure no one was unsafe, injured or being held against their will.

[58] The fact that both officers knew the applicants were on conditions not to consume alcohol (Lynzee) or consume alcohol outside of their residence (Charabelle) was not their main purpose for going to the door of the residence. There is no evidence they would have attended Daniel Luke's residence had the police not received the call

about the disturbance there. The small size of the community meant that the police were aware of everyone who was on conditions and what those conditions were. It is not reasonable that the police could or should put this knowledge out of their minds when they are interacting or potentially interacting with these individuals. Investigating the disturbance was a lawful purpose falling within the implied licence to knock. Approaching the door of Daniel Luke's residence to talk to the occupants at the door about the disturbance did not exceed their authority.

[59] There is no evidence that approaching the door to investigate the disturbance was a ruse to disguise a true purpose of arresting the applicants for breach of conditions and subsequently attempting to obtain information or evidence about the killing of Derek Edwards. There was no reason to believe the call from Darren Johnnie and relayed by Constable Anderson was baseless. The fact there was no one outside the house on the officers' arrival did not eliminate the risk that there was a disturbance occurring inside the house. The officers had a duty to respond to the call, especially in the context of the recent death of Derek Edwards and resulting heightened tensions in the community.

b. Did Lynzee have a reasonable expectation of privacy under s. 8?

[60] The law is unsettled about the reasonable expectation of privacy of a guest in another's house who claims a violation of s. 8. The question in that context is whether the privacy interest under s. 8 is a purely personal one that exists regardless of location, or whether the privacy interest is territorial requiring certain factors to be met.

[61] The Crown argues that even if the officers did breach s. 8 by their conduct, which the Crown does not concede, Lynzee did not have standing to claim under s. 8,

because she was not in her own house. The subject matter of a privacy claim may be the person of the claimant, a place, information, or a combination of all three: *R v Tessling*, 2004 SCC 67 at paras. 19-24.

[62] The Crown characterizes the privacy claim as an exclusively territorial one. That is, the presence of the police at the door and their entry into Daniel Luke's residence forms the source of the violation of the applicants' rights. The authority for territorial privacy claims is *Edwards*. The court listed a number of non-exhaustive factors supporting objective reasonability of an expectation of privacy including the consideration of: (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; and (v) the ability to regulate access, including the right to admit or exclude others from the place (*Edwards* at para. 45; *R v Belnavis*, [1997] 3 SCR 341 at para. 20; *R v M(MR)*, [1998] 3 SCR 393 at para. 31; *R v Buhay*, 2003 SCC 30 at para. 18). The Crown notes that only the first one of these factors was met here.

[63] The defence did not address this argument because they rely primarily on the unlawfulness of the arrest based on arbitrary detention prohibited by s. 9.

[64] The Supreme Court of Canada in *Le,* a decision under s. 9, did not decide this issue of the s. 8 privacy interest. In *obiter*, the court noted the following:

> 137 We are of the view that a case can be made that invited guests can, in some circumstances, have reasonable expectations of privacy in their host's property. **The determination of when, and to what extent, these guests have a reasonable expectation of privacy will be fact and context specific.** However, the analysis must always focus on s. 8's fundamental concern with the public being left alone by the state, the normative approach to discerning the parameters of privacy rights, and the fact that s. 8 provides

> protection to those who have diminished or qualified reasonable expectations of privacy. [emphasis added]

[65] There is insufficient evidence in this *voir dire* to conclude whether Lynzee had a reasonable expectation of privacy and to what degree under the *Edwards* test of a territorial privacy claim. First, it is unclear whether the applicants were invited or uninvited guests to Daniel Luke's residence. Second, it is not clear whether Daniel Luke was present when they arrived, or whether he came after the police arrived. This makes it uncertain whether the applicants had control of the place. Third, Lynzee answered the door, suggesting she may have had the ability to regulate access to and from the house. There is no evidence about the applicants' relationship with Daniel Luke, his presence in the house, or the circumstances of the applicants' presence that morning.

[66] There is other jurisprudence (*R v Adams,* 203 DLR (4th) 290; *R v Russell*, 2008 ABPC 324) in which a claim under s. 8 by a person arrested not in their own dwelling house was allowed to stand on the basis that the s. 8 right not to be unlawfully arrested was personal and not territorial. The law appears to be in a state of flux, evolving from *Edwards*, in part because of a recognition of increasing societal importance on privacy rights, reflected in the developing common law. As noted above in *Le*, s. 8 can still provide protection to those who have diminished or qualified reasonable expectations of privacy. For example, a guest's expectations may be qualified by the knowledge their host could invite others in, including the state. At the same time, it may still be objectively reasonable for a guest present on another's private property to expect that the state will not enter uninvited: *Le* at para. 136, meaning that their right to privacy is less qualified. This unsettled state of the law on reasonable expectation of privacy applicable to guests in another's residence, in addition to the absence of facts related to

the applicants as guests in this case, makes it difficult to determine this issue. My decision on whether there was a *Charter* breach in relation to the arrests is based on other aspects of the law, so it is not necessary to decide this question.

Purpose of s. 9

[67] The purpose of s. 9 of the *Charter* is relevant to the next two questions. The Supreme Court of Canada in *Le* wrote:

> [the] “prohibition of “arbitrary detention” is meant to protect individual liberty against unjustified state interference. Its protections limit the state’s ability to impose intimidating and coercive pressure on citizens without adequate justification (*Le* at para. 25 summarizing *R v Grant*, 2009 SCC 32 at para. 20).
>
> A detention requires “significant physical or psychological restraint”” (*Le* at para. 27 and cases cited therein).

[68] The analysis of s. 9 requires first a determination if the claimant was detained. The second stage is whether the detention was arbitrary. In this case, there is no dispute that Lynzee was detained. The question is whether that detention was arbitrary. Arbitrariness can result from the place of the detention and the absence of grounds for detention.

c. Did the arrest of Lynzee occur in the dwelling house?

[69] The defence assumes in their argument that the arrest occurred inside the house. They argue that even if the arrest began while the officer was outside the house, it was not completed until after he entered the house to retrieve Lynzee’s belongings and provide her with the cautions related to her *Charter* rights.

[70] On this interpretation of the facts, the defence says the arrest was unlawful under s. 9, based on *Feeney,* and s. 529.3 of the *Criminal Code*. Absent exigent

circumstances, which did not exist here, there is no justification for a warrantless arrest after a forcible entry into a dwelling. The principles in *Feeney* and s. 529 apply even if an individual is arrested in the home of a third party. The person's own *Charter* rights are engaged upon their arrest and the location of the arrest is irrelevant to the issue of standing to challenge its validity.

[71] The Crown agrees with this interpretation of the law but maintains that Lynzee's arrest at the door does not engage her s. 9 rights under *Feeney* or s. 529, because the doorstep is not a dwelling house and Constable Imrie had grounds for her arrest.

[72] The Crown's view is that this is a s. 8 case and that Lynzee's privacy rights are not engaged for several reasons, including the location of the arrest.

[73] Constable Imrie was consistent in his testimony that he arrested Lynzee at the door of Daniel Luke's residence in less than one minute after the door was opened. He said he entered the house after the arrest, with Lynzee handcuffed, to retrieve her boots and look for her jacket.

[74] The only evidence about the location of Lynzee's arrest came from Constable Imrie. I accept therefore that the arrest occurred at the door, immediately after Lynzee opened it. I have already found that the officers were lawfully entitled to be at the door. As noted by the court in *R v Bate* (2002), 28 MVR (4th) 273 (MBPC):

> 86 The reason for the general prohibition against warrantless arrests in a dwelling house is for protection of the privacy and security of a person's home. In Feeney Sopinka J. indicated that in the Charter era the emphasis on privacy interests mandates the need for a warrant before "forcibly entering a private dwelling to arrest". (At p. 156) The purpose of the Charter, Sopinka J. said at p. 155, "is to prevent unreasonable intrusions on privacy, not to sort them out from reasonable intrusions on an *ex post facto* analysis." (Emphasis in the original.) There is, however, in my view,

> still some room for balancing intrusions on the privacy of a person's home with effective police enforcement, having regard to the nature of such intrusion. **While the emphasis must be on privacy, there is minimal intrusion on privacy where an individual is arrested on the doorsill of his residence** [emphasis added].

I find that there was no breach of ss. 8 or 9 due to the location of the arrest.

d. Were there grounds for arrest of Lynzee?

[75] The defence argues there were no grounds for Lynzee's arrest and therefore s. 9 was breached as the police were unlawfully in the house. They rely on *Le*, where the court found a breach of s. 9 because the police had no grounds to enter the backyard where the accused was, or to arrest the accused. The police and the suspect were in a high crime area and the police had general information about contraband in a relation to an address. They did not know who was at the address. However, the police were not called to provide general assistance, maintain order, or respond to unfolding events. They were trespassers in the backyard. The accused fled from the backyard after police asked him what he had in the satchel he was carrying. The police pursued and arrested him. He had a firearm, drugs, and cash in his possession.

[76] The defence say in this case the police had no grounds because they did not know for certain that the applicants were in the house; whether they were drinking; and had very little information about the disturbance and saw no evidence of one outside the house. They were trespassing in Daniel Luke's residence.

[77] The Crown disagrees. The police had received a report of a potential disturbance because of the presence of the applicants in Daniel Luke's residence, possibly drinking, with Marion Edwards outside threatening them, after her brother's body had been found in the basement of Charabelle's house. Constable Imrie was not trespassing because

he was not inside the residence when he made the arrest of Lynzee. Constable Imrie observed Lynzee immediately when she opened the door. He noted the smell of alcohol, her slurred speech, and combative behaviour. He testified he had arrested Lynzee several times before and he knew her behaviour when drunk and when sober. He described her appearance and behaviour on that day as consistent with the other occasions he saw her drunk. These were sufficient grounds on which to determine she had breached her condition not to consume alcohol and provided a basis for her arrest at the door. It was not an arbitrary detention under s. 9.

[78] I therefore find the arrest of Lynzee was lawful.

Issue #1 b) Was the Arrest of Charabelle Unlawful? (s. 9)

[79] The Crown has conceded that Charabelle's arrest was unlawful.

Analysis - #1 b) – Arrest of Charabelle

[80] The officers did not have subjective or objective grounds for arrest of Charabelle while they were outside Daniel Luke's residence. There were no exigent circumstances known to police (such as police or public safety; or preservation of evidence) that justified the warrantless entry into the residence. Corporal Boone explained in the case of a disturbance call he understood he "was duty bound to and we have the authority to go in to determine that everyone in that household is safe, nobody had been injured, killed, beaten or being held against their will." This is a misunderstanding of his legal authority to enter a private residence. Answering a disturbance call or a 911 call does not entitle the police to enter or search the residence unless a forced entry is necessary to protect life or safety or preserve evidence or consent to enter is given. There was no

indication in this case that such a forced entry and search was necessary and no evidence of consent.

[81] Charabelle's intoxication became apparent after Corporal Boone entered the residence without legal authority, searched it, and then woke Charabelle up from her sleep on the couch. He smelled alcohol and noted her anger and belligerence and slurred speech. He then arrested her for breach of her condition not to consume alcohol outside of her residence.

[82] The principles in *Feeney* of a warrantless search apply whether someone is arrested in her home or the home of a third party, because the person's own *Charter* rights are engaged.

[83] As a result, it is clear that Charabelle's arrest was unlawful under s. 9 of the *Charter*.

Issue #2 -Was the Search and Seizure of the Applicants' Clothing and Hand Swabs, Including Observations of Blood, Unlawful? (s. 8)

[84] The defence challenge the officers' observations of blood on Charabelle's clothing and Lynzee's clothing and hands; the swabs of Lynzee's hands; the seizure of Lynzee's shirt; and the seizure of Charabelle's shirt and socks on the basis of an unlawful search and seizure and breach of s. 8. They say this evidence was seized unlawfully because of the unlawful arrests of both applicants. Even if the arrests were lawful, the seizures were not incidental to arrest, there were no reasonable grounds on which a warrant could have been issued and no exigent circumstances. The defence says the vague information the police had at the time would likely have been insufficient to obtain a warrant. They should have applied for a warrant in any event and they had other means to ensure the evidence was preserved while they did so – such as

observing the applicants in custody, or turning the water off in their cells so they could not wash their hands or clothing or flush the clothing in the toilet. The defence further argue that the manner of search was unlawful.

[85] The Crown states that Lynzee's arrest was lawful. The Crown does not address search and seizure incident to arrest. The Crown argues there were reasonable grounds to obtain a warrant, but exigent circumstances based on the imminent destruction of evidence made this impractical.

[86] The Crown says even though they concede Charabelle's arrest was unlawful, there were exigent circumstances once the blood stains were seen that justified the search and seizure of her t-shirt and socks. The Crown appears to argue that the exigent circumstances gave police authority to search and seize once they were at the detachment. There would have been reasonable grounds to obtain a warrant, and because exigent circumstances made this impractical, the search and seizure should be considered separately from the unlawful arrest.

Analysis - Issue #2 a) Lynzee - Observations of Blood; Seizure of Hand Swabs and T-shirt

[87] A warrantless search and seizure is presumptively unreasonable. As a result the Crown bears the onus on a balance of probabilities of proving that a warrantless search is reasonable. For a warrantless search and seizure after a lawful arrest to be reasonable under s. 8, it must meet three criteria: first, it must be authorized by law; second, the law itself must be reasonable; and third, the search must be carried out in a reasonable manner. Here the defence does not challenge the law itself, so only the first and third criteria will be addressed.

Search and seizure authorized by law?

[88] Authorized by law means the state conducting the search must do so according to a statute or common law; the search must be carried out in accordance with the procedural and substantive requirements of the law; and the scope of the search must be limited to the area and items for which the law has granted authority to search (*R v Caslake*, [1998] 1 SCR 51 at para. 12 ("*Caslake*")).

[89] In this case, the search was not incidental to arrest. A search incident to arrest must be reasonable on a subjective and objective basis. To meet the subjective and objective requirements, the officer must be acting for purposes related to the arrest.

> Requiring that the search be truly incidental to the arrest means that if the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence <u>of the offence for which the accused is being arrested.</u> For example, when the arrest is for traffic violations, once the police have ensured their own safety, there is nothing that could properly justify searching any further [underline in original] (*Caslake* at para. 22).

Similarly, where an accused was arrested for failing to identify himself, attempting to obstruct justice and providing the police with a false name, the police had no right to search for drugs incident to his arrest. Any search incident to arrest had to be restricted to evidence of identification (*R v Caprara* (2006), 211 OAC 211 at para. 7).

[90] Here, the observations of blood and the seizure of Lynzee's hand swabs and t-shirt were not done for the purpose of the offence for which she was arrested. She was arrested for a breach of a condition not to consume alcohol. Other than to ensure she had nothing on her person that would endanger her safety or the safety of others, it is hard to imagine any justifiable search and seizure incidental to an arrest for breach of a condition not to consume alcohol.

[91] Lynzee was advised by the police at the detachment that they were also investigating her for homicide before the seizures occurred. The seizure of the hand swabs and clothing were related to this investigation, not the breach of her condition.

[92] It is possible that this was search and seizure as a result of investigative detention but the Crown did not argue this. The defence did suggest the applicants were detained for the purpose of the homicide investigation in their analysis of the right to counsel but did not raise this possibility in the context of the seizures. I have not addressed investigative detention.

[93] The Crown relies on the reasoning in *R v Sam* (2003), 104 CRR (2d) 52 (Ont Sup Ct) ("*Sam*"), in support of its argument that this search and seizure was lawful. In that case, the accused Mr. Sam was arrested outside the building where a man had been shot with an assault rifle an hour earlier. Mr. Sam was charged with possession of burglary tools. The police searched and seized his clothing, on the belief that it might reveal evidence to link Mr. Sam to the shooting. They did not attempt to obtain a warrant.

[94] The court in *Sam* found the search was lawful to ensure the accused had nothing in his clothing that was a threat or could be used to escape. The seizure of the clothing was found to have as its sole purpose the seeking of evidence that might tie Mr. Sam to the shooting. The police could have applied for a warrant under s. 487.01 of the *Criminal Code*, the general warrant provision. There were proper grounds for its issuance based on the various facts: Mr. Sam appeared on the scene shortly after the shooting; he gave a false surname to the officer on the scene; he had a screwdriver that could be used to start cars with the ignition removed; he was observed going directly to

the car likely linked to the shooting, known by police to be stolen, with its ignition removed, and an AK-47 rifle in the trunk. The court found there was good reason to believe if he had been present at the shooting there could be blood, fibres, or gunshot residue on his clothing. Fibres and gunshot residue could be easily brushed off or inadvertently dislodged from clothing. The court noted the exigent circumstances provision in s. 487.11 does not apply to s. 487.01 but the common law of exigent circumstances did apply. Exigent circumstances at common law "will generally be held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed" (*R v Grant*, [1993] 3 SCR 223 at 243, quoted in *Sam* at para. 26). The time required to obtain a warrant could well have resulted in the loss of evidence sought. The subjective belief of the police that evidence could be lost or destroyed was found to be objectively reasonable by the court who observed that valuable evidence of a serious crime could be lost forever. Balancing these factors against the minimal intrusion on privacy especially as Mr. Sam was already in custody, the court found the seizure was reasonable.

[95] Here, the Crown argues there were reasonable grounds to obtain a warrant but there were exigent circumstances that made it impractical to do so. There was a real risk of imminent destruction of the evidence.

[96] I conclude first that the police did have reasonable grounds in this case to obtain a warrant to seize the clothing and swabs from Lynzee's hands. The grounds were the fact that the body of the deceased was found in the basement of Charabelle's house approximately five hours earlier; there was a lot of blood at the scene; Charabelle and

Lynzee were believed to have been in the house at the time; and Charabelle and Lynzee had blood stains on their shirts and Lynzee on her hands.

[97] I further find there were exigent circumstances in this case. The evidence of blood on the hands and on the clothing was in danger of disappearing. As noted by the court in *R v Smyth* (2006), 74 WCB (2d) 8 (Ont Sup Ct) at para. 111, "dried blood on the surface of the skin may readily disappear or be destroyed. It may fall off the surface because of its dried state. It may also be removed, intentionally or inadvertently." Further, I accept Constable Imrie's testimony that the police had concerns about the applicants' use of water in the sink or toilet or the use of urine to destroy the blood samples on the clothing.

[98] I also note the Crown's argument that the blood pattern analyst testified at the preliminary inquiry that any smudging or dilution of blood droplets on clothing could reduce their probative value. Specifically, there would be a reduced ability to draw inferences from the number, size, and distribution of the blood droplets about the proximity of the wearer of the clothes to the source of the blood and in some cases the degree of force used on the source of blood.

[99] The defence suggestions that the applicants could be watched in cells to ensure they did not destroy evidence or the water could be turned off until a warrant could be obtained are not practical. The officers would have to draft the information to obtain, and then find a judge or justice by telephone since there are no judges or justices in Pelly Crossing. This would take some time, possibly up to 24 hours or more. There were four people in cells on December 13, 2017. It is impossible for one cell guard to watch all persons in cells at all times. A guard is not permitted to enter the cells unless the person

is unresponsive or unconscious so even if destruction of evidence were observed to be occurring, the guard could do nothing except advise a police officer, if one was there. By that time it might be too late, and would certainly lend credence to the exigency of the circumstances. Similarly, having a person at an open cell door watching both applicants at all times was not practical or possible with the existing staff at the detachment.

[100] Smudging or rubbing out stains can be done quickly and unobtrusively. Dried blood on hands could fall off inadvertently. Turning off the water in certain cells but not others may not have been possible and toilet water would remain for at least one flush and possibly more. Persons in cells need to use the toilet, wash their hands, and have water to drink, especially if they are intoxicated. The relatively fragile nature of this evidence and the significant potential that it could be easily destroyed contributes to the exigent circumstances. The subjective belief of the police in this case was objectively reasonable. I note further the intrusion on privacy interests was minimal given the reduced expectation of privacy of a person lawfully in police custody after lawful arrest: *R v Beare*, [1988] 2 SCR 387 at 413 quoted in *R v Kitaitchik*, [2002] 161 OAC 169 at para. 32.

[101] The defence argues that the fact the police did not seize Charabelle's pants or Lynzee's leggings and socks until the following day detracts from the exigency argument.

[102] Constable Imrie explained that there were no females at the detachment or the neighbouring detachments and they had no replacement pants. To maintain the applicants' dignity, they could not seize their pants at that time.

[103] I accept this explanation from Constable Imrie and note that by that time the police had seized the other items of clothing and hand swabs.

[104] What is inconsistent and difficult to understand is why the pants were not seized until December 14, when Constable Locke arrived from Whitehorse on December 13, with a change of clothes. This delay detracts from the exigency argument.

[105] However, because the Crown has conceded that the pants and leggings should be excluded, I do not need to decide this matter. Overall, I do not find that the failure to seize the pants and leggings at the same time at the shirts detracts from the exigency argument based on Constable Imrie's evidence.

[106] In conclusion, I find the search and seizure of Lynzee's clothing and hand swabs, including the officers' observations of the blood on her shirt at the detachment was authorized by law.

Was the manner of search and seizure reasonable?

[107] The next issue to be determined is whether the search and seizure was carried out in a reasonable manner. This applies to the search and seizure of the hand swabs and the shirt, not the observations of the police of the blood.

[108] There was no evidence that the manner of obtaining the hand swabs was unreasonable.

[109] The taking of Lynzee's shirt began with Constable Imrie telling Lynzee while he was in her cell he would be taking her shirt after he got her a new shirt. There were no replacement shirts in the detachment so Corporal Boone went home to get one. Lynzee did not wait for the delivery of the new shirt. Instead, she took her shirt off as soon as Constable Imrie told her he would be taking it and threw it towards him in the cell. He

took it immediately because of his desire to preserve evidence and left Lynzee in the cell without a shirt. A male officer then entered the cell approximately ten minutes later to pick up part of the HVAC system off the floor and left the cell. Lynzee had no shirt on at the time. After he left, Lynzee removed her bra, threw it, picked it up, and put it back on. This occurred over two or three minutes. The replacement shirt arrived approximately 15 minutes after she had removed her shirt. It was put through the slot in the door of the cell. Lynzee put on the replacement shirt approximately 15 minutes later.

[110] At no time during the interval Lynzee was without a shirt was she given a blanket or any type of covering. However, around the same time she put on the shirt she was given a blanket through the cell door slot and used it to cover herself for much of the rest of the time she was in the cell.

[111] The defence argues the manner of seizure of Lynzee's shirt was not reasonable because i) there was no privacy screen or cover or blanket provided while the shirt was seized; ii) she was not advised verbally that the cell guard could watch by video-camera while she was removing her shirt, nor was she given an option to do so in a room without monitoring; iii) there was no female guard or civilian at the detachment to assist with the seizure. The defence acknowledges this was not a strip search but relies on *R v Golden,* 2001 SCC 83, in support of certain factors that made the manner in which the search and seizure was conducted unreasonable.

[112] The Crown says at that time (December 2017) there was no privacy screen or cover at the detachment, only a fire-retardant blanket and it was not the practice to give these to inmates because they are heavy. There was no policy in effect at that time for privacy blankets, although Staff Sergeant Langley, Senior Reviewer, Criminal

Operations, “M” Division (Yukon) and responsible for ensuring operations complied with policy and legislation, testified it would be common sense to provide one, as long as there were no safety issues in doing so.

[113] The Crown says there were signs throughout the detachment (on the secure bay door, the garage, the walls by the guard station and several signs in the cell area) about the cells being constantly monitored by video. The applicants had been in cells in the detachment earlier so would have had knowledge of the video-monitoring. The Crown says there was no evidence that anyone was watching them on the video monitor while they were taking off their shirts. There is now a policy in place requiring the video-monitor to be turned off when a strip search is occurring but that policy did not exist in 2017.

[114] Finally, the Crown says there were no female staff in any position at the Pelly Crossing detachment or in nearby detachments of Carmacks, Dawson, and Mayo, acknowledging this was a common and concerning issue. This was one of the reasons why they waited until a female officer arrived from Whitehorse before they seized Charabelle’s pants and Lynzee’s leggings.

[115] I conclude the police did not act reasonably in the manner of the search and seizure of Lynzee’s shirt because they did not provide Lynzee with any form of covering after she removed her shirt and they did not have a replacement shirt for her immediately.

[116] Constable Imrie attempted to seize Lynzee’s shirt in a reasonable manner. After Lynzee voluntarily removed her shirt and threw it towards him, it was reasonable in the

circumstances given the nature of the evidence and the desire to preserve it for Constable Imrie to take it.

[117] However, advising Lynzee while he was in the cell with her that they would be taking her shirt as soon as a replacement shirt was available, knowing at that time there was no replacement shirt at the detachment, was not an ideal approach. The failure of Constable Imrie or someone at the detachment to give Lynzee a blanket or some other protective covering immediately was unreasonable. There were no safety concerns in this case as she was given a blanket approximately half an hour later, which she kept for the rest of her time in cells. Compounding this infringement on her privacy rights and dignity was the entry into her cell by a male officer while she was shirtless to pick up a piece of HVAC on the floor. There did not seem to be any urgency to this action. Even if there was, that officer should have provided her with some sort of protective covering before entering. The situation worsened when Lynzee removed her bra. Although she did this voluntarily, she might have used or been encouraged to use a blanket or protective covering if one had been provided to her at that time. If she had had a replacement shirt at the time, this may not have been an issue at all.

[118] While it would have been preferable to have a female officer present to take the applicants' shirts, I accept the evidence of Staff Sergeant Langley and Constable Imrie that only 20-25% of the RCMP members are female, it is difficult to find civilian female staff, and no one in the Pelly Crossing or neighbouring detachments was female. The exigent circumstances of the need to preserve the evidence made it unreasonable to wait for a female officer from Whitehorse to arrive. However, the absence of a female at

the detachment made it all the more important that the seizure was done in a way that did not intrude on the applicants' dignity or privacy.

[119] Keeping the video-recording on in the cell during the seizure of the shirt was not unreasonable in and of itself. The video-recording provides necessary accountability for the RCMP for their treatment of persons in cells, and is also a way to monitor their health and safety. I did not find the evidence of Constable Imrie about the location of the signs indicating video-recording vague; instead, it demonstrated there were many places in the detachment where persons in custody were advised of the video-recording. What was unreasonable was the absence of a covering for Lynzee while the shirt was being seized. If a proper covering had been provided to her during the seizure of the shirt, then there would have been less concern with the video-recording.

[120] The unreasonable manner of the seizure of Lynzee's shirt constitutes a breach of s. 8.

Analysis – Issue #2 b) Charabelle -Observations of Blood; Seizure of T-shirt and Socks

[121] As a result of Charabelle's unlawful arrest, no search arising from it, incidental or otherwise, may be lawful. The legality of the search is derived from the legality of the arrest (*Caslake* at para. 13; *Feeney* at para. 45). The observations of blood and the seizure of her shirt and socks occurred as a result of the unlawful arrest. But for the unlawful arrest, beginning with the unlawful entry into Daniel Luke's home, police observations of the blood on Charabelle's clothing and hands and the subsequent seizures would not have been made.

[122] I do not agree with the Crown's argument that the exigent circumstances, which I have found to exist in this case, and the existence of reasonable grounds to obtain a

warrant, are sufficient to make the legality of the search and seizure a separate inquiry unconnected to the unlawful arrest.

[123] Although the Crown has conceded the unlawful arrest of Charabelle, which has led to my conclusion that the evidence seized was a breach of s. 8, it is necessary to review the facts, manner, and impact of the seizure for the s. 24(2) analysis.

[124] Constable Imrie testified he provided Charabelle with a replacement shirt before he put her in the cell. He testified he stood close by her so that the evidence was preserved but he did not observe her while she was undressing. She was not given a privacy screen or blanket to use while removing her shirt and socks. She put the replacement shirt on immediately. Constable Imrie asked if she was decent and then came in to get the shirt she had taken off and thrown in the corner of the cell. The video cameras in the cell were on and recording while this occurred.

[125] While Charabelle was left alone in her cell while she was changing her shirt and she was given a replacement shirt which she put on immediately, she still had to change in front of the video camera without any kind of privacy covering.

Issue #3 - Violation of Applicants' Right to Counsel (s. 10(b))

Purpose and Scope of s. 10(b)

[126] Section 10(b) of the *Charter* provides: "[e]veryone has the right on arrest or detention … (b) to retain and instruct counsel **without delay** and to be informed of that right;" [emphasis added].

[127] The defence must prove a breach of this right on a balance of probabilities.

[128] The purpose of s. 10(b) was set out in *R v Bartle,* [1994] 3 SCR 173 ("*Bartle*") at 191:

> The purpose of the right to counsel guaranteed by s. 10(*b*) of the *Charter* is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfill those obligations: *R. v. Manninen*, [1987] 1 S.C.R. 1233 at pp. 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: *Brydges*, at p. 206; *R. v. Hebert*, [1990] 2 S.C.R. 151 at pp. 176-77; and *Prosper*. Under s. 10(*b*), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(*b*) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process. [emphasis in original]

[129] The duties under s. 10(b) are threefold: first, the informational component requires the police to inform the detainee of their right to instruct counsel without delay, and the existence of legal aid and duty counsel; second, if the detainee has stated they wish to exercise this right, the police must provide the detainee with a reasonable opportunity to exercise that right, except in urgent and dangerous circumstances; and third, the police must refrain from eliciting evidence from the detainee until they have had the reasonable opportunity to exercise that right.

[130] The phrase "without delay" in s. 10(b) has been interpreted to mean immediately. This is necessary to achieve the intended purpose as described in *Bartle* – that is to mitigate the legal disadvantage and legal jeopardy of a detainee and to assist in regaining their liberty. A further purpose noted in more recent jurisprudence is the psychological value of the contact with counsel. As noted by the court in *R v Rover*, 2018 ONCA 745 ("*Rover*") at para. 45:

> The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

Analysis – Issue #3 a) – Lynzee's Right to Counsel

[131] Constable Imrie activated his audio recorder approximately a minute after his arrest of Lynzee at Daniel Luke's door and captured their interactions for the following 30 minutes.

[132] At Daniel Luke's residence, Constable Imrie told Lynzee and Charabelle of their right to silence and that anything they said could be used as evidence. The exchange at the residence between Constable Imrie and Lynzee continued:

> [Q: Constable Imrie]
> [A: Lynzee Silverfox]
>
> …
>
> Q: Okay and you have the right to a lawyer, do you want to talk to a lawyer?
> A: (INAUDIBLE) fucking sleeping
> Q: Do you want to talk to a lawyer?
> A: It's not like I was fucking hurting anybody
> Q: What's that?
> A: I said it's not like I was fucking hurting anybody I was just sleeping.
> Q: I know but you were still breaching your conditions, right?
> A: Yeah, (INAUDIBLE) my conditions
> Q: Okay
> A: (INAUDIBLE)
> Q: Do you want to talk to a lawyer, yes or no?
> A: I can talk to my own lawyer
> Q: Okay
>
> …

[RCMP Detachment]

Q: Right, it's 11:07. Lynzee SILVERFOX, you need to listen to what I'm, what I have to say, okay, that you've been arrested for failing to comply and that you have the right to a lawyer. Do you understand that?
A: Yes I do
Q: Would you like to speak to a lawyer?
A: (INAUDIBLE)
Q: Lynzee?
A: No, I already have my own lawyer (INAUDIBLE)
Q: You don't want to talk to your lawyer?
A: No
Q: Okay. You also need to know that you are a suspect in a homicide investigation that we're currently investigating right now, okay?
A: (INAUDIBLE)
Q: Do you understand that?
A: What are you guys talking about?
Q: Well we're talking about how there's blood on your shirt, okay. So we're going to be seizing things and taking swabs so you know that the reason why we're doing that is because you are a suspect in a……
A: I don't even know what the (INAUDIBLE)……..
Q: homicide investigation that……
A: you guys are talking about.
Q: we're currently investigating right now, okay? That's what's going on. Do you understand that?
A: (no audible reply)

…

Q: So I'm going to be swabbing your hands, okay. So just give me a second here.
It's 11,
A: Because I don't even know why you guys are doing this
Q: I, I told you why, just because right now you're a suspect, all right. I'm not arresting you for it, I'm saying that you're a suspect
A: Don't know why (INAUDIBLE)
Q: Okay and as of that because
A: (INAUDIBLE) please and thank you

> Q: just for to maintain the continuity of all of our evidence and stuff like that, that's why I'm doing this, okay. So I need to
> A: All right
>
> …
>
> [A short while later, while Cst. Imrie was swabbing Lynzee's hands, he asked the following:]
>
> Q: Did you say you want to talk to a lawyer or no?
> A: No
> Q: No, okay.

[133] The defence identifies three ways in which the police violated Lynzee's right to counsel: i) they did not advise her of her right to free duty counsel; ii) they did not provide her with her right to counsel on the homicide charge; and iii) they did not inform her again of her right to counsel after she was no longer intoxicated.

Failure to inform Lynzee of right to free duty counsel

[134] The Crown concedes that the police failure to advise Lynzee of her right to free duty counsel was a breach of s. 10(b).

[135] The court in *R v Brydges*, [1990] 1 SCR 190, made it clear that the informational component of s. 10(b) includes advising the detainee of free legal aid and duty counsel services available. In the Yukon, the *Charter* warnings police are required to give are written and provided to them on a card. The standardized right to counsel (s. 10(b)) warning includes a reference to the availability of a legal aid lawyer to provide free legal advice, which in this jurisdiction is also duty counsel, the offer of a private phone and the phone numbers for legal aid or any other lawyer of choice. Constable Imrie did not provide that legally required information to Lynzee.

[136] Lynzee's reference to having her own lawyer was not sufficient to constitute a waiver of her right to receive a caution fully informing her of her right to counsel and making it unnecessary for the police to advise her of legal aid or duty counsel. The court in *Bartle* stated that "valid waivers of the informational component of s. 10(b) will … be rare" (at 203). The standard for waiver of a *Charter* right is high (at 206). It must be clear and unequivocal the person is waiving the procedural safeguard in the full knowledge of what they are waiving.

[137] Here, there was no evidence Lynzee was aware of her right to legal aid or duty counsel. The fact that she had been arrested before was not sufficient to allow police to assume she had acquired a certain level of sophistication in dealing with police and knew her full rights (*Le* at paras. 107-110). As Lynzee had not been informed fully of her s. 10(b) rights, she could not be waiving them.

Failure to inform of right to counsel after advised suspect in a homicide

[138] Constable Imrie advised Lynzee at the detachment that she was a suspect in a homicide investigation they were currently investigating, after she told him she did not want to talk to her lawyer about the arrest for failing to comply.

[139] The law is clear that police must reiterate the detainee's right to counsel once the nature of the investigation changes:

> This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one requiring reconsideration of an initial waiver of the right to counsel. [*R v Evans*, [1991] 1 SCR 869, 892]

[140] The court clarified that in an "exploratory investigation" the police are not required to reiterate the right to counsel every time the investigation touches on a different

offence. However, where there is a "fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning" (at 893), the police must restate the right to counsel.

[141] Here, an incomplete caution of her right to counsel was given to Lynzee by Constable Imrie after he advised her the second time she was arrested for failing to comply with one of her conditions by consuming alcohol. He then told her that she was a suspect in an ongoing homicide investigation. This new information qualifies as a fundamental and discrete change in the purpose of the investigation and an investigation into a significantly more serious offence than the one for which she was initially arrested.

[142] The concern underlying the requirement to reiterate the right to counsel is that the new circumstances may render the initial decision not to speak to counsel inappropriate or inapplicable. If legal advice has already been sought, that advice may be inadequate, necessitating a second consultation.

[143] The court in *R v Sinclair*, 2010 SCC 35 ("*Sinclair*") set out three situations in which a second consultation would be required: new non-routine procedures such as a polygraph or line-up; change in jeopardy involving a more serious offence; or if there is reason to question the detainee's understanding of their s. 10(b) right to counsel, such as where the detainee has waived their right to counsel but may not have understood their right.

[144] Although *Sinclair* refers to a second consultation with counsel, the principles are equally applicable in the situation where a detainee has chosen not to seek legal advice and the circumstances change.

[145] I agree with the defence that all three of the examples set out in *Sinclair* exist in this case. First, the police took hand swabs and clothing from Lynzee after they advised her of the homicide investigation – a new, non-routine procedure. She may have wanted to talk to a lawyer in order to make a meaningful choice about cooperating in this aspect of the investigation. The legality of the suspension of her right to counsel due to the exigent circumstances of preserving evidence is addressed below.

[146] Second, to be investigated as a suspect in the homicide investigation is more serious than an arrest for a breach of condition not to consume alcohol. The change in jeopardy justifies a reconsideration of a decision around the communication with counsel.

[147] Third, as noted above, Lynzee was provided with an incomplete caution at the outset and may not have understood fully her right to counsel, including the availability of legal aid. At Daniel Luke's residence she said in response to the initial caution "I can talk to my own lawyer." Constable Imrie testified he understood from this she did want to speak to counsel. At the detachment she appeared to change her mind, when she answered she did not want to talk to her lawyer. She also appeared not to understand fully the new circumstances of the homicide investigation. She said twice after Constable Imrie told her she was a suspect in a homicide that she did not know what they were talking about and later she said she did not know why she was a suspect. Constable Imrie did not tell her it was the Derek Edwards homicide or give her any other

information. This apparent confusion and absence of information contributed to the lack of understanding of her rights.

[148] I do not accept the Crown's argument that Constable Imrie's question to her while he was halfway through taking her hand swabs "did you say you want to talk to your lawyer or no?", with Lynzee responding "no" was compliant with the s. 10(b) requirement. As argued by defence, this was deficient in that he did not clarify what the police were investigating, did not advise her of her right to legal aid/duty counsel, and had already begun a new non-routine procedure – the hand swab.

[149] Further, there is a standard script provided to police to be used in a situation where there may be a waiver. It includes the statement "the police are not allowed to take a statement from you or collect any other evidence from you until you have either talked to a lawyer or decided not to talk to a lawyer" based on the requirement set out in *R v Proper*, [1994] 3 SCR 236 at para. 43. This was not provided to Lynzee. It was even more important to do this after she was advised she was a suspect in a homicide investigation. The provision of additional information to her in the context of exigent circumstances is addressed below.

Failure to reiterate right to counsel after no longer intoxicated

[150] Lynzee was arrested because of her intoxication. Constable Imrie described her slurred speech, her combative behaviour and her smell of alcohol. Her conversation showed incoherence and some confusion at times. Constable Imrie testified his normal practice is to re-read a detainee their right to counsel once they are sober, but he did not do so here.

[151] The court in *R v Clarkson*, [1986] 1 SCR 383 ("*Clarkson*"), found that an intoxicated detainee's refusal of counsel was not a valid and effective waiver of her s. 10(b) right. The police should have delayed their questioning until she was sober enough to exercise her right to retain and instruct counsel or be fully aware of waiving the right. Her inculpatory statement was excluded.

[152] The Crown says in its written submissions that *Clarkson* has been replaced by *R v Oickle*, 2000 SCC 38 ("*Oickle*"), that is, the "operating mind" test for voluntariness of a statement has addressed the court's concerns in *Clarkson*. The Crown did not elaborate further in oral submissions or include the *Oickle* decision in their authorities. I am unable to address this argument further than to say that *Oickle* is about the voluntariness of providing a statement and not the more general comprehension by a detained person of the consequences of waiving the right to counsel. It does not appear to overrule *Clarkson*. The focus of the defence argument is not on the provision of an inculpatory statement as in *Clarkson*, but on the effect of a detainee's intoxicated state on their ability to have their rights complied with.

[153] In this case, while Lynzee was able to converse with the officers, and appeared to understand many of their questions and to comply with their directions, there was clear evidence of her significant intoxication. It would have been consistent with the purpose of s. 10(b) for her to be cautioned again once she was no longer intoxicated, so that if she continued to refuse to speak to a lawyer, it was clear she understood what she was giving up.

Exception for Exigent Circumstances

[154] Courts have recognized that exigent circumstances can justify a delay in providing a detainee access to counsel. Those circumstances include the preservation of evidence. There are limits to the basis for and length of the delay. The Ontario Court of Appeal in *Rover* adopted the useful summary of the law in *R v Wu*, 2017 ONSC 1003. The assessment of justification for the delay requires a fact specific contextual determination and includes the following principles (*Wu* at para. 78):

> a. The suspension of the right to counsel is an exceptional step that should only be undertaken in cases where urgent and dangerous circumstances arise or where there are concerns for officer or public safety. Effectively the right to counsel should not be suspended unless exigent circumstances exist …
>
> b. There is no closed list of scenarios …
>
> v. [Those exigent circumstances can include] [c]ases where there is a risk of destruction of evidence and/or an impact on an ongoing investigation …
>
> …
>
> f. The suspension of the right must be only for so long as is reasonably necessary … the police should be vigilant to ensure that once the decision has been made to suspend the right to counsel, steps are taken to review the matter on a continual basis. The suspension is not meant to be permanent or convenient. … A decision to suspend rights that is initially justifiable may no longer be justified if the police subsequently fail to take adequate steps to ensure that the suspension is as limited as is required in the circumstances.
>
> g. The longer the delay, the greater the need for justification. …
>
> h. The suspension of the right to counsel must be communicated to the detainee … . [citations omitted]

[155] Here, I have found there were exigent circumstances – specifically, the preservation of the potential evidence of blood on the shirt and hands. However, the police did not respect the limitations set out in the principles above in suspending the right to counsel for Lynzee. They did not appear to have conducted a proper assessment of what they were doing and for how long. For example, although Constable Imrie asked while he was halfway through the hand swabbing but before he seized the shirt from Lynzee whether she wanted to talk to a lawyer, he asked in a way that was incomplete. While she answered "no", her right to counsel was not fully complied with as the option of legal aid was not given and clarification of the investigation for homicide was not provided. Her statements "I don't even know what the … you guys are even talking about" should have alerted him to the need to provide additional information. He was relying on exigent circumstances in taking the hand swabs, but he did not tell Lynzee that her right to counsel was being suspended because of their need to preserve evidence. As noted above, he did not attempt to advise her of or implement her right to counsel again until before her telephone appearance at court the following day. This delay was unjustified, even in the exigent circumstances.

[156] For these reasons, I find there was a breach of Lynzee's s. 10(b) rights.

Analysis – Issue #3 b) Violation of Charabelle's Right to Counsel

[157] After Charabelle was arrested by Corporal Boone she was brought to the detachment and taken out of the police vehicle by both officers. Once inside the detachment, Constable Imrie repeated she was under arrest for failing to comply. He asked if she wanted to talk to a lawyer and she said "Yeah". There was a brief

exchange including a question about the blood on her socks, to which she answered "self fucking defence". Constable Imrie then said "Okay, do you, do you want to talk to a lawyer, you said you do, if I give you the phone, right?" Charabelle responded "Yeah". However, Constable Imrie carried on asking her to take off her necklace and hair elastic. He advised her she was a suspect in the homicide investigation, put her in the cell, seized her shirt and socks, gave her a replacement shirt and socks, and then took hand swabs from her. While he was taking her hand swabs he asked, "Do you have a lawyer that you want to talk to or?" She answered, "I have a lawyer, yeah". Constable Imrie asked "Who's your lawyer? … Or do you want to talk to Legal Aid?" Charabelle then said something about calling her sister and her mother. There was no follow up by Constable Imrie after that comment.

[158] Neither Constable Imrie nor any other police officer attempted to implement Charabelle's initial request for a lawyer or to clarify her second less clear answer about whether she wanted to speak to her own lawyer. Constable Imrie testified that he would not implement a call to counsel without receiving the name of a counsel. Yet he made no effort to attempt to obtain that name other than to ask her once as part of two questions being asked in close succession, and did not clarify.

[159] By the afternoon of December 13, there were five or six Major Crime Unit police officers from Whitehorse at the Pelly Crossing detachment. None of them assisted Charabelle with implementing her right to counsel. It was not until 11:29 a.m. on December 14, the following day, that the police provided Charabelle with a telephone call to counsel before her court appearance by telephone.

[160] The Crown concedes Charabelle's s. 10(b) right was breached. It is necessary to review the circumstances for the purpose of the s. 24(2) analysis.

[161] Here, Constable Imrie failed to implement Charabelle's initial request to speak to a lawyer, and instead kept processing her for the cell. Her answers to the second request were unclear but instead of trying to clarify, Constable Imrie focussed on her reference to her sister and did not make efforts to implement her right to counsel. He did not follow up on his unanswered question about the name of a lawyer she wanted to call. Further, no other officer either informed her again of her rights or implemented her initial request until more than 24 hours later.

[162] This was a clear breach of Charabelle's s. 10(b) rights.

Issue #4 - Violation of s. 503 of the *Criminal Code* – Arbitrary Detention (s. 9)

[163] Section 503 of the *Criminal Code* states:

> 503 (1) Subject to the other provisions of this section, a peace officer who arrests a person with or without warrant and who has not released the person under any other provision under this Part shall, in accordance with the following paragraphs, cause the person to be taken before a justice to be dealt with according to law:
>
> (a) if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period; and
>
> (b) if a justice is not available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice as soon as possible.

[164] The applicants were arrested at approximately 10:45 a.m. and were in cells by approximately 11:15 a.m. on December 13. They were brought before a justice of the peace in Whitehorse for the first time at 1:00 p.m. on December 14.

[165] The three RCMP members at the Pelly Crossing detachment were very busy on December 13. They had arrested five people. They had commenced an investigation into a homicide. They testified they had no time to prepare the necessary paperwork for bail court which occurs at the regularly scheduled time of 1:00 p.m. every day (10:00 a.m. on weekends and statutory holidays). They further testified that unlike other jurisdictions, there was no flexibility in the weekday 1:00 p.m. timing of bail court in Whitehorse.

[166] Constable McCowan, one of the RCMP officers who arrived in Pelly Crossing from Whitehorse on December 13, testified he was advised by a Crown lawyer by telephone that a special sitting of bail court could be arranged for 9:30 a.m. on December 14. This information was relayed to others but no efforts were made to arrange an earlier hearing. Constable McCowan testified he thought police have twenty-four hours to bring a detainee before the court.

Analysis – Issue #4 a) and b) – Applicants' Detention Contrary to s. 503

[167] The purpose of s. 503 is to ensure judicial oversight of a detention. It has been described as one of the most important procedural provisions in the *Criminal Code* because it protects the liberty of the subject, which is not to be taken away except in accordance with the law (*R v McGregor*, 2020 ONSC 4802 ("*McGregor*") at para. 260; *R v Poirier*, 2016 ONCA 582 ("*Poirier*") at para. 57).

[168] It is clear from the statute and confirmed in the jurisprudence that 24 hours is the outer limit of the detention (*Poirier* at para. 61; *McGregor* at para. 259). The police are required to bring the person before a justice **without unreasonable delay and in any event within that period [of 24 hours],** provided a justice of the peace is available**.** An

unreasonable delay can occur in less than 24 hours as the police have a duty to ensure the detainee is not detained any longer than is absolutely necessary.

[169] Here, it is understandable in the circumstances that the three Pelly Crossing RCMP members would not have had sufficient time to prepare the paperwork for a bail hearing for the applicants at 1:00 p.m. on December 13 by telephone. However, by the afternoon, even with the approximately six additional RCMP officers from Whitehorse it appears that no one attempted to bring the applicants before a justice earlier than December 14 at 1:00 p.m. No attempt was made by any of the officers to request a special sitting of the court for the following morning or any other time.

[170] As a result, the applicants were detained without any judicial oversight or representation by counsel for almost 26 hours, outside of the limits set out in s. 503.

[171] The Crown conceded this was a breach of the applicants' s. 9 rights. I agree.

Issue #5 – Violation of s. 490 of the *Criminal Code* - Failure to Report to a Justice (s.8)

[172] Section 490 of the *Criminal Code* sets out the procedural framework for detaining, accessing, returning or forfeiting seized items during an investigation of a criminal offence. Any item seized should be returned to its lawful owner unless the police bring it before a justice or file a Report to a Justice about it. The Crown must satisfy the justice that detaining the item is required for the purpose of any investigation, a preliminary inquiry, a trial or other proceeding. The initial detention order is valid for a maximum of three months after the date of the seizure. An order for further detention of one year can be obtained on application on notice to the person from whom it was seized. Further orders for detention for more than one year can be sought if the Crown can show the court detention is warranted given the complexity of the investigation.

Analysis – Issue #5 – Violation of s. 490 of *Criminal Code*

[173] Here, the police did not file a Report to a Justice after the seizures of the applicants' clothing and hand swabs. They obtained a search warrant on January 9, 2018, and prepared a Report to a Justice on February 8, 2018. This was valid for 90 days, until April 9, 2018. An extension application was brought and granted on June 8, 2018 until November 30, 2018. No further order for detention was obtained before the applicants' arrest on May 16, 2019.

[174] The applicants were served with copies of the notice to seek an extension for the June 8, 2018 hearing. There was no affidavit attached to the notice explaining the police were out of time. Lynzee was in custody at that time and there is no evidence of any efforts made to determine if she wanted to attend court. Charabelle attended court and did not oppose further detention.

[175] The Crown concedes this was a breach of s. 8. I agree on the basis of two time lapses. The first was the failure to apply for an extension of the first 90-day order that expired on April 9, 2018 until June 8, 2018. The second was the failure to obtain an extension at all after November 30, 2018 and before the arrest of the applicants on May 16, 2019.

[176] The Crown's argument that the facts were less serious than those in *R v Gill*, 2021 BCSC 377, referenced by the applicants, will be considered under the s. 24(2) analysis.

Law - Section 24(2)

[177] As noted above in para. 4, the applicants seek to have the following evidence excluded as a result of the *Charter* breaches:

a. police observations of blood on Charabelle's clothing;

b. police observations of blood on Lynzee's clothing and hands;

c. Lynzee's left and right hand swabs;

d. Lynzee's t-shirt; and

e. Charabelle's t-shirt and socks.

[178] The following summary of the law follows closely the summary set out in *R v Robertson*, 2017 BCSC 965.

[179] To obtain an order of exclusion of evidence under s. 24(2), the applicants must show on a balance of probabilities that the evidence was obtained in a manner that infringed or denied their rights, and the admission of the evidence would bring the administration of justice into disrepute. Section 24(2) of the *Charter* states:

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

Threshold requirement: "evidence obtained in a manner"

[180] The applicants must meet the threshold requirement of establishing a sufficient temporal or contextual nexus between the obtaining of the evidence at issue and the *Charter* breaches (*R v Lauriente*, 2010 BCCA 72 at para. 35). A causal connection between the breaches and obtaining the evidence is not required, although it may exist (*R v Mian*, 2014 SCC 54 at para. 83; *R v Wittwer*, 2008 SCC 33 at para. 21).

[181] The Ontario Court of Appeal in *R v Pino*, 2016 ONCA 389, summarized the following principles from the jurisprudence on the "obtained in a manner" threshold

requirement:

> [72] Based on the case law …
>
> -- the approach should be generous, consistent with the purpose of s. 24(2);
>
> -- the court should consider the entire "chain of events" between the accused and the police;
>
> -- the requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct;
>
> -- the connection between the evidence and the breach may be causal, temporal or contextual, or any combination of these three connections;
>
> -- but the connection cannot be either too tenuous or too remote.

[182] This assessment must be done on a case-by-case basis.

Grant factors

[183] Once the threshold requirement is met, the following three factors must be considered and weighed (*Grant*, at para. 71) in deciding whether to admit or exclude evidence:

- the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
- the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little); and

- society's interest in the adjudication of the case on the merits (exclusion may send the message that the truth-seeking function of the trial process is not sufficiently important).

[184] The court must engage in a qualitative balancing of these factors to determine whether having regard to all the circumstances the evidence would bring the administration of justice into disrepute in the long-term, from the perspective of a reasonable person (*Grant* at paras. 68, 85-86; *R v Côté*, 2011 SCC 46 at para. 48). The starting point of s. 24(2) is that the *Charter* breaches have already damaged the public's confidence in the administration of justice. The balancing process in the analysis required by *Grant* is to determine whether further damage in the public's long-term faith in the justice system will be done by admitting the evidence at issue (*Grant* at paras. 68-69).

Seriousness of Charter-infringing state conduct

[185] This factor requires the court to consider the qualitative seriousness of the state conduct as well as the level of knowledge of the state actors. The degree of seriousness is considered along a spectrum. It can be described at one end as "technical or trivial" (*R v Harrison*, 2009 SCC 34 at para. 3), "inadvertent or minor" (*Grant* at para. 74), or a result of "an understandable mistake" (*Harrison* at para. 22), and at the other end as "brazen", "flagrant" (*Harrison* at para. 23), "abusive", "deliberate" or "egregious" (*Grant* at para. 133). Deliberate violations are more serious than inadvertent ones. However, reckless or careless disregard for *Charter* rights have been found to undermine the public's confidence in the administration of justice (*Harrison* at para. 24; *Grant* at paras. 74-75).

[186] Factors that may attenuate the seriousness of the *Charter*-infringing conduct include: i) good faith – which is different from the absence of bad faith and is where the officer tried to comply with the *Charter* and mistakenly believed they had done so (*R v Smith*, 2005 BCCA 334 at paras. 56-61); ii) urgent need to prevent the disappearance of evidence (*Grant* at para. 75); and iii) if a warrant for the evidence would likely have issued had one been sought and it was reasonable for the police not to have sought one.

[187] Additional factors that may increase the seriousness of the *Charter*-infringing conduct are: i) cumulative effect of multiple *Charter* breaches in the same investigation: in a case where each of the individual breaches are serious but not at the extreme end of the spectrum and not demonstrating bad faith by police, the cumulative effect of all of them may show a pattern of disregard of *Charter* rights serious enough to favour exclusion of the evidence (*Lauriente* at para. 30 and *R v Bohn*, 2000 BCCA 239 at para. 47); ii) systemic problems such as racial profiling or other types of discrimination (*Grant* at para. 133); and iii) if the police failed to obtain a warrant when they could reasonably have done so.

Impact of the breach on Charter – protected interests of the accused

[188] The court must examine the interests of the accused engaged by the infringed right – such as privacy, liberty, dignity, and the right against self-incrimination – and the degree to which the *Charter* infringement intrudes on those interests. The duration and intensity of the breach are relevant considerations.

[189] The lack of a causal connection between the breach and the evidence can mitigate the seriousness of the impact on the accused's interest.

Society's interest in adjudication on the merits

[190] This factor requires the court to consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion" (*Grant* at para. 79). An assessment of the reliability of evidence and its importance to the Crown's case is necessary under this factor. If evidence reliable and essential to the Crown's case is excluded, especially in the case of a serious offence, it may bring the administration of justice into disrepute by making the trial unfair from the perspective of a reasonable person.

[191] Courts have cautioned not to allow the seriousness of the offence or the reliability of the evidence to overwhelm the analysis, as this would result in less *Charter* protection to those charged with more serious offences (*Harrison* at paras. 34 and 40). While the public has a heightened interest in seeing a case of a serious offence adjudicated on its merits, society also has a vital interest in having a justice system above reproach, where the state actors consistently respect *Charter* rights, regardless of context (*Grant* at para. 84; *R v Reddy*, 2010 BCCA 11 at para. 94).

Balancing the Grant factors

[192] The balancing exercise undertaken by the court must always be done on a case-by-case basis. The jurisprudence has provided some guidance for that exercise. The Ontario Court of Appeal in *R v McGuiffie*, 2016 ONCA 365 ("*McGuiffie*") wrote that this third factor becomes important when only one of the first two factors pushes strongly toward the exclusion of evidence. If both the first and second factors make a strong case for exclusion, the third factor will rarely tip the balance in favour of admission. If

both the first two factors provide weaker support for the exclusion of evidence, the third inquiry will almost certainly confirm the admissibility of the evidence (para. 63).

Analysis – s. 24(2)

[193] I will first discuss the threshold requirement as it applies to the evidence sought to be excluded in this case – in other words, whether all of the breaches have a sufficient nexus to the evidence.

Threshold requirement: evidence "obtained in a manner"

[194] The defence argues that the breaches all arise from the same transaction or chain of events. They say all the breaches cascaded from the unlawful arrests.

[195] The Crown in its written submissions argues that the failure to provide right to counsel to Charabelle was causally disconnected to the seizure of her t-shirt and socks. The Crown further argues the failure to bring Charabelle before a justice (infringement of s. 503 of the *Criminal Code*) and the failure to obtain extensions of the detention orders in a timely way (infringement of s. 490 of the *Criminal Code*) were temporally and causally disconnected from the seizure of her clothing.

[196] The Crown did not make this argument in relation to Lynzee, but I will address it for her circumstances as well.

[197] As noted above, the Ontario Court of Appeal in *Pino* and cases following it such as *R v Boukhalfa*, 2017 ONCA 660, have summarized the obtained in a manner requirement as a "causal, temporal, contextual or any combination of these three connections; but the connection cannot be either too tenuous or too remote" (*Pino* at para. 72).

[198] If a breach occurs after the collection of evidence, in order to be considered under the s. 24(2) analysis, it must be part of the same transaction or course of conduct.

[199] In this case I find that all the breaches are part of the same transaction, occurrence or chain of events, and therefore connected to the exclusion of evidence. I address the circumstances for each of the applicants as follows.

[200] **Charabelle**: Charabelle was unlawfully arrested. Had she not been arrested and taken to the police detachment, the police would not have seen the blood on her clothing and hands. Her right to counsel was infringed at the detachment before the evidence was seized. After the seizure, the police failure to bring her before a justice in accordance with the *Criminal Code* was part of the continuing chain of events that commenced with the unlawful arrest. It was contextually and temporally related to the earlier breaches as appearing in court as soon as possible and within 24 hours is a necessary requirement if someone is detained. Finally, the failure to obtain the extension of detention orders as required by the *Criminal Code*, was not temporally related, but contextually related, since the extension was for the same material as was initially seized.

[201] **Lynzee**: Lynzee was lawfully arrested and the evidence was lawfully seized under exigent circumstances. However, the manner of search and seizure of her t-shirt was unlawful and her right to counsel was infringed – these two breaches occurred before or at the time of the seizure of the evidence. The breach of the right to counsel was temporally and contextually connected, as in Charabelle's case, to the failure to bring her before a justice in accordance with the *Criminal Code*. Further the relationship

between the failure to comply with s. 490 for the detention of the evidence is contextually related for the same reason as in Charabelle's case.

[202] As a result, I find that all of the breaches meet the "obtained in a manner" requirement.

Grant factors

Seriousness of the conduct

[203] I will address the breaches under each factor, address the issue of cumulative effect, then provide my conclusion.

[204] **Charabelle – unlawful arrest –** Corporal Boone testified that his general practice on attending a residence to investigate a disturbance call was to enter the residence to ensure no one needed attention, no one was being held against their will, or had been or was being assaulted. He testified he believed police had the authority to do this without a search warrant even if there were no obvious sign of disturbance outside the residence or the occupants asked him not to enter. He testified he was "duty bound" to enter the residence and search throughout to ensure everyone was safe. This differed from Constable Imrie's understanding who testified when answering a disturbance call at a residence he could not just walk into the house, unless he had a search warrant or the permission of the owner.

[205] Corporal Boone is now retired from the RCMP but in 2017 he was the detachment commander at the Pelly Crossing detachment. His actions on December 13, 2017, were consistent with his usual practice. He entered Daniel Luke's residence without a warrant, where there was no obvious sign of a disturbance, and without being invited in. He arrested Charabelle after waking her up from a sleep and

noting signs of intoxication from the smell of alcohol and her agitated and belligerent state.

[206] Corporal Boone's misunderstanding of the law, in particular the implied licence to knock and the limits of detention as set out by s. 9, was serious. His action in entering the residence was not an inadvertent error, but his usual practice. He made the arrest without reasonable and probable grounds.

[207] I cannot go so far as to say this is a systemic issue as Constable Imrie's testimony revealed the correct understanding of the law. I recognize that evidence was led about an earlier incident on December 13, 2017, involving the same officers where they entered another residence in answer to a disturbance call without being invited and arguably without the presence of exigent circumstances. Yet, one other occurrence involving the same officer is still not sufficient to conclude this was a systemic problem.

[208] However, Corporal Boone's testimony showed a surprising lack of knowledge for an experienced officer and because this was his usual practice, it puts the breach at the more serious end of the spectrum and favours exclusion.

[209] **Charabelle – unlawful seizure of shirt and socks –** This seizure occurred after the observations of blood on clothing by the police at the detachment. Absent the unlawful arrest, the officers would not have made the observations. The connection to the unlawful arrest makes the seizure serious. The unreasonable manner of the search, done without a privacy screen or blanket while the video was recording added to the seriousness. This is at the more serious end of the spectrum and favours exclusion.

[210] **Charabelle – no right to counsel –** Charabelle was asked twice by Constable Imrie if she wanted to speak with a lawyer. The first time in cells she answered yes, but

nothing was done to implement the right. The second time she was asked while her hands were being swabbed, and after she had been advised she was being investigated for homicide. The police did not attempt to clarify her answer when she referred to calling her sister and mother. No further attempt was made during the following 24 hours in cells to put her in contact with counsel, until 90 minutes before court on December 14. This is a serious breach and favours exclusion.

[211] **Charabelle – s. 503 –** The failure to bring Charabelle before a justice earlier than 26 hours after arrest is a moderately serious breach in this case. On its own it would be minor but there were other contextual factors that made this more serious: not one of the approximately eight or nine officers at the detachment attempted to request an earlier court sitting although at least one had been advised by Crown counsel this was a possibility; no police officer thought about appearing and requesting a remand from the court to prepare the paperwork; as a consequence of police inaction, Charabelle had to remain in a cell for 26 hours, including overnight, without a privacy screen when she was using the cell toilet, and without any contact with counsel. While there is not sufficient evidence to suggest this police delay and inaction was deliberate, it does appear to have been negligence or wilful blindness. This context makes this breach moderately serious and tends toward exclusion.

[212] **Charabelle – s. 490 –** The failure to comply with s. 490 by not obtaining extensions of the detention order in a timely way is not a serious breach. Charabelle was given notice of the ongoing detention, she attended court in February 2018 and did not object. Her residual personal and privacy interests in the clothing detained was low, unlike an interest in a cell phone or computer, where there would be intrusiveness into

biographical or lifestyle information and deprivation from use and enjoyment. The seizure was authorized by a search warrant, and the delay was due to oversight. It was highly likely the application would have been granted if it had been made. This breach tends toward admission of the evidence.

[213] **Cumulative effect:** Charabelle was unlawfully arrested, denied access to counsel, and wrongly held in custody for almost 26 hours before being brought before a justice. These multiple *Charter* breaches augment their seriousness and favour exclusion.

[214] **Lynzee – no right to counsel –** Lynzee received a partial warning of her right to counsel but it was incomplete on all three occasions it was referenced because the offer of legal aid or duty counsel was not made. Clarification of a possible waiver was not done. Further clear and complete offers, including an explanation of the suspension of the right to counsel in order to preserve evidence after she was advised of the homicide investigation, and after she was sober did not occur. It created the absence of a lifeline that counsel can provide an accused in detention for approximately 24 hours in this case. There was a suggestion that Lynzee did not want to speak to a lawyer and no statement was taken or potentially incriminating questions asked during this time, both of which are mitigating factors. The partial warning, provided more than once, makes this breach a moderate one and tends toward admission of evidence.

[215] **Lynzee – manner of seizure unreasonable –** The police conduct in taking Lynzee's shirt before they had a replacement shirt for her and letting her sit in the cell without a shirt and in view of the cameras was serious. It could have been easily remedied with handing her a blanket earlier. The degree of seriousness was aggravated

by the entry of a male officer into her cell while she was shirtless to pick up a plastic covering on the floor that did not seem to be urgent and without any attempt to provide her with a covering. This favours exclusion of the evidence.

[216] **Lynzee – s. 503 –** The analysis above at para. 204 for Charabelle applies here with the exception that I have found Lynzee's arrest to be lawful. The seriousness of the breach is moderate.

[217] **Lynzee – s. 490 –** Similar to the analysis for Charabelle, this not a serious breach for the same reasons. Lynzee did receive notice and was in custody at the time so did not appear.

[218] **Cumulative effect –** There are multiple breaches here, some of them on their own serious. Given their existence in the same chain of events, their seriousness is more significant and favours exclusion of evidence.

Impact of breaches on Charter-protected interests

[219] **Charabelle: unlawful arrest –** The Crown urges me to adopt the reasoning in *R v Jennings*, 2018 ONCA 260, that the impact of the unlawful arrest breach be limited to the actual process of arrest itself. I do not agree that *Jennings* applies. The question there was the admissibility of breath samples taken from a roadside breathalyzer test. The Supreme Court of Canada has accepted that the taking of a breath sample is an example of a minimal intrusion on a person's privacy, bodily integrity and human dignity: *Grant* at para. 111. The Court of Appeal in *Jennings* found that to consider the entirety of the procedure after the taking of breath samples including detention, transportation by police vehicle to a police station and detention at the police station would be akin to creating a categorical rule that s. 8 breaches in obtaining breath samples favour

exclusion of evidence under the second *Grant* factor. This would be contrary to the characterization of the taking of a breath sample as minimally intrusive.

[220] Here, the police conduct at issue was the unlawful entry, arrest, and detention. There was no prior minimally intrusive search such as the taking of breath samples. The impact of an arrest itself is a significant limit on a person's liberty, more than being asked to provide breath samples. It is appropriate here to consider the impact of not only the arrest itself but the ongoing detention period in cells, which is inextricably connected to the deprivation of liberty occasioned by the arrest. This was a significant impact on her liberty and privacy interests.

[221] Even if the arrest alone is considered here it is still a serious impact on her liberty interests. The fact that Charabelle was not in her own house and was on conditions did not diminish her expectation of privacy to the extent that it minimized the impact of the unlawful entry and arbitrary detention in these circumstances. The decision of *R v Woroby*, 2003 MBCA 41, relied on by the Crown for the proposition that there is reduced expectation of privacy for those on conditions is a sentencing appeal making it of limited value in this context. The other decision relied on by the Crown, *R v Kanak*, 2003 ABPC 122, resulted in an exclusion of evidence under s. 24(2) after the court considered many factors, one of which was a reduced expectation of privacy for an accused on conditions. I accept in this case that Charabelle's expectation of privacy may have been reduced but not to the extent that an unlawful arrest was not an infringement of that interest, considering all of the circumstances here.

[222] The unlawful arrest's intrusion on Charabelle's liberty and privacy interests is significant and favours exclusion.

[223] **Charabelle – Manner of seizure of clothing and hand swabs**

[224] The manner of seizure of Charabelle's shirt intruded on her privacy interest as she was not given a covering to use while she was changing in the cell with the video-camera recording. As she was given a replacement shirt and put it on immediately the impact was minimal and favours admission.

[225] **Charabelle – No right to counsel –** Charabelle was denied right to counsel until approximately 24 hours after her arrival in cells. The Ontario Court of Appeal in *Rover* found that a six-hour delay in allowing the detained accused to speak to his lawyer had a significant impact on his rights. The Court of Appeal noted the lifeline provided by counsel to detained persons (para. 45) and wrote at para. 46:

> … The applicant was held [in cells] for several hours without any explanation for the police refusal of access to counsel, and without any indication of when he might be allowed to speak to someone. His right to security of the person was clearly compromised. The significant psychological pressure brought to bear on the appellant by holding him without explanation and access to counsel for hours must be considered in evaluating the harm done to his *Charter*-protected interests.

[226] Here, the length of the delay in accessing counsel when it was clearly requested but not implemented the first time, and the request not clarified or appropriately followed up on the second time had a significant impact on the liberty and right against self-incrimination interests of Charabelle and favours exclusion.

[227] **Charabelle – s. 503 –** The failure to bring Charabelle before a justice until 26 hours elapsed has a similar impact as the denial of rights to counsel. As noted above, it must be viewed in the entire context of the unlawful arrest and detention, without access

to counsel and without dignified privacy in cells. In this context, the impact is moderate and favour admission.

[228] **Charabelle – s. 490 –** The impact on Charabelle's privacy interests of the breach is minimal and on its own is not significant. It favours admission.

[229] **Lynzee – manner of seizure of shirt –** The circumstances of this seizure were a significant impact on Lynzee's privacy interests. They favour exclusion.

[230] **Lynzee – no right to counsel –** Despite the lack of clarity in Lynzee's answers about wanting to speak to a lawyer, she was entitled to being asked clearly what she wanted to do and to understand clearly what she was giving up. Without this, her right against self-incrimination was infringed. But because of the lack of clarity and the partial attempt to provide her right to counsel, the impact here was moderate and favours admission of the evidence affected by this infringement, the observations of blood and the hand swabs.

[231] **Lynzee – s. 503 –** The overholding in cells for 26 hours had a more severe impact when combined with the infringement on her right to counsel, resulting in a long period of detention without a lifeline and without privacy while using the toilet. The impact however, is still moderate and favours admission.

[232] **Lynzee – s. 490 –** The impact of the breach on Lynzee's privacy interests is minimal and this favours admission of the evidence.

Society's interest in adjudication on the merits

[233] **Charabelle and Lynzee –** The offences here are some of the most serious in the *Criminal Code*. The Crown submits the evidence is highly reliable and critically probative for the prosecution, although they do not say the exclusion of the evidence of

Charabelle's t-shirt and socks, Lynzee's t-shirt and hand swabs would end the prosecution. Society nevertheless has a heightened interest in ensuring a just result in these circumstances.

[234] A just result however, must take into account respect by state actors of *Charter* rights of persons accused with serious offences. To allow the seriousness of the offences or the reliability of the evidence to overwhelm the analysis is to invite a different standard of *Charter* rights protection for those charged with serious offences.

Balancing of Grant factors

[235] I recognize police have a difficult job. Their responsibilities become more onerous in a small community detachment where a sudden death occurs and they are tasked with trying to keep the community safe as well as manage the initial stages of an investigation in a way that preserves evidence and treats people fairly.

[236] There are relatively simple tools that can be used by police to make their jobs easier and mitigate circumstances such as this – such as using the *Charter* right to counsel warning card, ensuring detachments keep blankets and replacement clothing on hand, maintaining open communication with the Crown and courts to understand the degree of flexibility with procedures, and increasing their understanding of the law surrounding warrantless entries into private residences.

[237] As noted in *McGuiffie*, where the first and second factors of the *Grant* test favour exclusion, it will be rare for the third factor to tip the balance in favour of admission. Similarly, if the first two factors provide weaker support for exclusion of the evidence, the third factor will usually confirm the admissibility of the evidence.

[238] **Charabelle:** I have found that the conduct of police in relation to Charabelle and its impact on her was serious and significant, particularly the unlawful arrest and the denial of the right to counsel. The cumulative effect of all of the breaches must also be considered.

[239] My analysis of the first two factors favours exclusion of the evidence. The necessity of ensuring police adhere to *Charter* standards must be emphasized in this case. The third *Grant* factor is insufficient to tip the balance and the evidence related to Charabelle will be excluded.

[240] **Lynzee:** The manner of seizure of Lynzee's shirt in this case showed a serious disregard by police of her privacy and dignity rights. The first two factors as they relate to the seizure of the shirt favour exclusion. Combined with the cumulative effect of the other breaches, although they were found to be less serious with less significant impacts, this seizure infringement favours exclusion of the evidence of the t-shirt.

[241] The admissibility or not of the observations of blood and the taking of the hand swabs is related to the infringement of Lynzee's right to counsel, which I have found to be moderate in its seriousness and in its impact under the first two factors. The admissibility of this evidence is also related to the two other breaches which I have found to be less serious and significant. In this case, even considering the cumulative effect of all the breaches, I find on balance that the evidence of the observations of blood and the hand swabs should be admitted.

Conclusion

[242] For the above reasons, the following will be excluded under s. 24(2) of the *Charter* from evidence at trial:

1. Constable Imrie's and Corporal Boone's observations of blood stains on Charabelle Silverfox's clothing;
2. Charabelle Silverfox's t-shirt and socks; and
3. Lynzee Silverfox's t-shirt.

[243] The following evidence is admissible at trial:

1. Constable Imrie's and Corporal Boone's observations of blood stains on Lynzee Silverfox's clothing and hands; and
2. swabs of Lynzee's left and right hands.

[244] In addition, as conceded by the Crown, I order that the following will be excluded under s. 24(2) from evidence at trial:

1. Charabelle's sweatpants seized December 14, 2017; and
2. Lynzee's leggings and socks seized December 1, 2017.

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DUNCAN C.J.