

ONTARIO COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

LAUREN McDIARMID

Before Justice Fergus ODonnell
Reasons for Judgment on a Charter Application, delivered on 31 May, 2022

Mr. Vanja Ilic..... for the Crown
Mr. Scott Buchanan for the defendant, Lauren McDiarmid

Fergus ODonnell J.:

Overview

1. On 15 September, 2020 Richard Beal had a bad night that became a much worse morning. As told to the police by his girlfriend, Lauren McDiarmid, who is the defendant before me, Mr. Beal was having chest pains and was up all night. He used some fentanyl and was high. He then announced that he was

going to go to the drug store, whereupon he threw his bag out their third floor window and jumped out after it, apparently striking a second-floor air conditioner unit on the way down to the ground, two floors below their apartment. Emergency medical services and the police attended and Mr. Beal was taken first to the St. Catharines General Hospital and then airlifted to Hamilton because of the severity of his injuries. Mr. Beal is not a defendant before me. While he was at the hospital in Hamilton, a quarter ounce of a crystal methamphetamine/fentanyl mix was discovered in his buttocks.

2. In responding to the call, the first responding officer asked Ms. McDiarmid for Mr. Beal's health card and accompanied her to the apartment, where she started looking for it. Before she found the card, the first officer noticed some fentanyl residue and evidence of drug consumption and asked Ms. McDiarmid to leave the apartment for both their protection after she confirmed there was fentanyl in the apartment. A second officer went into the apartment later to retrieve the health card and found that there was already a third officer in the apartment taking photographs. The second officer found Mr. Beal's health card, but in doing so saw additional fentanyl in the purse underneath the wallet the health card was in, in a quantity he characterized as a trafficable amount. He then obtained a search warrant which uncovered an even larger amount of fentanyl, plus some cash and high-end bicycles, which the Crown alleges were proceeds of crime.

3. The police called Ms. McDiarmid at the hospital in Hamilton after the search warrant was executed and told her she would be charged with possession of fentanyl for the purpose of trafficking and possession of proceeds of crime. She surrendered in Niagara later that night and she was released after processing, also the same night.
4. At trial, Ms. McDiarmid asserts that the various police entries into her and Mr. Beal's apartment were violations of her constitutional rights, in particular the protection against unreasonable search and seizure set out in s. 8. She also argues that the evidence found should be excluded from her trial under s. 24(2) of the *Charter*.

The Evidence in Detail

5. I heard from four witnesses, namely:
 - a. Constable Christopher Morin, one of the first responding officers, the first officer to enter the apartment looking for the health card.
 - b. Detective Constable Mike Landry, the second officer to enter the apartment looking for the health card.
 - c. Detective Constable Geoffrey Poirier, the officer who took scene of crime photographs when the drug search warrant was executed.
 - d. Sergeant Lori Coristine, at the time a detective constable, who was assigned to investigate the circumstances of Mr. Beal's defenestration.

I did not hear from the Forensic Services Unit officer whom D.C. Landry walked in on when D.C. Landry went to the apartment to retrieve Mr. Beal's health card.

6. I also heard a certain amount of narrative or contextual evidence, some of which was hearsay, but which is relevant to an overall understanding of what happened. There were certain constraints placed by the defence on the conceded admissibility or use of some of that evidence, but I believe I am playing within the lines defined by the defence when I do refer to that evidence in these reasons.
7. Constable Morin described arriving on the heels of the Emergency Medical Services ("E.M.S."), personnel and observing them attending to Mr. Beal outside the building, with Ms. McDiarmid right beside them. While E.M.S. attended to Mr. Beal, Constable Morin spoke with Ms. McDiarmid and got Mr. Beal's and her details, as well as the explanation set out above about how Mr. Beal got from this third-floor apartment to the ground below. Constable Morin's evidence made it clear that Ms. McDiarmid was extremely distraught and crying, unable to catch her breath, pale, having trouble expressing herself.
8. Constable Morin said that on every one of hundreds of medical assistance calls he has attended, the E.M.S. responders have asked for the patient's health card, so he asked Ms. McDiarmid where it was. She said it was in the apartment and he accompanied her there for her safety. He explained to her that Mr. Beal

would be taken to St. Catharines General Hospital and told Ms. McDiarmid that he would drive her there once they retrieved the health card. He ultimately did that, stopping en route and buying her something to eat.

9. Ms. McDiarmid entered the apartment and held the door open for Constable Morin. While in the apartment, Constable Morin stood back as Ms. McDiarmid looked for the health card in the living room and bedroom. He estimated they were in the apartment for about twenty minutes. In plain view he noticed purple residue in a ramekin, saline solution and various drug paraphernalia. Based on his experience, he asked Ms. McDiarmid what was in the ramekin, for his own safety, and she said it was fentanyl. At this point, for both their safety he said, he asked Ms. McDiarmid to leave the apartment with him and they left, without having located the health card. Since this was a case where Mr. Beal's survival was in doubt, Niagara Regional Police policy was to hold the scene, so Constable Morin waited for an officer to attend for that purpose and then took Ms. McDiarmid to St. Catharines General. When it became clear that Mr. Beal was being airlifted to Hamilton, Constable Morin lent Ms. McDiarmid his phone to allow her to arrange for a ride to Hamilton.
10. Constable Morin believed he briefed then D.C. Coristine about what he had found and then returned to the police station where he told D.C. Landry who would be investigating from there on.

11. I have no problem accepting Constable Morin's evidence as truthful and reliable. There were shortcomings with respect to his notes as brought out by Mr. Buchanan's cross-examination, but at the time Constable Morin had only been a police officer for just over a year and he himself recognized that his notes that day did not live up to his own standards at the time he was testifying about a year-and-a-half later. Mr. Buchanan suggested various things testified to by Constable Morin were not actually said or did not actually happen and Constable Morin rejected those challenges to his evidence. I believe him.
12. The evidence becomes a bit murkier when one gets to the testimony of D.C. Landry and now Sergeant Coristine, which overlaps but does not coincide. I shall deal with Sergeant Coristine's evidence first. For the most part, I shall refer to her by her rank at the time of the events.
13. At the time of these events, Sergeant Coristine was a detective constable in the Street Crime Unit, a unit that handles drug investigations and property offences such as break and enters. D.C. Landry was a member of the same unit. D.C. Coristine testified that on 15 September, D.C. Landry was the acting sergeant of the Street Crime Unit. Because the Criminal Investigation Bureau, which would normally handle suspicious incidents like Mr. Beal's fall, was unavailable, Staff Sergeant Harris asked the Street Crime Unit to cover it and because then D.C. Coristine had spent time in the C.I.B., she was tasked with that role by D.C. Landry. D.C. Coristine got up to speed on the background details, including

attending at the scene and focused on investigating how Mr. Beal's life-threatening injuries had occurred, including the potential that it was an attempted suicide, which falls within the C.I.B.'s remit.

14. D.C. Coristine also testified that she spoke with D.C. Landry, in his role as the acting sergeant of the Street Crime Unit, because the Street Crime Unit, in D.C. Coristine's words, "were involved in the other aspect of the case." She had one conversation with D.C. Landry and, "I continued with my investigation and they continued with theirs". It is inescapable from her evidence that in D.C. Coristine's mind she was conducting a suspicious injury investigation and D.C. Landry was investigating the drug side of things.

15. D.C. Coristine said that she did ask D.C. Landry to look for Mr. Beal's health card in the course of his investigation. She did not direct D.C. Landry to enter the apartment for the card. She did not ask D.C. Landry to look for controlled substances. She did not recall if the health card was ever found and had no notes on that point. She was clear that she had not relayed any health card information to the hospital. From her perspective, the relevance of the health card in a case involving injuries such as Mr. Beal's injuries, was that if Mr. Beal had died, the coroner would absolutely require photographic identification of him.

16. D.C. Landry testified to his interaction with Staff Sergeant Harris and D.C. Coristine, about attending the scene and then returning to the station to get

Constable Morin's report to be used as part of his search warrant application. D.C. Landry said that D.C. Cristine "directed" him to get Mr. Beal's health card or any other identification, so he went up to the apartment and went directly into the bedroom where a purse was, lifted out a wallet and found Mr. Beal's health card. He believed he had been told by D.C. Cristine that the identification would be in that purse. When he removed the wallet from the purse to get Mr. Beal's health card, D.C. Landry said he saw a trafficable amount of fentanyl underneath, a total of about four grams. He said he grabbed the health card and left for safety reasons in light of the fentanyl.

17. D.C. Landry also testified that when he went into the apartment there was a member of the Forensic Services Unit taking photographs, but could not recall which room, although in cross-examination he was sure it was the living room. Just before noon, D.C. Landry said, D.C. Cristine relayed to him that medical personnel in Hamilton had retrieved a quantity of suspected crystal methamphetamine in Mr. Beal's buttocks.

18. D.C. Landry testified that he took the health card and presented it to D.C. Cristine, but he had no note of doing so (and as noted, she had no note or recollection of receiving it and was sure she had not passed the health card information to the hospital). D.C. Landry said it would make no sense for him to search for the health card and then not take it. However, he also had no idea how Mr. Beal's health card came to be photographed in the wallet at the time the

search warrant was executed hours later. Even when confronted with a photograph of the wallet with the health card in it taken during the execution of the warrant later that day, D.C. Landry said that made no sense. It became clear that at the time he was testifying, D.C. Landry had not even reviewed the information to obtain he had drafted for Ms. McDiarmid's and Mr. Beal's home. While notes are not expected to be perfect, Mr. Buchanan drew out shortcomings in D.C. Landry's notes of events. Unlike Constable Morin, with a decade of experience at the time of this investigation, D.C. Landry did not have the mitigating circumstance of inexperience to explain these shortcomings.

19. D.C. Poirier was also a member of the Street Crime Unit. He attended on the search warrant execution later that day and took photographs. He identified a picture of a wallet with two health cards, taken in the bedroom of the apartment, the same picture that had been shown to D.C. Landry. Other than confirming that he had taken the photograph, D.C. Poirier could not assist with any other details, saying the searching officer, whose identity he had not noted, would have to be the source of any other information about the discovery of the wallet, the location of the health cards within it, etc.

20. Other than the fact that he or she was present in Ms. McDiarmid's home as disclosed by D.C. Landry, there was no evidence from the Forensic Services Unit photographer or any evidence from other witnesses about the reason or the basis for his or her photographing of the apartment or the nature or extent thereof.

The Information to Obtain the Search Warrant

21. D.C. Landry drafted an information to obtain a search warrant for the apartment and the warrant was granted. In it D.C. Landry asserted his belief that Mr. Beal and Ms. McDiarmid were street-level fentanyl and crystal methamphetamine dealers. He set out Mr. Beal's fall/jump from the third floor, Constable Morin's attendance in the apartment with Ms. McDiarmid to obtain Mr. Beal's health card, his observation of a syringe and some paraphernalia with fentanyl on it and Ms. McDiarmid's admission there was fentanyl in the apartment. He then set out his own attendance, the presence of Forensic Services officers (plural in this version), when he arrived, his discovery of the health card and his observation of two bags of fentanyl in the purse under the wallet containing the health card, as well as the report from Hamilton about the discovery of crystal methamphetamine (as it was suspected to be at that time) in Mr. Beal's buttocks. He then set out his grounds for believing the quantities he saw were more than for personal use and that this could be an addict-trafficker scenario. These latter observations were not challenged and fall within the bounds of reasonableness on the evidence in the information to obtain, although what D.C. Landry saw in the apartment might stretch the concept of possession for the purpose when one considers that there were two supposed addicts living in the apartment.

22. In total, therefore, there were four police entries into Ms. McDiarmid's apartment, namely by Constable Morin, by the Forensic Services Unit photographer(s) D.C.

Landry found in the apartment, by D.C. Landry and by the team executing the search warrant. The first three of these entries were made without a warrant. The onus is on the Crown to demonstrate that these entries were "reasonable".

Basic Principles

23. A warrantless "search" is presumed to be unreasonable (notwithstanding the Crown's comments, whether each entry was a "search" within common parlance, each entry engaged the privacy rights protected by section 8 of the *Charter of Rights*; in this case the nomenclature does not make a difference). The onus to justify a warrantless search or entry is on the Crown and the Crown must demonstrate each was reasonable on a balance of probabilities.

24. A search conducted pursuant to a warrant, on the other hand, is presumed to be valid. The onus is on the defence if they wish to challenge a warranted search, again on a balance of probabilities.

25. Where information relied upon to obtain a search warrant has been obtained unlawfully (e.g. by an invasion of privacy that violates s. 8), any such information must be excised from the information to obtain. The question then becomes whether or not the remainder of the information could support issuance of the warrant. In a case where material has been excised from the information to obtain, the reviewing judge is not assessing the appropriateness of the issuing

justice's decision at all because the reviewing judge is assessing the warrant without reliance on the excised material that was before the issuing justice.

26. Where a breach of section 8 has been found, the onus is on the defence to demonstrate that admission of the evidence despite the section 8 breach would bring the administration of justice into disrepute. For more than a decade now, the Supreme Court of Canada's judgment in *R. v. Grant*, 2009 SCC 32 has set out the test for admission or exclusion, with clarification from a series of successor cases.
27. There was no suggestion made here that Ms. McDiarmid had consented to any "search" of her apartment. Her consent would be irrelevant to the warranted search and she was nowhere around to give consent for the entries by D.C. Landry or the Forensic Services Unit photographer. On the record before me, including the record about Ms. McDiarmid's emotional state, the likelihood of a consent for Constable Morin's entry, express or implicit, satisfying the requirements set out in *R. v. Wills*, 1992 CanLII 2780 (ONCA) seems infinitesimal. Certainly, on the record before me, the criteria set out in *Wills* have not been made out.
28. In its written material the Crown relied on three bases to justify the warrantless entries, namely:

Section 529.3 of the *Criminal Code*.

29. This is the exigent circumstances "*Feeney* warrant" provision, which allows for a warrantless entry for the purpose of making an arrest where a warrant to enter for arrest could not realistically be obtained in time. This provision is entirely irrelevant to the present case. Before Constable Morin entered the apartment, at best he had a suspicion that Ms. McDiarmid was under the influence of some substance (as set out in the information to obtain). He had no grounds to arrest Ms. McDiarmid and, since they were outside the building together, he certainly did not need to enter her apartment to arrest her if he actually had grounds. As Ms. McDiarmid was at the hospital or even en route to Hamilton by the time D.C. Landry and the Forensic Services officer entered the apartment, s. 529.3 is again totally irrelevant. Quite apart from the *Code* provision being inapt, I note that the Crown's factual foundation for it was unsupported. In its factum, the Crown said s. 529.3(2)(a) applied to justify Constable Morin's entry because there was a need to, "prevent imminent bodily harm or the death of Mr. Beal." There was no evidence at all to suggest that Mr. Beal's medical care, either by E.M.S. or at the hospital was going to be affected in any way whatsoever based on whether or not he had his health card. Indeed, to the extent there was evidence on that issue at trial, it was to the contrary, as is common sense. The Crown's further arguments to use s. 529.3 to justify D.C. Landry's warrantless entry are not supported in the evidence or in common sense, for example, "any alternative course of action would have been impractical and moreover a danger to civilians of the 2 Lighthouse Road St. Catharines, the police officers investigating the attempt suicide call and Mr. Beal himself."

Section 11(7) of the *Controlled Drugs and Substances Act*.

30. This is the exigent circumstances authorization to enter premises to seize drugs, precursors, etc. where reasonable grounds exist but circumstances do not permit getting a warrant. As the Crown wisely abandoned reliance on this section during oral argument, I shall say no more about it.

The common law police duty to protect life and ensure public safety.

31. Here again, the Crown places enormous weight on the importance of getting Mr. Beal's health card, weight which is not borne out on the evidence or in light of common sense. If a rationale exists for the urgent retrieval of the health card having been related to the protection of the health or safety of Mr. Beal or any other person, it was not made out in evidence and is not a matter of which judicial notice could reasonably be taken. The evidence before me made it clear that, while it was a routine practice to try to get the health card in cases like this (which makes sense, as a matter of convenience), obtaining the card was not a requirement for Mr. Beal's injuries to be addressed on scene or at the hospital. At some future point, if the hospital was not satisfied that Mr. Beal had coverage, he might have been required to pay for that care, but that would be a civil matter between Mr. Beal and the hospital. Obviously, if Mr. Beal had died, the police would need to confirm his identity, but Mr. Beal was not dead (it was not even suggested in the trial that he had died of his injuries even eventually) so there was no demonstrated urgency in obtaining photographic proof of identity.

32. There is no doubt that, in appropriate circumstances, the police responding to an emergency call may have a power, and indeed a public duty, to enter private premises to ensure public safety. This has been labeled as the ancillary powers doctrine and has a pedigree that extends back almost six decades: *R. v. Waterfield*, (1963), [1964] 1 Q.B. 164 (Eng. C.A.). As set out by the Supreme Court of Canada in *R. v. Godoy*, 1999 1 SCR 311, at paragraph 12:

If police conduct constitutes a *prima facie* interference with a person's liberty or property, the court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty.

33. I accept that that power or duty is not limited, for example to the "classic" example of police responding to a hang-up 911 domestic violence call, but that does not mean it is a *carte blanche* power. The application of that power and the two-part test have recently been considered by the Court of Appeal for Ontario in *R. v. Stairs*, 2020 ONCA 678. In that case, Fairburn, A.C.J.O., referring to the factual basis before her, noted:

[19] It is against that backdrop that the police had to make a decision. The consequences of not responding quickly and decisively could have been grave. While the female in this case eventually walked out of the basement, in another case, she might not have. The luxury of time was not on offer. The police had a duty to ensure safety and their exercise of powers – entering the home without a warrant in order to locate the female occupant that had been seen by the 9-1-1 caller – was a justifiable exercise of power associated with that duty

34. Assuming for present purposes that retrieving the health card fell, "within the general scope of any duty imposed by statute or recognized at common law" (which is not entirely clear), on the record before me, nothing coming within a

country mile of the sort of scenario in *Stairs*, the sort of risk in *Stairs*, the immediacy requirement in *Stairs*, or the lack of viable alternatives seen in *Stairs* was in play when the police entered Ms. McDiarmid's apartment. I accept as a perfectly common-sense assertion that E.M.S. and the hospitals will always want a patient's health card. I accept that, if a misadventure like Mr. Beal's turns fatal, the coroner will need to be certain of the deceased's identity. However, none of that comes close to the nature of the classic *Waterfield* kind of scenario. As I have said earlier, if there was a reason why the health card was vital to Mr. Beal's health care or his safety or to the preservation of evidence of a crime, that reason does not come through on the evidence before me.

35. In assessing whether or not the Crown has met its onus to demonstrate the reasonableness of the entries I must also consider two peculiar features of this particular case. While I accept the evidence of Constable Morin as reflecting a sense of duty and honesty and genuine concern for Ms. McDiarmid, the balance of the Crown's evidence is more problematic.

36. The first conundrum is what to do with the evidence of D.C. Cristine and D.C. Landry. Their evidence of who did what based on whose instructions is impossible to reconcile. Landry said he only went into the apartment to get the health card at D.C. Cristine's specific instruction. She said she only asked him to keep an eye out for it in case it came to light during his drug investigation and she was crystal-clear that her investigation and his were totally separate

investigations and that he had a specific focus on the drug side of things as a Street Crime investigation while she was conducting a C.I.B. investigation into the circumstances of Mr. Beal's injuries.

37. It is not uncommon for honest witnesses to have different recollections of events and of details of events and for professional witnesses' notes to be of varying quality. Mr. Buchanan, for Ms. McDiarmid, suggests that I should conclude that D.C. Landry entered Ms. McDiarmid's home using the retrieval of the health card as nothing but a pretext for a look around because he knew that up to that point he lacked sufficient grounds to obtain a search warrant. On the totality of the evidence I understand Mr. Buchanan's scepticism; indeed, measured scepticism is a valuable part of any lawyer's tool kit. However, it is one thing to be suspicious of what happened and quite another for me to be satisfied of wilful misconduct, a standard I find has not been made out on the evidence before me. That being said, as between D.C. Landry's recollection and then D.C. Coristine's recollection, I am of the view that her evidence is more reliable and that she did not direct him to go and retrieve the health card but only asked, since he was seeking a drug warrant anyway, for his officers to keep an eye open for the health card, purely as a matter of convenience and efficiency. Her explanation simply makes more sense than his. His evidence about going in there specifically for the health card, when contrasted with the fact that the health card showed up still in the wallet hours later on execution of the search warrant is also concerning.

38. The second problem is this: while I have conflicting explanations for D.C. Landry's entry into the apartment, I have no explanation at all about why the Forensic Services photographer was in the apartment. I could speculate about that, but I should not. No information was provided at trial about the factual basis for that officer's or those officers' attendance or about the existence of any other common-law or statutory basis for their apparently warrantless attendance or photographing of the apartment. All I know is that there was a separate entry by another officer or officers taking photographs of the interior of Ms. McDiarmid's apartment, another entry conducted without any apparent warrant. Three (or more) separate police officers entered the apartment, Ms. McDiarmid's and Mr. Beal's home, without a warrant on three separate occasions that day.

Conclusion About the Three Warrantless Entries and the Warrant

39. On the record before me, the Crown has failed to demonstrate that any of the three warrantless entries into Ms. McDiarmid's home was reasonable.

40. The known fruits of those entries are:

- a. The observations by Constable Morin (i.e. evidence of past use of fentanyl and at best an ambiguous utterance to him by Ms. McDiarmid about the presence of fentanyl in the apartment, which could refer to nothing more than the residue that he had already observed).
- b. D.C. Landry's observations of a trafficable quantity of suspected fentanyl (about four grams) in the purse underneath the wallet in which he had

observed Mr. Beal's health card (although it appears he did not actually retrieve it or, if he did retrieve it, it somehow made its way back to the wallet for the execution of the search warrant).

41. Accordingly, in general terms, what remained as grounds for issuance of the warrant was:

- a. Mr. Beal and Ms. McDiarmid were boyfriend and girlfriend and Mr. Beal was high on fentanyl and had jumped out of a third-floor window to go to the drug store. That window was in the apartment to be searched for evidence of drug trafficking.
- b. The precise nature of his or her connection to the apartment was not made out in the information to obtain, e.g. by admissions of ownership/tenancy or by third-party information to that effect.
- c. Ms. McDiarmid appeared high to Constable Morin as set out in the information-to-obtain (although the strength of that conclusion must be assessed in light of the more detailed evidence of Constable Morin at trial, detailing behaviours consistent with extreme stress at one's partner having stepped out a third-floor window).
- d. Mr. Beal had a very, very long criminal record. Ms. McDiarmid had no record and no outstanding charges but a large number of unspecified "contacts" with the police. (A "contact" could be as a complainant or witness, I note).

- e. A quarter-ounce of suspected crystal methamphetamine had been found in Mr. Beal's buttocks at the hospital and it was D.C. Landry's view that that was more than a personal-use amount.
- f. Various opinions about the nature of the drug trade and how drug dealers operate.

42. Stripped of the observations made during warrantless entries, the information to obtain effectively amounts to an assertion that evidence of a person being in personal possession of a quarter ounce of suspected crystal methamphetamine makes out reasonable grounds for issuance of a warrant to search the residence from which that person had apparently come before being taken to the hospital. I am satisfied (this is a defence onus) that a warrant could not have issued on the basis of the information-to-obtain excised of the unlawful observations.

Section 24(2) of the *Charter of Rights: Admissibility of the Evidence Seized*

43. The Supreme Court's decision in *Grant*, referred to above sets out the following test for whether or not evidence should be excluded under section 24(2) of the *Charter of Rights*. (The onus is on the defence on this point):

- a. The seriousness of the violation. State misconduct in relation to the *Charter* can range from the inadvertent and minor to the wilful and egregious. Since the focus here is on maintaining public confidence, violations at the lower end of the scale might be seen as minimally (or not at all) compromising public confidence in the rule of law, whereas state

misconduct reflecting “wilful or reckless disregard of Charter rights” (paragraph 74 of *Grant*), would be much more likely to bring the administration of justice into disrepute. The analysis allows room for urgency or other extenuating circumstances but also requires that state actors have meaningful awareness of their *Charter* obligations.

- b. The impact of the violation on the defendant, which could range from, “fleeting and technical to profoundly intrusive.” (paragraph 76 of *Grant*). As the impact on the defendant’s rights increases, so too does the risk that admitting the evidence would send a message to society that *Charter* rights are a meaningless paper tiger, “of little actual avail to the citizen.” In the search context, the nature of the place searched, which can affect the level of one’s expectation of privacy, will matter.
 - c. Society’s interest in an adjudication on the merits. The *Charter* stands astride Canadian society but cannot stand isolated from it. Just as Canadians rightly expect *Charter* rights to be meaningful, so too do they value objective truth and the idea that people who violate the law will be held accountable, although how people are found to be accountable also matters. The end does not necessarily justify the means. The court must ask whether vindicating the *Charter* right that has been found to have been violated would come at too high a price.
44. These three considerations must be measured and balanced by the courts in reaching a decision on admission or exclusion after a *Charter* breach. Over time,

however, it has come to be the accepted view that an unfavourable outcome for the Crown on the first two criteria will seldom be outweighed by a favourable outcome for the Crown on the third criterion.

45. There are here three violations. I reach the following conclusions about the seriousness of the breaches:

- a. I cannot in good faith characterize Constable Morin's conduct as being anywhere other than at the extreme low end of the scale in terms of *Charter* violations. His was a decision, made in the immediacy of Mr. Beal's very serious injury, to try to take care of an administrative detail on Ms. McDiarmid's behalf, at a time when she was understandably in great distress. I have found that there was in fact no compelling urgency for getting the health card, but that does not render it irrelevant. Having it at the hospital would be one less worry for Ms. McDiarmid even if its absence would not affect her boyfriend's care at all. Seen through that lens, Constable Morin conducted himself at all times in good faith, even in the somewhat narrowed interpretation the courts have given to that term in *Charter* litigation. If this were the only *Charter* issue, there would simply be no path towards exclusion of the evidence. Indeed, if he had seized the offending items and paraphernalia, this case would have fallen squarely under the Good Samaritan provisions of s. 4.1 of the *Controlled Drugs and Substances Act* and no charges would have ensued.

- b. Chronologically, the second entry is that of the Forensic Services Unit officer or officers that D.C. Landry encountered when he entered the apartment. Strictly speaking we do not know if there were one or two or several since D.C. Landry's descriptions in the information-to-obtain and in his evidence switch from plural to singular. We do know that they were photographing, i.e. making a permanent record of Ms. McDiarmid's home. We do not know of any common law or statutory authority for their presence. We do know that there is no suggestion of urgency made out for their entry. This is more wilful conduct than Constable Morin's and involves greater intrusion (both in terms of his limited role in the apartment and in the taking of photographs). It is therefore a more serious breach. In addition to that it is more serious by being the second warrantless entry.
- c. Finally, there is D.C. Landry's entry. This is the third warrantless entry into Ms. McDiarmid's home in the course of a couple of hours or so. As I have noted, I am struck by the conflict between the evidence of D.C. Coristine and D.C. Landry and the peculiar fact that D.C. Coristine has no recollection of seeing the health card that he said was supposedly the entire purpose of the entry and that the health card was still in the wallet when the drug officers executed the warrant. On that record and given the absence of evidence of any urgent need for the health card, it is impossible to find "good faith" (in the narrow *Charter* sense) here.
- d. Cumulatively, these three entries amount to a serious violation of Ms. McDiarmid's rights under s. 8 of the *Charter*. The latter two violations

were done in the absence of any urgency since the scene had been secured and Mr. Beal and Ms. McDiarmid were otherwise engaged.

46. With respect to the impact of the violations on Ms. McDiarmid:

- a. All of the entries related to Ms. McDiarmid's home. A person's home typically attracts one of the highest levels of privacy protection available.
- b. Constable Morin's entry to the apartment had a minimal impact. He stayed in a passive, security sort of role and engaged in no active "search" beyond taking in that which was inescapable, i.e. the evidence of drug paraphernalia and of past use of fentanyl, which was in plain view without anything being removed.
- c. The Forensic Service officers' entry appears to have had no practical impact on Ms. McDiarmid's exposure to criminal liability, certainly not in the way the case was presented before me, as I do not even know who the officer was or who they were. However, given the evidence of D.C. Landry, they were making a photographic record of Ms. McDiarmid's home.
- d. Although it may not have been the longest entry into Ms. McDiarmid's home, D.C. Landry's had the greatest practical impact as it allowed him to get into her affairs on a fairly intimate level, i.e. into her purse in her bedroom. While people keep all sorts of random and benign items in purses and pockets, it also tends to be where more private items may be

kept. While nobody wants someone else in their business, a search of this nature would be particularly concerning to most people.

- e. All things considered, the impact of the police entries into Ms. McDiarmid's apartment was well above "fleeting and technical", but some distance short of "profoundly invasive", but far closer to the latter than the former. The cumulative effect is serious.

47. The third criterion looks at society's interest in an adjudication on the merits.

This is not a trivial consideration—the further the courts move away from determination of criminal cases on the merits, the greater the danger that the courts lose the public's confidence. That being said, however, the *Charter* has long ago been adopted as the supreme law of the country and the values and protections it enshrines must be real. The simple reality is that this is a drug case and in almost every drug case the item under challenge is real evidence that would be profoundly relevant to the defendant's guilt or innocence. That is not to say that Ms. McDiarmid is in fact guilty or innocent—if there is a trial, the Crown will have to prove beyond a reasonable doubt that she had knowledge and control of the varying quantities of controlled substances and other items and that any amounts of drugs within her knowledge and control (as opposed to Mr. Beal's or their joint knowledge and control) were possessed by her for the purpose of trafficking as opposed to being for personal use. Whether she is guilty or innocent, though, a drug case without the drugs admitted in evidence is

usually doomed. This is real evidence of significant probative value relating to a serious offence that harms the local community immeasurably.

48. In balancing the three criteria, I am left then with cumulatively serious violations with a cumulatively serious impact on Ms. McDiarmid's *Charter*-protected interests, relating to reliable evidence of significant probative value.

49. The application of the three-factor *Grant* analysis was the object of comment by the Court of Appeal for Ontario in *R. v. McGuffie*, 2016 ONCA 365, in which Doherty J.A. made the following comments on behalf of the panel:

62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: [citations omitted].

[63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: [citations omitted] If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility [citations omitted]. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: [citation omitted]. (emphasis added)

50. The case before me is a classic example of the arithmetic described by Justice Doherty. The first two criteria push strongly towards exclusion while the third criterion pushes strongly towards admission of the items seized in evidence.

There is nothing about the present case that strikes me as placing it in the “seldom, if ever” exception to the usual result in such a balancing.

Conclusion

51. The admission of the evidence seized from Ms. McDiarmid’s apartment in this trial would bring the administration of justice into disrepute under s. 24(2) of the *Charter of Rights* and the evidence is accordingly excluded at this trial.

52. Counsel are welcome to address me with respect to the applicability, or not, of this ruling in relation to the disposition of the items and cash seized during the search as the admissibility inquiry on an application for disposition of the seized property would not necessarily lead to the same outcome as the admissibility inquiry on a trial on the criminal charges.