



SUPREME COURT OF CANADA

CITATION: R. v. Beaver, 2022
SCC 54

APPEALS HEARD: February 14,
2022

JUDGMENT RENDERED:
December 9, 2022

DOCKETS: 39480, 39481

BETWEEN:

James Andrew Beaver
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Ontario and Canadian Civil Liberties Association
Intervenors

AND BETWEEN:

Brian John Lambert
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Ontario
Intervener

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: Jamal J. (Wagner C.J. and Moldaver, Rowe and Kasirer JJ. concurring)
(paras. 1 to 137)

DISSENTING REASONS: Martin J. (Karakatsanis, Côté and Brown JJ. concurring)
(paras. 138 to 233)

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James Andrew Beaver

Appellant

v.

His Majesty The King

Respondent

and

**Attorney General of Ontario and
Canadian Civil Liberties Association**

Interveners

- and -

Brian John Lambert

Appellant

v.

His Majesty The King

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Indexed as: R. v. Beaver

2022 SCC 54

File Nos.: 39480, 39481.

2022: February 14; 2022: December 9.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Criminal law — Evidence — Admissibility — Confessions rule — Voluntariness — Individual unlawfully detained after reporting death of roommate — Individual given police caution and advised of right to retain and instruct counsel without delay but refusing to contact lawyer and confessing to involvement in death — Individual later charged with manslaughter and seeking exclusion of confession as involuntary — Trial judge admitting confession and entering conviction — Whether confession admissible at trial.

Criminal law — Arrest — Warrantless arrest — Reasonable and probable grounds — Warrantless arrests by police of two individuals for murder after they reported death of roommate — Whether police had reasonable and probable grounds for arrests.

Constitutional law — Charter of Rights — Remedy — Exclusion of evidence — Police detaining two individuals with respect to death of roommate in breach of several of their Charter rights — Police attempting to make fresh start by

later advising individuals of Charter rights and arresting them for murder — Police then obtaining confessions — Trial judge admitting confessions at trial and entering convictions for manslaughter — Whether confessions should be excluded — Canadian Charter of Rights and Freedoms, s. 24(2).

The accused, L and B, shared a townhouse with the deceased. One morning, L called 9-1-1 and alleged that he and B had arrived home to find the deceased dead in a puddle of blood. L told the 9-1-1 operator that they did not know how the deceased had died, but admitted that there had been altercations all week between L, B, and the deceased. Police officers who attended the scene in response to the 9-1-1 call breached the accused's ss. 9, 10(a) and 10(b) *Charter* rights by detaining them and taking them to the police station without lawful authority. When homicide detectives realized that their colleagues had unlawfully detained the accused, they promptly tried to make a “fresh start” by advising them of their *Charter* rights and then arresting them for murder. When questioned separately, the accused initially denied any knowledge of how the deceased had died. Eventually, however, they both confessed to killing him.

At issue at trial was the admissibility of these confessions. On *voir dire*, the trial judge held that the Crown had proved the voluntariness of the accused's confessions beyond a reasonable doubt and that neither of their confessions should be excluded under s. 24(2) of the *Charter*, as they had not been “obtained in a manner” that infringed or denied any rights or freedoms guaranteed by the *Charter*. The trial judge determined that the homicide detectives cured the *Charter* breaches arising from

the accused's unlawful detention by making a "fresh start" and arresting them for murder at police headquarters. The accused were convicted of manslaughter. The Court of Appeal dismissed the conviction appeals. It found that there was no reviewable error in the trial judge's assessment of voluntariness, and that the police had reasonable and probable grounds to arrest the accused for murder. The court further agreed that the homicide detectives made a "fresh start" in arresting the accused, such that their confessions were not "obtained in a manner" that breached the *Charter*. B appeals the determination regarding the voluntariness of his confession and both B and L appeal the determination that their confessions should not be excluded under s. 24(2) of the *Charter*.

Held (Karakatsanis, Côté, Brown and Martin JJ. dissenting): The appeals should be dismissed.

Per Wagner C.J. and Moldaver, Rowe, Kasirer and **Jamal** JJ.: B's confession was voluntary and thus admissible under the common law confessions rule, and the police had reasonable and probable grounds to arrest both accused for murder. However, although homicide detectives made a "fresh start" from the *Charter* breaches arising from L's unlawful detention, there was no "fresh start" made in B's case. Thus, only B's confession was obtained in a manner that breached the *Charter*. Balancing the lines of inquiry under s. 24(2) of the *Charter*, admitting B's confession into evidence would not bring the administration of justice into disrepute.

The common law confessions rule provides that a confession to a person in authority is presumptively inadmissible, unless the Crown proves beyond a reasonable doubt that it was voluntary. Under this rule, an involuntary confession always warrants exclusion. But a voluntary confession will not always be admitted into evidence: if a voluntary confession was “obtained in a manner” that breached the *Charter*, it can still potentially be excluded under s. 24(2). At the heart of the confessions rule is the delicate balance between individual rights and collective interests in the criminal justice system. The twin goals of the rule involve protecting the rights of the accused without unduly limiting society’s need to investigate and solve crimes. On the one hand, the common law recognizes an individual’s right against self-incrimination and right to remain silent; on the other, it is accepted that the police often need to speak to people when discharging their important public responsibility to investigate and solve crime.

Voluntariness, broadly defined, is the touchstone of the confessions rule. It is a shorthand for a complex of values engaging policy concerns related to not only the reliability of confessions, but also to respect for individual free will, the need for the police to obey the law, and the fairness and repute of the criminal justice system. The application of the confessions rule is necessarily flexible and contextual. When assessing the voluntariness of a confession, the trial judge must determine, based on the whole context of the case, whether the statements made by an accused were reliable and whether the conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to a person in authority. The trial judge must consider all

relevant factors, including the presence of threats or promises, the existence of oppressive conditions, whether the accused had an operating mind, any police trickery that would shock the community, and the presence or absence of a police caution. These factors are not a checklist and do not supplant a contextual inquiry. Absent an error of law in relation to the applicable legal principles, a trial judge's application of the voluntariness framework is a question of fact or of mixed fact and law attracting appellate deference. Mere disagreement with the weight given to various items of evidence is not a basis to reverse a trial judge's finding of voluntariness.

The police have statutory authority to arrest a person without a warrant under s. 495 of the *Criminal Code*, which allows a peace officer to arrest a person if, on reasonable grounds, they believe the person has committed or is about to commit an indictable offence. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint.

In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence. Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal. The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable

knowledge, training, and experience as the arresting officer. The arresting officer's grounds for arrest must be more than a hunch or intuition. In evaluating the objective grounds to arrest, courts must recognize that the officer's decision to arrest must often be made quickly in volatile and rapidly changing situations, and the officer must make their decision based on available information which is often less than exact or complete. At the same time, the police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest. Courts must also remember that determining whether sufficient grounds exist to justify an exercise of police powers is not a scientific or metaphysical exercise, but one that calls for the application of common sense, flexibility, and practical everyday experience.

“Reasonable and probable grounds” as a basis for a warrantless arrest is a higher standard than “reasonable suspicion”. Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime. The reasonable and probable grounds standard requires a reasonable belief that an individual is connected to the offence. A reasonable belief exists when there is an objective basis for the belief which is based on compelling and credible information. It is the police officer who directed the arrest who must have reasonable and probable grounds. The existence of reasonable and probable grounds is a factual finding reviewable only for palpable and overriding error, yet whether the facts as found by the trial judge amount to reasonable and probable grounds is a question of law reviewable for correctness. The police's failure to take detailed contemporaneous notes of the grounds for arrest and the material relied on in forming

those grounds does not preclude a finding of reasonable and probable grounds. Although notes are generally desirable, they are not mandatory in all cases. Imposing such a requirement could undermine the ability of the police to respond appropriately to the dynamic situations they face each day. Furthermore, the lack of contemporaneous notes does not necessarily frustrate judicial review of warrantless arrests. Courts routinely evaluate the existence of reasonable and probable grounds based on the arresting officer's testimony and other evidence.

Determining whether evidence should be excluded under s. 24(2) of the *Charter* proceeds in two parts. The first component — the threshold requirement — asks whether the evidence was “obtained in a manner” that infringed or denied a *Charter* right or freedom. The threshold requirement insists that there be a nexus between the *Charter* breach and the evidence, absent which s. 24(2) has no application. This determination involves a case-specific factual inquiry into the existence and sufficiency of the connection between the *Charter* breach and the evidence obtained; there is no hard and fast rule. Once the threshold requirement is met, the second component of the s. 24(2) analysis — the evaluative component — asks whether, having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute. Answering this question involves examining the impact of the admission on public confidence in the administration of justice over the long term, based on a balancing of (i) the seriousness of the *Charter*-infringing state conduct; (ii) the impact of the breach on the accused's *Charter*-protected interests; and (iii) society's interest in the adjudication of the case on its merits. Section 24(2) of the

Charter is not an automatic exclusionary rule precluding the admission of all unconstitutionally obtained evidence. Such evidence will only be excluded when the accused establishes that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute. Balancing the relevant considerations under s. 24(2) is a qualitative determination that is not capable of mathematical precision.

Evidence will not be “obtained in a manner” that breached the *Charter* when the police made a “fresh start” from an earlier *Charter* breach by severing any temporal, contextual, or causal connection between the *Charter* breach and the evidence obtained or by rendering any such connection remote or tenuous. The police may make a “fresh start” by later complying with the *Charter*, although subsequent compliance does not result in a “fresh start” in every case. The “fresh start” inquiry applies to any form of evidence that the police obtain following a *Charter* violation; it is not limited either to successive statements or to s. 10(b) *Charter* violations. When undertaking the case-specific factual inquiry into whether the police effected a “fresh start”, some potentially illustrative indicators include whether (i) the police informed the accused of the *Charter* breach and dispelled its effect with appropriate language; (ii) the police cautioned the accused after the *Charter* breach but before the impugned evidence was obtained; (iii) the accused had the chance to consult counsel after the *Charter* breach but before the impugned evidence was obtained; (iv) the accused gave informed consent to the taking of the impugned evidence after the *Charter* breach; (v) the accused was released from detention after the *Charter* breach but before the

impugned evidence was obtained; and (vi) whether and how different police officers interacted with the accused after the *Charter* breach but before the impugned evidence was obtained.

In the instant case, deference is owed to the trial judge's conclusion that B's confession was voluntary, as B has not established that any palpable and overriding error infected the trial judge's findings of fact. Furthermore, when examining all the information before the homicide detective through the eyes of a reasonable person with the knowledge, training, and experience comparable to such a seasoned homicide detective, it must be concluded that he had objectively reasonable and probable grounds to arrest the accused for murder.

However, the trial judge erred in law by failing to apply the correct legal test and by applying an incorrect legal principle in his "fresh start" analysis by unhelpfully and inaccurately describing the police as having "cured" the earlier *Charter* breaches. The *Charter* breaches still occurred and merit proper consideration under the threshold requirement, but *Charter*-compliant conduct may dissociate the breaches from the impugned evidence. Analyzing the issue afresh, in L's case, the police took several steps that collectively severed any contextual connection between the breach of his *Charter* rights arising from his unlawful detention and his confession. These steps rendered any temporal connection with the *Charter* breaches remote. There was also no causal relationship between the *Charter* breaches and L's confession. In all, L's confession was not "obtained in a manner" that breached the *Charter*. However, B's

confession remained contextually linked to the earlier *Charter* breaches notwithstanding the police's attempts at a "fresh start". B's confession was thus "obtained in a manner" that breached the *Charter*, which satisfies the threshold requirement under s. 24(2). The cumulative weight of the first two lines of inquiry is overwhelmed by a compelling public interest in admitting B's confession. This evidence is crucial to the prosecution's case against an offender who allegedly killed another person and then tried to obstruct the police investigation. On a proper balancing of the three lines of inquiry under s. 24(2), B's confession should be admitted into evidence.

*Per Karakatsanis, Côté, Brown and **Martin JJ.** (dissenting):* The appeals should be allowed, the evidence obtained in a manner that infringed the accused's *Charter* rights excluded, the convictions set aside, and new trials ordered. There is disagreement with the majority's conclusion that it was lawful for the police, after learning of the circumstances of the accused's unlawful detention, to immediately arrest them for murder and direct their continued questioning. The information relied on to direct the accused's arrests does not come close to the particularized probability required to meet the reasonable grounds standard. The arrests were a blatant attempt to salvage the investigation in the face of what officers knew were multiple serious violations of the accused's *Charter* rights. The accumulation of breaches of well-established *Charter* standards requires that the evidence be excluded as a remedy under s. 24(2) of the *Charter* to avoid bringing further disrepute to the administration of justice. There is further disagreement with the majority regarding the test for

exclusion under s. 24(2), which is long established and well known. The focus is on the connection between the breach and the evidence obtained, with reference to temporal, contextual, and causal elements. There is no need to speak in terms of whether there was a “fresh start” for those who have breached *Charter* rights. The notion of a “fresh start” is an unhelpful and potentially misleading concept that has no place in the s. 24(2) analysis. It divides what is to be a holistic analysis into before and after segments and operates to remove *Charter* breaches from the analysis, thus placing a heavy finger on the scale of s. 24(2).

The police must have reasonable grounds to believe an individual committed or was about to commit an indictable offence in order to lawfully arrest them without prior judicial authorization. The reasonable belief must relate to two elements: whether an offence has been committed, and whether the person under arrest committed the offence. The test must be met on both a subjective and an objective basis, which means that it is necessary, but not sufficient, for the police to have a personal, honestly held belief in the presence of reasonable grounds. The Crown must also establish that the asserted grounds were objectively reasonable from the perspective of a reasonable person standing in the position of the officer. Reasonable grounds is a high threshold that is met at the point where a credibly-based probability replaces suspicion. It requires the police to point to particularized evidence to support an objective basis for the belief which is based on compelling and credible information. Whether the legal standard of reasonable grounds was met on the particular facts of a given case is a question of law to be assessed on a correctness standard.

The need to establish reasonable grounds before effecting an arrest is not a mere procedural requirement — it is a constitutional imperative. An arrest is a key investigative step on which much hinges, both for the police and for the arrestee. It triggers intrusive police powers relating to detention, interrogation, search, and the use of force. Absent reasonable grounds, the intrusion on liberty interests tolerated in the name of the investigation of crime cannot be justified. The reasonable grounds standard is a key constitutional safeguard and must not be watered down for investigative expediency or to salvage an investigation in the face of *Charter*-infringing conduct.

It is well-recognized that police notes are crucial to the court's ability to meaningfully review the exercise of police power without prior judicial authorization, including the arrest power. The absence of notes is a factor to be considered in deciding whether to accept the police officer's testimony. In reviewing reasonable grounds, the absence of notes may inform the court's assessment of the officer's credibility, which is relevant to both the subjective and the objective elements of the test. Without notes, it is difficult to question assertions by the police that they had grounds to arrest the individual. Notes are therefore critical to checking the exercise of police power by ensuring that statements of personal belief do not go routinely or effectively unchallenged. The absence of notes may therefore hinder the accused's ability to challenge the decision to arrest, and the court's ability to get to the truth of the basis for that decision.

In the instant case, the information that the homicide detective explained formed the basis of his decision to arrest the accused may have given rise to a reasonable suspicion, but to accept that it formed the basis of reasonable grounds to believe that they killed the deceased would erode the reasonable grounds standard to a level inconsistent with what is required to provide a meaningful check on the state's investigatory powers in accordance with the *Charter's* requirements. While the assessment is global and does not require an isolated parsing of each particular component or a *prima facie* case to answer on each element of the offence, there must be something of substance proffered in order to meet the objective reasonable grounds standard. The police have failed to offer a substantively reasonable basis to support the asserted belief that at the time of the accused's arrest, there were reasonable grounds to believe they had killed the deceased.

In determining whether evidence was "obtained in a manner" that breaches the *Charter*, courts should examine the entire relationship between the evidence and the breach to determine the strength of the connection and assess whether the breach and the evidence are part of the same transaction or course of conduct. The connection may be temporal, contextual, causal, or a combination of the three. A strict causal connection is not required. Instead, a global assessment is necessary to determine whether a *Charter* violation occurred in the course of obtaining the evidence. The "obtained in a manner" analysis necessitates the full contextual analysis each time it is performed, regardless of whether subsequent *Charter*-compliant actions exist.

The notion of a “fresh start” is not part of the law in Canada and should not be so recognized. It is unnecessary because the established holistic approach is more than adequate to the task. The concept of a “fresh start” detracts from the broad and generous approach that the Court has adopted for the “obtained in a manner” requirement of s. 24 of the *Charter*. Regardless of the presence of *Charter*-compliant conduct following a breach, the test must remain the same in every case. Substituting a “fresh start” analysis for a complete and contextual “obtained in a manner” analysis would create an inflexible test that makes *Charter* remedies less accessible to those whose rights were violated. No single rule should disrupt the courts’ remedial inquiry.

As with all remedial provisions, s. 24 of the *Charter* must be given a large and liberal interpretation consistent with its purpose. Such an approach is important, as it is the gateway to the focus of s. 24(2): whether the admission of evidence would bring the administration of justice into disrepute. An overly narrow interpretation of s. 24(2) would prevent courts from even considering the seriousness of the *Charter*-infringing conduct, an unwelcome result which would automatically immunize prior *Charter* breaches. By shifting the focus to the eventual *Charter*-compliant conduct, the “fresh start” doctrine distracts from the remedial nature of s. 24(2) and allows police to insulate their conduct from review, regardless of the severity of that conduct.

Because the trial judge erred in concluding that there were reasonable grounds to arrest the accused and in relying on the concept of a “fresh start”, his

conclusion that the evidence was not “obtained in a manner” within the meaning of s. 24(2) of the *Charter* is not owed deference. There is a strong temporal, contextual, and causal connection between the breaches of the accused’s *Charter* rights and the collection of their statements. The accused were under the continuous control and supervision of the police from the time of their unlawful detention and transportation from the scene, to the time the police unlawfully directed their arrests, to the time they ultimately admitted their involvement in the death of their roommate. The fact that the police would not have obtained the evidence but for the violation of the accused’s *Charter* rights supports the conclusion that the *Charter* breaches and the evidence provided were inextricably linked.

Analyzing the issue anew, the admission of the evidence would bring the administration of justice into disrepute and therefore the evidence must be excluded under s. 24(2) of the *Charter*. The circumstances of the accused’s detention and questioning led to multiple officers breaching multiple *Charter* rights. The police conduct was extremely serious, violating foundational *Charter* principles that officers have been bound for decades to follow during the course of an investigation. There were no circumstances of uncertainty in the law or urgency in handling a dynamic situation that might explain these basic errors, which fundamentally undermined the accused’s *Charter*-protected interests. Considering the strength of these factors, society’s interest in the adjudication of the case on its merits is insufficient to tip the balance in favour of admission.

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By Jamal J.

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By Martin J. (dissenting)

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SCC 34, [2009] 2 S.C.R. 494; *R. v. Washington*, 2007 BCCA 540, 248 B.C.A.C. 65; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Noel*, 2019 ONCA 860; *R. v. Burlingham*, [1995] 2 S.C.R. 206.

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APPEALS from a judgment of the Alberta Court of Appeal (O’Ferrall, Wakeling and Feehan JJ.A.), 2020 ABCA 203, 4 Alta. L.R. (7th) 301, [2020] 7 W.W.R. 550, 393 C.C.C. (3d) 175, 459 C.R.R. (2d) 105, [2020] A.J. No. 581 (QL), 2020 CarswellAlta 933 (WL), affirming a decision of Yamauchi J., 2019 ABQB 125, 88 Alta. L.R. (6th) 337, [2019] 12 W.W.R. 320, 431 C.R.R. (2d) 14, [2019] A.J. No. 257 (QL), 2019 CarswellAlta 358 (WL). Appeals dismissed, Karakatsanis, Côté, Brown and Martin JJ. dissenting.

Sarah Rankin and Kelsey Sitar, for the appellant James Andrew Beaver.

Jennifer Ruttan and Michael Bates, for the appellant Brian John Lambert.

Rajbir Dhillon and Andrew Barg, for the respondent.

Mabel Lai and Nicholas Hay, for the intervener the Attorney General of Ontario.

Samara Secter and Reakash Walters, for the intervener the Canadian Civil Liberties Association.

The judgment of Wagner C.J. and Moldaver, Rowe, Kasirer and Jamal JJ. was delivered by

JAMAL J. —

I. Introduction

[1] At the heart of these appeals is the balance between the protection of the rights of the accused in the criminal process and society's interest in the effective investigation and prosecution of serious crimes. The appeals raise three issues: (1) the voluntariness of one of the appellants' confessions under the common law confessions rule; (2) whether the police had reasonable and probable grounds to arrest the appellants for murder; and (3) whether the appellants' confessions were "obtained in a manner" that breached the *Canadian Charter of Rights and Freedoms* because the police failed to make a "fresh start" from earlier *Charter* breaches, and if their confessions were so obtained, whether they must be excluded under s. 24(2).

[2] The appellants, Brian John Lambert and James Andrew Beaver, shared a townhouse in Calgary with the deceased, Sutton Bowers. One morning, Lambert called 9-1-1 and alleged that he and Beaver had arrived home to find Bowers dead in a puddle of blood. Lambert told the 9-1-1 operator that they did not know how Bowers had died, but he admitted that there had been "altercations all week", including the night before when Bowers had told both Lambert and Beaver to "get the hell out" (R.R., at pp. 17-18). The operator told Lambert that the townhouse would be treated as a crime scene for now.

[3] It is not disputed that the police officers who attended the scene in response to the 9-1-1 call breached the appellants' *Charter* rights by detaining them and taking them to the police station without lawful authority. It is also not disputed that when homicide detectives realized that their colleagues had unlawfully detained the

appellants, they promptly tried to make a “fresh start” by advising them of their *Charter* rights and then arresting them for murder. When questioned separately, the appellants initially denied any knowledge of how Bowers had died. Eventually, however, they both confessed to killing Bowers during a fight, mopping up his blood, and dragging his body to the bottom of the stairs to make his death look like an accident. At issue at trial was the admissibility of these confessions.

[4] At trial, the appellants argued that their confessions were involuntary and thus inadmissible under the common law confessions rule. The appellants also asserted that the police lacked reasonable and probable grounds to arrest them for murder. In the alternative, the appellants claimed that because the homicide detectives had failed to make a “fresh start” from the *Charter* breaches that stemmed from the appellants’ unlawful detention, their confessions were obtained in a manner that breached the *Charter* and must be excluded under s. 24(2).

[5] On *voir dire*, the Court of Queen’s Bench of Alberta disagreed with the appellants and admitted their confessions into evidence (2019 ABQB 125, 88 Alta. L.R. (6th) 337). Based on this decision, the appellants entered an agreed statement of facts in which they admitted their role in the killing and invited the trial judge to convict them as co-principals to manslaughter. The trial judge did so and sentenced each to four years’ imprisonment (2019 ABQB 235). The Court of Appeal of Alberta dismissed the appellants’ appeals from conviction (2020 ABCA 203, 4 Alta. L.R. (7th) 301) and sentence (2021 ABCA 227). The appellants now appeal their convictions to this Court

with leave. Only Beaver appeals the voluntariness of his confession. Both Beaver and Lambert claim that their confessions should be excluded under s. 24(2) of the *Charter*.

[6] I would dismiss the appeals, but for somewhat different reasons than the decisions under appeal. As I will explain, I agree with the lower courts that Beaver's confession was voluntary and thus admissible under the common law confessions rule. I also agree that the police had reasonable and probable grounds to arrest the appellants for murder. However, I find that the homicide detectives made a "fresh start" from the *Charter* breaches arising from the appellants' unlawful detention for Lambert but not for Beaver. Thus, only Beaver's confession was obtained in a manner that breached the *Charter*. Balancing the lines of inquiry under s. 24(2) of the *Charter*, I conclude that admitting Beaver's confession into evidence would not bring the administration of justice into disrepute. I would thus confirm the appellants' convictions for manslaughter.

II. Background Facts

A. *Three Roommates: Bowers, Lambert, and Beaver*

[7] The appellants, Lambert and Beaver, and the deceased, Bowers, were roommates in a townhouse in Calgary. Bowers was the landlord of the property, as his father owned the townhouse and allowed him to live there rent-free and earn income by renting out rooms. Beaver and Lambert were tenants.

B. *The Suspicious 9-1-1 Call*

[8] On October 9, 2016, at 9:59 a.m., Lambert called 9-1-1 to report that “there’s a guy in a puddle of blood . . . inside [his] house” (R.R., at p. 16). He told the 9-1-1 and Calgary Police Service operators that there had been “altercations all week”, including when he came home the previous night and Bowers “had people there” (p. 17). Lambert said that Bowers “told [him and Beaver] to get the hell out”, so he left with Beaver because he “wasn’t about to get into a confrontation” (pp. 17-18). He claimed that when he returned the next morning, he found Bowers lying “in a puddle of blood”, “face down front [on] the floor” (p. 21).

[9] The Calgary Police Service operator told Lambert that the situation would be treated with “just a little bit of a suspicion because [they] don’t know what’s goin’ on at this point” (pp. 24-25). Lambert insisted he did not know what happened to Bowers, repeating “[h]e was pretty angry at us, so we just left” (p. 25). Lambert then confirmed that Bowers was not conscious or breathing, and advised that Beaver said that “he looks like he fell and hit his head” (p. 26). The Calgary Police Service operator said that they would “treat [the townhouse] as a crime scene for now” (p. 27). While awaiting emergency medical services, the 9-1-1 operator told Lambert to perform CPR, but Lambert advised that rigor mortis had set in, adding: “He’s dead” (p. 36).

C. *The Police Find Bowers Dead*

[10] Within minutes, police and emergency medical services arrived and found Bowers at the foot of the staircase, where he lay dead. The senior police officer, Sgt. James Lines, directed that this was a crime scene. He ordered two other officers, Csts. Trent Taylor and Alana Husband, to detain Lambert and Beaver under the *Medical Examiners Act*, legislation that he admitted on the *voir dire* does not exist; he had meant to refer to Alberta's *Fatality Inquiries Act*, R.S.A. 2000, c. F-9, but this Act provides no detention powers.

D. *The Police Detain Lambert*

[11] As directed, Cst. Taylor told Lambert that he was being detained under the *Medical Examiners Act*. He advised Lambert that he had the right to retain and instruct a lawyer without delay and cautioned him, saying that he could be charged with an offence and that he did not have to say anything but anything he did say could be used in evidence. Lambert said that he understood the caution and wanted to speak to a lawyer "to cover [his] ass", even though he was "not guilty of anything" (A.R., vol. I, at p. 95).

[12] While Cst. Taylor drove Lambert to police headquarters, he asked him what had happened. Lambert repeated what he had told the 9-1-1 operator. On the *voir dire*, Cst. Taylor conceded that he had "messed up" and that he should not have questioned Lambert during the drive because he had asked to speak to a lawyer (p. 109). At no point did Cst. Taylor place Lambert under arrest.

E. *The Police Detain Beaver*

[13] Cst. Husband placed Beaver in her police car. When Beaver was alone in the car, the car video recorded him saying, “[t]hey’re gonna take my statement” (A.R., vol. III, at p. 26). Cst. Husband then told him: “I just have to read you the legalities here. . . . I am investigatively, detaining you for, uh, whatever’s going on in there, (laughing)” (p. 28). She advised Beaver of his right to retain and instruct a lawyer without delay and asked him if he wanted to contact a lawyer. He responded, “I don’t need one. . . . No” (p. 30). Cst. Husband repeated that Beaver was being “investigatively detained” and cautioned him, saying that he did not have to say anything but anything he did say could be used in evidence (p. 30). Beaver said he understood.

[14] When Cst. Husband asked Beaver what had happened, he responded with a narrative consistent with Lambert’s 9-1-1 call. She then drove him to police headquarters, told him he was still under investigative detention, and asked him again if he wanted to speak to a lawyer. Once again, he declined. At no point did Cst. Husband place Beaver under arrest.

F. *The Arrival of a Seasoned Homicide Detective*

[15] Soon afterwards, a medical investigator from the Office of the Chief Medical Examiner contacted the Calgary Homicide Unit to communicate that Bowers’ death appeared suspicious. At 10:36 a.m., S/Sgt. Colin Chisholm telephoned

Det. Christian Vermette, a seasoned homicide detective, and told him to come to work. On the *voir dire*, Det. Vermette testified that he was “basically [being called out to work] on a suspicious death” because it was his “turn to be the primary investigator for the next homicide” (A.R., vol. I, at p. 207). He testified that S/Sgt. Chisholm, who had spoken to the medical investigator, “basically relayed . . . that a male was found facedown in a pool of blood near the front entrance of a residence” and “that there was some sort of conflict or dispute that occurred between the victim and roommates” (p. 205). Det. Vermette’s impression at this point was that the two roommates were under arrest and on their way to police headquarters.

[16] At 10:46 a.m., Det. Vermette received an email from S/Sgt. Chisholm with the subject line “Looks like New homicide” and which confirmed what the Staff Sergeant had just told him by phone.

[17] At 11:22 a.m., Det. Vermette arrived at police headquarters, and at 11:39 a.m., he met with Csts. Taylor and Husband, who told him that Lambert and Beaver had been “*Chartered* and cautioned” (p. 210). Det. Vermette then “review[ed] the file”, which included an Event Information document that summarized the 9-1-1 call and an Event Chronology document that detailed the events after the 9-1-1 call and included contemporaneous police comments (p. 209). He also reviewed a Police Information Management System report, which noted that three days earlier the police had attended at the townhouse because Lambert had reported that Bowers assaulted him but that he did not want charges laid and would not provide a statement. The Police

Information Management System report stated that Lambert planned to move out within the next two weeks and that he did not want the police to speak to Bowers.

G. *Lambert and Beaver Arrive at Police Headquarters*

[18] At 11:15 a.m., Lambert and Beaver arrived at police headquarters. Lambert spoke to a lawyer by telephone. Beaver declined the opportunity to do so.

[19] Two homicide investigators, Dets. Matthew Demarino and Reagan Hossack, were tasked with interviewing Lambert and Beaver, respectively.

[20] At 12:09 p.m., Det. Demarino, who believed that Lambert and Beaver were already under arrest, began interviewing Lambert. He confirmed that Lambert had spoken to a lawyer and that he understood his lawyer's advice. Det. Demarino advised Lambert that, regardless of anything anyone had previously told him, he did not have to say anything unless he wished to do so, but anything he did say could be used in evidence. He then repeated this caution once more and Lambert indicated that he understood. Det. Demarino also informed Lambert that his interview was being recorded.

[21] Det. Demarino asked Lambert if he knew the deceased. At first, Lambert responded that he "[d]on't wanna talk about nothin'", saying that the police "have ways to figure out who [the deceased] is without [him] having to talk to [them] about it"

(A.R., vol. II, at pp. 7-8). Later, he confirmed that the deceased was his roommate, Bowers.

[22] When Det. Demarino left the interview to give this information to the homicide team, he spoke with Cst. Husband. It was only at this time that Det. Demarino learned that neither Lambert nor Beaver had been arrested. At this point, Beaver's interview had not yet begun.

[23] At about 12:20 p.m., Det. Vermette was advised that neither Beaver nor Lambert had been arrested. At 12:22 p.m., Det. Vermette directed Dets. Demarino and Hossack to arrest Lambert and Beaver for murder. When making this direction, Det. Vermette believed that he had reasonable and probable grounds to do so.

H. *Lambert Is Arrested for Murder*

[24] At 12:29 p.m., Det. Demarino arrested Lambert for murder and then continued to interview him, underscoring that "this is a very, very serious matter" (p. 17). Det. Demarino tried to distance his interaction with Lambert from the earlier unlawful conduct by (1) telling him they were going to "start from the very beginning" (p. 17); (2) telling him four times he was under arrest for murder; (3) facilitating Lambert's second consultation with a lawyer and confirming that he understood his lawyer's advice; (4) repeating that they "have to start everything all over again" (p. 30) after Lambert consulted a lawyer; and (5) providing him with a primary caution three times during the interview (i.e., that he did not have to say anything unless he wished

to do so but whatever he did say could be used in evidence) and a secondary caution (i.e., that his decision on whether to speak to the police should not be influenced by anything he had already told the police or that the police had told him).

I. *Beaver Is Arrested for Murder*

[25] At roughly the same time, Det. Hossack arrested Beaver for murder. Unlike Det. Demarino, however, Det. Hossack did not caution Beaver again. Instead, she referred to Cst. Husband's earlier caution, saying, "it's no different than what uh, Constable Husband read to you [a] little while ago" (A.R., vol. III, at p. 51). She said that she was "just reading it 'cause [she's] a new person that [he's] gonna be talking to" (pp. 51-52). (At the *voir dire*, Det. Hossack acknowledged that her failure to caution Beaver was "a mistake, an error, on [her] part" (A.R., vol. I, at p. 185).) Det. Hossack advised Beaver of his right to retain and instruct counsel without delay, but Beaver declined to speak to a lawyer, saying he did not think he needed one. He then added that he "probably should" speak with a lawyer and that he was "not understanding the severity of it" (A.R., vol. III, at p. 53). Det. Hossack emphasized to Beaver that it was up to him whether he spoke to a lawyer and reminded him that he was being questioned because "someone was found dead in the apartment" and that he had "been brought [to the police headquarters] because [he was] there" (p. 53). Det. Hossack then repeated, "it's just important that you know that you can call a lawyer right now" (p. 54), and then said, once again, "it's important that you know that if you wanna call a lawyer you

can” (p. 55). Beaver insisted that he did not need a lawyer and formally waived his right to counsel.

J. *Det. Vermette Confirms His Earlier Decision to Arrest the Appellants*

[26] At 12:35 p.m., just a few minutes after Det. Vermette had directed that the appellants be arrested for murder, he learned that Bowers had sent Facebook messages to a friend the previous evening highlighting his conflicts with Beaver and Lambert:

6:36 p.m. im taking brian and jim down they fucked me

9:13 p.m. I just destroyed brian and jim now I can get some worthy roommates any suggestions

(R.R., at p. 45)

[27] These messages confirmed Det. Vermette’s earlier decision to arrest the appellants.

K. *After Police Questioning, Lambert Confesses*

[28] Det. Demarino questioned Lambert for over 12 hours. At first, Lambert maintained that he had found Bowers dead in the townhouse and that he had nothing to do with his death. But at the tail end of the interview, Det. Demarino confronted Lambert with inculpatory evidence that led him to confess that Bowers had died during a fight with him and Beaver.

L. *After Seeing a Video of Lambert's Confession, Beaver Confesses*

[29] During the first 12 hours of his interview, Beaver also maintained that he had nothing to do with Bowers' death. He insisted that he did not remember details of events that took place before his arrival at the police headquarters because he had been drinking the night before. He continued to cite his poor memory even when he was shown Lambert's videotaped confession. Det. Hossack's interviewing style then became more confrontational. She called Beaver's memory lapse "bullshit" and said "people . . . don't forget stuff like this" (A.R., vol. III, at p. 282). Within another hour of questioning, Beaver confessed, admitting that Bowers had died during a fight with him and Lambert.

M. *Beaver and Lambert Are Charged With Manslaughter and Obstruction of Justice*

[30] Beaver and Lambert were charged with manslaughter for their involvement in Bowers' death and obstruction of justice for misleading the police in the investigation into Bowers' death.

III. Judgments Below

A. *Court of Queen's Bench of Alberta (Yamauchi J.)*

(1) The Voir Dire Ruling, 2019 ABQB 125, 88 Alta. L.R. (6th) 337

[31] On a blended *voir dire*, the trial judge held that the Crown had proved the voluntariness of the appellants' confessions beyond a reasonable doubt and that neither of their confessions should be excluded under s. 24(2) of the *Charter*.

[32] First, the trial judge held that Beaver's confession to Det. Hossack was voluntary. Applying *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, the trial judge concluded that Beaver had an operating mind and that the police did not extract his confession through threats, promises, police trickery, or oppressive tactics (paras. 82 and 94-95). Nothing Det. Hossack did during the interview broke Beaver's will; "[w]hat did break his will was the version of events that Mr. Lambert had provided to Det. Demarino" (para. 96). Det. Hossack's failure to repeat the police caution that Cst. Husband previously provided did not deprive Beaver of a meaningful choice as to whether to speak to the police, since "[t]here is no requirement that the police repeat the caution" if the accused "already indicates that he understands his right to refuse to answer questions" (para. 92).

[33] Second, the trial judge held that the police had reasonable and probable grounds to arrest both appellants for murder. Det. Vermette subjectively believed he had reasonable and probable grounds to arrest the appellants (at para. 151), and his belief was objectively reasonable "based on the trauma that Mr. Bower[s] suffered, the motive that [the appellants] had, and the opportunity [they had] to carry out their objectives" (para. 159).

[34] Third, the trial judge held that the homicide detectives “cured” the *Charter* breaches arising from the appellants’ unlawful detention by making a “fresh start” and arresting the appellants for murder at the police headquarters (paras. 191 and 209). The Crown conceded and the trial judge found that the police breached ss. 9, 10(a), and 10(b) of the *Charter* in their initial interactions with the appellants. The appellants were unlawfully detained contrary to s. 9 of the *Charter* because there was no statutory basis to detain them or any basis to place them under investigative detention at common law (paras. 149 and 229). Their ss. 10(a) and 10(b) *Charter* rights were also breached because they did not know the jeopardy they faced after being detained under non-existent legislation (paras. 183 and 188). Finally, Lambert’s s. 10(b) *Charter* right was further infringed when Cst. Taylor asked him what had happened after Lambert said he wanted to speak to a lawyer (para. 185). Nevertheless, the “fresh start” made by the homicide detectives meant that the appellants’ confessions were not “obtained in a manner” that breached the *Charter*. There was thus no need to consider s. 24(2) (paras. 209 and 215).

[35] Fourth, in the alternative, the trial judge held that admitting the appellants’ confessions would not bring the administration of justice into disrepute (para. 254). Although the seriousness of the *Charter*-infringing state conduct in the initial police interactions favoured excluding the confessions, the minimal impact of the breaches on the appellants’ *Charter*-protected interests and society’s interest in adjudicating the case on the merits “tip[ped] the balance in favour of admission” under s. 24(2) (para. 259).

(2) The Trial Decision

[36] With the confessions admitted into evidence, the parties submitted an agreed statement of facts inviting the trial judge to convict Lambert and Beaver for manslaughter and to make the following factual findings and inferences: (1) Lambert and Beaver verbally argued with Bowers about the rent for the townhouse; (2) the argument turned into a violent scuffle involving all three men, resulting in Bowers' death from "blunt force trauma to the neck"; (3) "[t]he force used by Lambert and Beaver caused the death of Bowers"; (4) Lambert and Beaver placed Bowers' body at the bottom of the stairs and mopped up the blood to mislead the authorities about how he died; and (5) Lambert and Beaver "had an agreement as to what to falsely tell the authorities, and did so starting with Lambert's 911 call" (R.R., at p. 48).

[37] The trial judge accepted the agreed statement of facts, made the invited factual findings and inferences, and convicted the appellants of manslaughter. The Crown then stayed the obstruction of justice charges.

[38] The trial judge sentenced the appellants to four years' imprisonment, less credit for pretrial custody, and imposed various ancillary orders (2019 ABQB 235, paras. 78-81 (CanLII)). He found that the appellants killed Bowers in a "two on one" attack involving "gratuitous violence" (para. 31) and noted that they made a failed attempt to feign an accident by moving Bowers' body to the bottom of the stairs. The trial judge concluded that the gravity of the offence and moral culpability of both appellants was "very high" (paras. 31 and 48-49).

B. *Court of Appeal of Alberta, 2020 ABCA 203, 4 Alta. L.R. (7th) 301 (O’Ferrall, Wakeling and Feehan JJ.A.)*

[39] The Court of Appeal dismissed the conviction appeals. There was no reviewable error in the trial judge’s assessment of voluntariness (paras. 30-31). The police also had reasonable and probable grounds to arrest the appellants for murder and “made a practical and common-sense decision” to arrest them “based on the information [Det. Vermette] had received by the time of the arrests” (para. 9).

[40] The Court of Appeal agreed that the homicide detectives made a “fresh start” in arresting the appellants, such that their confessions were not “obtained in a manner” that breached the *Charter* (paras. 15 and 18). The police gathered little evidence of significance when the appellants were unlawfully detained, and the homicide detectives tried to insulate any subsequent evidence they might gather from the earlier *Charter* breaches (para. 17). There was “no causal connection” between any *Charter* breach and the confessions, “arguably no temporal connection”, and “the context in which the confessions were given was completely different from the initial detention and early general questions” (para. 26). There was thus no need to consider whether the trial judge erred in his alternative s. 24(2) analysis (para. 27).

[41] The Court of Appeal later dismissed the sentence appeals (2021 ABCA 227).

IV. Issues

[42] These appeals raise three issues:

- A. Was Beaver's confession voluntary?
- B. Did the police have reasonable and probable grounds to arrest the appellants for murder?
- C. Should the appellants' confessions be excluded under s. 24(2) of the *Charter*?

V. Analysis

A. *Was Beaver's Confession Voluntary?*

[43] Before this Court, only Beaver challenges the voluntariness of his confession. He argues that his confession was involuntary and therefore inadmissible under the common law confessions rule. Beaver notes that the trial judge was the same trial judge as in *R. v. Tessier*, 2018 ABQB 387, a decision that the Court of Appeal of Alberta overturned as reflecting "an impoverished understanding of the modern confessions rule" (2020 ABCA 289, 12 Alta. L.R. (7th) 55, at para. 46). Since then, however, a majority of this Court, per Kasirer J., has overturned the Court of Appeal's decision (2022 SCC 35 ("*Tessier (SCC)*").

[44] As I will elaborate, I do not accept that Beaver's confession was involuntary. It therefore need not be excluded under the common law confessions rule.

(1) The Common Law Confessions Rule

(a) *General Principles*

[45] The common law confessions rule provides that a confession to a person in authority is presumptively inadmissible, unless the Crown proves beyond a reasonable doubt that the confession was voluntary (*Oickle*, at paras. 30 and 68; *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500, at para. 11; *Tessier (SCC)*, at paras. 39, 68 and 89). Under the confessions rule, an involuntary confession “always warrants exclusion” (*Oickle*, at para. 30; see also *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at para. 38). But a voluntary confession need not always be admitted into evidence. If a voluntary confession was obtained in a manner that breached the *Charter*, it can still potentially be excluded under s. 24(2) (*Oickle*, at para. 30; *Singh*, at para. 38).

[46] At the heart of the confessions rule is the delicate balance between individual rights and collective interests in the criminal justice system (*Singh*, at paras. 1, 21, 27-28, 31 and 34; *Tessier (SCC)*, at paras. 4 and 69; *Oickle*, at para. 33). The “twin goals” of the rule involve “protecting the rights of the accused without unduly limiting society’s need to investigate and solve crimes” (*Oickle*, at para. 33). On the one hand, the common law recognizes an individual’s right against self-incrimination and right to remain silent, such that an individual need not give information to the police or answer their questions absent statutory or other legal compulsion; on the other hand, the police often need to speak to people when discharging their important public responsibility to investigate and solve crime.

[47] Voluntariness, broadly defined, is the “touchstone” of the confessions rule (*Oickle*, at paras. 27, 32 and 69; *Spencer*, at para. 11; *Singh*, at para. 31). Voluntariness is a shorthand for a complex of values engaging policy concerns related to not only the reliability of confessions, but also to respect for individual free will, the need for the police to obey the law, and the fairness and repute of the criminal justice system. Involuntary confessions can be unreliable, unfair, and harmful to the reputation of the criminal justice system (*Oickle*, at paras. 32 and 70; *Singh*, at paras. 30 and 34; *Tessier (SCC)*, at paras. 70 and 72). A statement may be involuntary “because it is unreliable and raises the possibility of a false confession, or because it was unfairly obtained and ran afoul of the principle against self-incrimination and the right to silence” (*Tessier (SCC)*, at para. 70).

[48] The application of the confessions rule is necessarily flexible and contextual. When assessing the voluntariness of a confession, the “trial judge must determine, based on the whole context of the case, whether the statements made by an accused were reliable and whether the conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to a person in authority” (*Tessier (SCC)*, at para. 68). The trial judge must consider all relevant factors, including the presence of threats or promises, the existence of oppressive conditions, whether the accused had an operating mind, any police trickery that would “shock the community”, and the presence or absence of a police caution. These factors are not a checklist that supplants a contextual inquiry (see *Oickle*, at paras. 47, 66-67 and 71; *Spencer*, at paras. 11-12; *Singh*, at para. 35; *Tessier (SCC)*, at paras. 5, 68, 76 and 87).

(b) *Oppression*

[49] Oppression focusses on the atmosphere of a police interview. This Court has accepted that “[o]ppression clearly has the potential to produce false confessions” because a suspect may “confes[s] purely out of a desire to escape [inhumane] conditions” (*Oickle*, at paras. 58 and 60). The non-exhaustive factors that can create oppressive conditions include depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; or excessively aggressive, intimidating police questioning for a long time (*Oickle*, at paras. 58-60; *Tessier (SCC)*, at para. 99).

(c) *The Role of a Police Caution*

[50] The role of a police caution in the voluntariness analysis was recently clarified in *Tessier (SCC)*, where Kasirer J. affirmed, at para. 5, that “the presence or absence of a police caution is an ‘important’ factor in answering the question of voluntariness”, based on Charron J.’s guidance in *Singh*, at para. 33 (see also *Singh*, at para. 31; *Boudreau v. The King*, [1949] S.C.R. 262, at p. 267).

[51] In *Tessier (SCC)*, Kasirer J. explained that if the accused was a suspect, the absence of a caution is *prima facie* evidence of — but does not itself establish — involuntariness (paras. 11 and 89). Neither a caution nor proof of actual knowledge of the right to silence is a necessary condition of voluntariness (*Tessier (SCC)*, at paras. 12 and 74; see also *Singh*, at paras. 31 and 33; *Boudreau*, at p. 267). Nevertheless, the absence of a caution “weighs heavily” in the voluntariness analysis because it is “*prima*

facie evidence that the suspect has been unfairly denied their choice to speak to the police and that, as a consequence, the statement cannot be considered voluntary” (*Tessier (SCC)*, at para. 11).

[52] When the police have not given a caution, the Crown must “show that the absence of a caution did not undermine the suspect’s free choice to speak to the police as part of the contextual examination of voluntariness” (*Tessier (SCC)*, at para. 8). The absence of a caution may be afforded less weight when the suspect subjectively understood the right to silence or the consequences of speaking to the police. Kasirer J. provided the following guidance in *Tessier (SCC)*, at para. 88:

While not necessary for the Crown to demonstrate, proof that the accused was in fact subjectively aware of their right to silence or aware of the consequences of speaking will be powerful evidence that the absence of a caution did not undermine voluntariness. In such an instance, doubts as to fairness that could result from the absence of a caution plainly do not arise because the suspect has the information necessary to choose whether to speak or remain silent.

[53] Some of the non-exhaustive factors that can help show the suspect was subjectively aware of their right to silence or of the consequences of speaking to the police include (1) the suspect’s awareness of being recorded; (2) indications that the suspect is directing the conversation; (3) the suspect’s awareness of what is being investigated and their alleged role in the investigation; (4) the suspect’s exercise of the right to silence by declining to answer police questions; and (5) the suspect’s eagerness to talk, although this factor can weigh for and against such a finding, depending on the circumstances (*Tessier (SCC)*, at para. 88).

[54] Absent an error of law in relation to the applicable legal principles, a trial judge's application of the voluntariness framework is a question of fact or of mixed fact and law attracting appellate deference (*Oickle*, at para. 22; *Spencer*, at paras. 16-18; *Tessier (SCC)*, at para. 46). Mere disagreement with the weight given to various items of evidence is not a basis to reverse a trial judge's finding of voluntariness (*Oickle*, at para. 22).

(2) Application

[55] Beaver claims that the trial judge and the Court of Appeal erred by taking a narrow approach to voluntariness that merely glossed over whether he had been denied his right to silence or had made a meaningful choice to speak with the police. He claims that the trial judge mechanically reviewed a checklist of voluntariness factors without considering the more fundamental question of whether he could make a meaningful choice to speak to the police when he was not informed of his jeopardy or properly advised that he had a choice about whether to give a statement. He also says that the duration of his interview and Det. Hossack's "interview strategy" created an oppressive atmosphere. Lastly, he contends that the Court of Appeal improperly deferred to the trial judge's finding of voluntariness without independent scrutiny.

[56] As I will explain, I disagree with Beaver's submission that his confession was involuntary.

(a) *The Trial Judge Correctly Stated the Law and Concluded That Beaver's Confession Was Voluntary Based on Three Findings of Fact*

[57] As the Court of Appeal held (at paras. 28-29), the trial judge correctly cited the general legal principles of voluntariness from *Oickle* and *Singh* (paras. 43-46). He properly noted that voluntariness is the touchstone of the confessions rule and must be examined contextually (para. 44). He also correctly stated that although an individual has the right to remain silent, this does not mean that they have a right not to be spoken to by the police (para. 45). Absent any identifiable legal error in the trial judge's statement of the relevant legal principles, Beaver's real quarrel is with how the trial judge applied these principles when concluding that his confession was voluntary.

[58] In my view, the trial judge made three findings of fact that justified his conclusion that Beaver's confession was voluntary: (1) Beaver was given a police caution and understood that he did not have to speak to the police and that anything he said could be used in evidence; (2) Beaver knew exactly why the police were interviewing him after he was arrested for murder, which undermines his argument that he did not know the jeopardy he faced when he was arrested; and (3) Beaver confessed because he was confronted with Lambert's videotaped confession. I will address each finding in turn.

(i) Beaver Was Given a Police Caution and Understood It

[59] First, the trial judge found as fact that Beaver was given a police caution and understood it (paras. 90-91). He was given a police caution at the scene, even if only when he was unlawfully detained. Cst. Husband used standard wording, telling him: “You’re not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence” (A.R., vol. III, at p. 30; see also *Singh*, at para. 31; *R. v. Manninen*, [1987] 1 S.C.R. 1233, at p. 1237). This caution informed Beaver of his right to remain silent “in plain language” (*Singh*, at para. 31).

[60] The trial judge appreciated that the question before him was whether Beaver’s confession was voluntary, even though Det. Hossack did not caution Beaver during her interview at the station but referred back to Cst. Husband’s caution at the scene (paras. 90-91). The trial judge stated that “[t]here is no requirement that the police repeat the caution more than once if the accused person already indicates that he understands his right to refuse to answer questions” (para. 92).

[61] Here, the fact that Det. Hossack did not caution Beaver again upon his arrest is not “*prima facie* evidence that the suspect has been unfairly denied their choice to speak to the police” (*Tessier (SCC)*, at para. 11). Unlike the accused in *Tessier*, Beaver had been cautioned and understood the caution. Even if it would have been preferable for Det. Hossack to have repeated the caution when Beaver was arrested for murder, a caution is not a condition of voluntariness (*Tessier (SCC)*, at para. 89). Put otherwise, the absence of a caution in itself does not “bind the hands of the Court” by

automatically rendering a subsequent confession involuntary (*Boudreau*, at p. 267, quoted by Charron J. in *Singh*, at para. 31).

(ii) Beaver Knew the Police Were Interviewing Him in a Murder Investigation and Subjectively Understood the Consequences of Speaking With the Police

[62] Second, and relatedly, the trial judge found as fact that Beaver knew why Det. Hossack was interviewing him after he had been arrested for murder and what he would be questioned about (paras. 83, 93 and 246). Before proceeding with the interview, Det. Hossack told Beaver “right now you’re under arrest for murder” (A.R., vol. III, at p. 51; ABQB *voir dire* reasons, at para. 93). Thus, even though Beaver did not know his jeopardy when he was unlawfully detained, he did know his jeopardy when he was arrested.

[63] Beaver subjectively knew the consequences of speaking with the police upon his arrest (*Tessier (SCC)*, at para. 88). For example, in formally waiving his right to counsel, Beaver confirmed that he understood that Det. Hossack could only take a statement from him if Det. Hossack was sure that Beaver did not want to exercise his right to contact a lawyer and that any statement he gave could be used in evidence against him. Det. Hossack also told Beaver four times that everything he said was being recorded, which Beaver acknowledged. Beaver then initiated the conversation by asking Det. Hossack, “[o]kay, where should I start? How ‘bout yesterday?” (A.R., vol. III, at p. 58).

[64] Because the trial judge found as fact that Beaver “knew exactly why Det. Hossack was interviewing him” (para. 93), this is a case in which “doubts as to fairness . . . from the absence of a caution plainly do not arise” (*Tessier (SCC)*, at para. 88).

[65] Even so, Beaver argues that Det. Hossack unfairly deprived him of a meaningful choice about whether to speak to the police. He says that Det. Hossack was “deliberately casual” when arresting him for murder, including by telling him the caution was “no different than what uh, Constable Husband read to [him]” and that being arrested “doesn’t mean [he’s] gonna be charged with anything. All that means is right now . . . that [he] can’t leave, ‘kay?” (Beaver factum, at para. 37; A.R., vol. III, at p. 51). It is this “pernicious” language that Beaver impugns (Beaver factum, at para. 37).

[66] I do not agree. It was legally and factually accurate for Det. Hossack to tell Beaver that being arrested for murder did not necessarily mean he would be charged with murder (see *R. v. Brown*, 2015 ONSC 3305, at para. 124 (CanLII)). Beaver also says that Det. Hossack sent a mixed signal about the jeopardy he faced after he had been arrested for murder by saying “in a cautionary way [they] have to charter everyone” (Beaver factum, at para. 37; A.R., vol. III, at p. 54). But the trial judge referred to and weighed all these statements in finding that Beaver “knew exactly why Det. Hossack was interviewing him”. This Court must defer to that finding (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 15-18). In effect, Beaver is

asking this Court to reweigh the evidence to reverse the trial judge's finding of voluntariness. I would decline to do so.

(iii) Beaver's Interview Was Not Oppressive

[67] Lastly, the trial judge found as fact that the circumstances of Beaver's interview were not oppressive (paras. 95-96). I disagree with Beaver's claim that Det. Hossack created an oppressive atmosphere by asking increasingly confrontational questions during an interview that spanned 13 hours. Although Beaver's interview was long, it was not the type of "excessively aggressive and intimidating" interview contemplated as oppressive in *Oickle (Tessier (SCC))*, at para. 99). The trial judge described the interview as "conversation[al]" in nature and highlighted that Det. Hossack was "respectful" when interviewing Beaver, before becoming only "somewhat more confrontational" when presenting him with Lambert's videotaped confession (para. 95). Although the trial judge accepted that, in principle, "subjecting the accused person to aggressive and prolonged questioning" can be an oppressive tactic affecting voluntariness (at para. 94), he found as fact that the atmosphere of the interview did not "break [Mr. Beaver's] will" (para. 96). Instead, the trial judge found that what broke Beaver's will was having to face "the version of events that Mr. Lambert had provided to Det. Demarino" in the videotaped confession (para. 96).

(b) *Conclusion: Beaver's Confession Was Voluntary*

[68] The trial judge properly applied the relevant legal principles in deciding that Det. Hossack's interview of Beaver raised no concern as to the voluntariness of his confession. Because Beaver has not established that any palpable and overriding error infected the trial judge's findings of fact, I must defer to his conclusion that Beaver's confession was voluntary.

B. *Did the Police Have Reasonable and Probable Grounds to Arrest the Appellants for Murder?*

[69] The second issue is whether the police had reasonable and probable grounds to arrest the appellants for murder. It is uncontested that Det. Vermette instructed the homicide detectives to arrest the appellants after they had been arbitrarily detained for just over two hours. The appellants claim that courts should be vigilant when considering whether the police had reasonable and probable grounds to make an arrest following an unlawful detention in order to "protect against abuses of power inherent when police are actively violating an arrestee's *Charter* rights" (Lambert factum, at para. 36).

[70] As I will elaborate, even with this vigilance in mind, I do not accept that the appellants' arrest for murder was unlawful.

(1) Legal Principles Governing a Warrantless Arrest

[71] The police have statutory authority to arrest a person without a warrant under s. 495 of the *Criminal Code*, R.S.C. 1985, c. C-46. The applicable part of s. 495 in this appeal, s. 495(1)(a), allows a peace officer to arrest a person without a warrant if, on reasonable grounds, they believe the person has committed or is about to commit an indictable offence.

[72] The essential legal principles governing a warrantless arrest are settled:

1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint (*R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51; *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 26; *R. v. Tim*, 2022 SCC 12, at para. 24).
2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 17). Subjective grounds for arrest are often established through the police officer's testimony (see, for example, *Storrey*, at p. 251; *Latimer*, at para. 27; *Tim*, at para. 38). This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal (*R. v. G.F.*,

2021 SCC 20, at para. 81; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 4).

3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer (*Storrey*, at pp. 250-51; *Latimer*, at para. 26; *Tim*, at para. 24).

4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism" (*R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at paras. 64-65). Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45 and 47; *MacKenzie*, at para. 63). The arresting officer's grounds for arrest must be more than a "hunc[h] or intuition" (*Chehil*, at para. 47).

5. In evaluating the objective grounds to arrest, courts must recognize that, “[o]ften, the officer’s decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete” (*R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 750, per Doherty J.A.). Courts must also remember that “[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a ‘scientific or metaphysical exercise’, but one that calls for the application of ‘[c]ommon sense, flexibility, and practical everyday experience’” (*R. v. Canary*, 2018 ONCA 304, 361 C.C.C. (3d) 63, at para. 22, per Fairburn J.A. (as she then was), citing *MacKenzie*, at para. 73).

6. “Reasonable and probable grounds” is a higher standard than “reasonable suspicion”. Reasonable suspicion requires a *reasonable possibility* of crime, while reasonable and probable grounds requires a *reasonable probability* of crime (*Chehil*, at para. 27; *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1166). At the same time, police do not require a *prima facie* case for conviction before making an arrest (*Storrey*, at p. 251; *Shepherd*, at para. 23; *Tim*, at para. 24). Nor do the police need to establish that the offence was committed on a balance of probabilities (*Mugesera v.*

Canada (Minister of Citizenship and Immigration), 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114; see also *R. v. Henareh*, 2017 BCCA 7, at para. 39 (CanLII); *R. v. Loewen*, 2010 ABCA 255, 490 A.R. 72, at para. 18). Instead, the reasonable and probable grounds standard requires “a reasonable belief that an individual is connected to the offence” (*MacKenzie*, at para. 74 (emphasis deleted); *Debot*, at p. 1166). A reasonable belief exists when “there is an objective basis for the belief which is based on compelling and credible information” (*Mugesera*, at para. 114; see also *R. v. Al Askari*, 2021 ABCA 204, 28 Alta. L.R. (7th) 129, at para. 25; *R. v. Omeasoo*, 2019 MBCA 43, [2019] 6 W.W.R. 280, at para. 30; *R. v. Summers*, 2019 NLCA 11, 4 C.A.N.L.R. 156, at para. 21). The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest (*Chehil*, at para. 34; *Shepherd*, at para. 23; *R. v. Ha*, 2018 ABCA 233, 71 Alta. L.R. (6th) 46, at para. 34; *R. v. MacCannell*, 2014 BCCA 254, 359 B.C.A.C. 1, at paras. 44-45; *R. v. Rezansoff*, 2014 SKCA 80, 442 Sask. R. 1, at para. 28; E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (3rd ed. (loose-leaf)), at § 5:40).

7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest (*R. v. Biron*,

[1976] 2 S.C.R. 56, at p. 72; *R. v. Brayton*, 2021 ABCA 316, 33 Alta. L.R. (7th) 241, at para. 43; *Ha*, at paras. 20-23; *R. v. Montgomery*, 2009 BCCA 41, 265 B.C.A.C. 284, at para. 27; *Ewaschuk*, at § 5:40).

8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds (*Debot*, at pp. 1166-67).

[73] The existence of reasonable and probable grounds for a warrantless arrest is based on the trial judge's factual findings reviewable only for palpable and overriding error. Whether the facts as found by the trial judge amount to reasonable and probable grounds is a question of law reviewable for correctness (*Shepherd*, at para. 20; *Tim*, at para. 25).

(2) Contemporaneous Police Notes Are Desirable but Not Mandatory in a Warrantless Arrest

[74] The appellants do not question the legal principles above. Instead, they contend that a warrantless arrest is unlawful where the police fail to take detailed contemporaneous notes of their grounds for arrest and the material relied on in forming those grounds. They claim that the lack of contemporaneous notes frustrates a court's

ability to review the existence of subjective grounds for arrest, the information known to the officer at the time of arrest, and whether this information justifies the subjective grounds from an objective viewpoint.

[75] I agree that contemporaneous notes are generally desirable when determining whether the police had reasonable and probable grounds for a warrantless arrest, but I disagree that such notes should be mandatory in all cases. This Court has insisted on detailed notes to justify the police conducting warrantless cell phone searches (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 82), and has encouraged them in several contexts, including for strip searches (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 101), for warranted searches of a computer (*R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 70), and after searching a home incident to arrest (*R. v. Stairs*, 2022 SCC 11, at para. 81). However, our law has never insisted on contemporaneous notes for all warrantless arrests, nor would I impose such a requirement. Insisting on contemporaneous notes in all cases could undermine the ability of the police to respond appropriately to the dynamic situations they face each day.

[76] The lack of contemporaneous notes does not necessarily frustrate judicial review of warrantless arrests. Courts routinely evaluate the existence of reasonable and probable grounds based on the arresting officer's testimony and other evidence (see, e.g., *R. v. Nguyen*, 2017 BCPC 131; *R. v. Kroeker*, 2019 BCPC 127; *R. v. Rauch*, 2022 BCPC 117; *R. v. Daley*, 2015 ONSC 7367).

[77] I therefore conclude that contemporaneous notes are not legally required for a warrantless arrest in all cases. Nor, as I will explain, does the absence of such notes frustrate judicial review here.

(3) Application

(a) *Det. Vermette Had Reasonable and Probable Grounds to Arrest the Appellants*

[78] Here, the trial judge accepted Det. Vermette's testimony that he had subjective reasonable and probable grounds to direct the appellants' arrests for murder (paras. 151, 153, 157, 232 and 240). That finding is uncontested. The contested issue is whether those grounds were objectively reasonable. The appellants say that Det. Vermette had no more than an "impression" that Bowers' death was suspicious, which fails to meet the threshold of credibly based probability that the appellants murdered Bowers.

[79] I do not agree. I readily accept that some of the evidence Det. Vermette had when he formed his reasonable and probable grounds may have pointed towards Bowers' death being an accident rather than murder. This includes, for example, Lambert's statement to the 9-1-1 operator that "[Beaver] says he looks like he fell and hit his head" (R.R., at p. 26). But Det. Vermette did not have to rule out possible innocent explanations of Bowers' death before arresting the appellants. Nor did he require a *prima facie* case for conviction.

[80] I also readily accept that the police relied on circumstantial evidence to establish reasonable and probable grounds to arrest the appellants, but this is not unusual. When the police learn of a suspicious death and there is no direct evidence of who may be responsible, they routinely look to motive and opportunity to further their investigation. For example, in *Latimer*, at para. 27, this Court held that the police had reasonable and probable grounds to arrest a father for the murder of his severely disabled daughter based on the circumstantial evidence that carbon monoxide was found in the daughter's blood, strongly suggesting that she had been poisoned; that it was unlikely that her death was accidental; that given her physical condition, her death could not have been suicide; and that the father had both motive and opportunity. This is not to say that motive, opportunity, and a suspicious death will establish reasonable and probable grounds to arrest for murder in every case. Whether circumstantial evidence of this nature establishes grounds to arrest will depend on the facts and the strength of the evidence.

[81] Here, the trial judge's factual findings confirm that Det. Vermette's belief that the appellants were connected to Bowers' death was objectively reasonable when he directed their arrest. Far from having a mere suspicion, Det. Vermette had compelling and credible information that the appellants had motive to kill Bowers, that they had the opportunity to act on this motive, and that Bowers' death was suspicious.

(i) The Appellants Had Motive and Opportunity to Kill Bowers

[82] The trial judge found that both appellants had the motive and opportunity to kill Bowers (para. 159). These factual findings were amply supported by the information before Det. Vermette when he formed his subjective reasonable and probable grounds. The appellants had motive to kill Bowers based on the recent history of conflict and violence in the townhouse that had led to “altercations all week”, including the night before when Bowers had angrily told the appellants to “get the hell out”, and a few days earlier when the police had attended the townhouse after Lambert claimed that Bowers had assaulted him. The appellants also had the opportunity to kill Bowers because they lived with him, they were the last known persons to see him alive, and they claimed to have discovered his body at the townhouse before placing the 9-1-1 call (para. 143).

(ii) Bowers’ Death Was Suspicious

[83] The totality of the circumstances also showed that Bowers’ death was suspicious.

[84] First, Det. Vermette, a seasoned homicide detective, viewed the death as suspicious. His view was supported by the call he had received from S/Sgt. Chisholm calling him into work. S/Sgt. Chisholm had advised him that he had spoken with the medical investigator’s office, which had “vast experience” and which had advised that the homicide team needed to be called out to investigate because the “death investigator” had identified “issues” or “problems” (A.R., vol. I, at pp. 238-39). As Det. Vermette put it, the medical investigator’s office effectively said, “[h]ey, this is

suspicious” (p. 239). Det. Vermette viewed this as “important” because he knew from experience how the medical investigator’s office triaged calls in cases of suspicious deaths (p. 227). S/Sgt. Chisholm’s follow-up email to him also had the subject line “Looks like New homicide”. None of this information had been available to the police when the appellants were unlawfully detained, but all of it was available to them when they arrested the appellants for murder.

[85] Second, the evidence of the appellants’ motive and opportunity reinforced the suspicious nature of the death. Bowers was found dead in the townhouse he lived in with the appellants, the morning after he had argued with them and had angrily told them to “get the hell out”. This atmosphere of violence was not an isolated incident: Lambert told the 9-1-1 operator that there had been “altercations all week” and alleged that Bowers assaulted him just three days earlier.

[86] Finally, police found Bowers lying face down in a pool of blood with apparent trauma to his body, and the townhouse was being treated as a crime scene (ABQB *voir dire* reasons, at para. 158).

(b) *Det. Vermette Did Not Form His Grounds to Arrest in Two Minutes*

[87] I also do not accept the appellants’ argument that Det. Vermette’s decision to arrest the appellants for murder was a “hurried decision” made “two minutes after being advised the appellants were unlawfully detained” (Lambert factum, at para. 48; Beaver factum, at para. 44). Det. Vermette was confronted with this theory on

cross-examination and rejected it as “not accurate” (A.R., vol. I, at p. 256). His unchallenged evidence was that when he directed the appellants’ arrests, he was “already satisfied” of the grounds for arrest because he had reviewed all the relevant material over the course of the morning (p. 256).

(c) *Conclusion: The Appellants Were Lawfully Arrested*

[88] Examining all the information before Det. Vermette — including the appellants’ motive to kill Bowers, the opportunity they had to act on this motive, and the evidence that Bowers’ death was suspicious — through the eyes of a reasonable person with the knowledge, training, and experience comparable to such a seasoned homicide detective, I conclude that Det. Vermette had objectively reasonable and probable grounds to arrest the appellants for murder. Det. Vermette’s grounds went well beyond a hunch or intuition and objectively justified his reasonable belief that the appellants were involved in Bowers’ killing.

C. *Should the Appellants’ Confessions Be Excluded Under Section 24(2) of the Charter?*

[89] The final issue is whether the appellants’ confessions should be excluded from evidence under s. 24(2) of the *Charter*. The appellants say that because the police failed to effect a “fresh start” from the earlier *Charter* violations arising from their unlawful detention, their confessions were “obtained in a manner” that breached the *Charter* and must be excluded under s. 24(2).

(1) The Charter Rights Infringed

[90] The s. 24(2) analysis requires identifying the *Charter* rights infringed. The Crown conceded, and the trial judge found, that the police breached the appellants' ss. 9, 10(a), and 10(b) *Charter* rights from when they were unlawfully detained until they were arrested for murder about two hours later. The police breached s. 9 by unlawfully detaining the appellants at the scene and by transporting them to the police station while they were being "investigatively detained" under the non-existent *Medical Examiners Act*. There was no basis to place the appellants under investigative detention at common law because, at the time of their detention, there was no "clear nexus" between them and Bowers' death, and it had not been established that Bowers' death resulted from a recent criminal offence (ABQB *voir dire* reasons, at para. 149). Nor, at the time, was there statutory authority to arrest the appellants under the more onerous reasonable and probable grounds standard in s. 495(1)(a) of the *Criminal Code*. The police also breached s. 10(a) of the *Charter* by failing to give the appellants a legally valid reason for their detention and breached s. 10(b) because the appellants did not know the jeopardy they faced while they were unlawfully detained (paras. 183 and 188). Finally, the police breached Lambert's s. 10(b) rights by asking him questions in the police car after he had said that he wanted to speak to a lawyer (para. 185).

[91] I do not accept the appellants' suggestion that the trial judge found that the police breached their s. 8 *Charter* rights. The trial judge considered only Lambert's s. 8

Charter rights and found that both his arrest for murder and the search of his person incident to arrest were lawful (para. 210).

[92] I also reject the appellants' suggestion that the trial judge found that the police breached their rights to silence under s. 7 of the *Charter*. The trial judge noted that because the appellants' confessions were voluntary, the argument that their confessions were obtained in a manner that breached their s. 7 right to silence could not succeed: it is established that a voluntary confession cannot have been obtained in a manner that breached s. 7 of the *Charter* (paras. 127-30, citing *Singh*, at para. 8, and *R. v. Broyles*, [1991] 3 S.C.R. 595, at p. 609; see also D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 453). I see no error in these conclusions.

[93] As a result, I will consider whether the confessions should be excluded under s. 24(2) based solely on the ss. 9, 10(a), and 10(b) *Charter* violations. As I detail below, I have concluded that Lambert's confession was not "obtained in a manner" that breached the *Charter*, but that Beaver's confession was. The police severed any contextual connection between Lambert's confession and the earlier *Charter* breaches arising from his unlawful detention and rendered any temporal connection to those breaches remote or tenuous. In doing so, the police made a "fresh start" from the *Charter* breaches for Lambert. However, the police failed to do so for Beaver. This Court must therefore consider whether exclusion of Beaver's confession is required

under s. 24(2). On a proper weighing of the relevant considerations, I conclude that it is not.

(2) The “Obtained in a Manner” Threshold Requirement

[94] There are two components to determining whether evidence must be excluded under s. 24(2). The first component — the *threshold requirement* — asks whether the evidence was “obtained in a manner” that infringed or denied a *Charter* right or freedom. If the threshold requirement is met, the second component — the *evaluative component* — asks whether, having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute (see *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 44, per Doherty J.A., who coined this terminology; see also *R. v. Strachan*, [1988] 2 S.C.R. 980, at p. 1000; *Tim*, at para. 74; *R. v. McSweeney*, 2020 ONCA 2, 451 C.R.R. (2d) 357, at para. 57; *R. v. Lauriente*, 2010 BCCA 72, 283 B.C.A.C. 215, at para. 35; S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams’ Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 19:22).

(a) *“Fresh Start” and the Threshold Requirement*

[95] Section 24(2) of the *Charter* is engaged only when the accused first establishes that evidence was “obtained in a manner” that breached the *Charter*. The threshold requirement “insists that there be a nexus” between the *Charter* breach and the evidence, absent which “s. 24(2) has no application” (*R. v. Manchulenko*, 2013

ONCA 543, 116 O.R. (3d) 721, at para. 71, per Watt J.A.). Determining whether evidence was “obtained in a manner” that infringed the *Charter* involves a case-specific factual inquiry into the existence and sufficiency of the connection between the *Charter* breach and the evidence obtained. There is “no hard and fast rule” (*Strachan*, at p. 1006; *Tim*, at para. 78).

[96] The general principles governing the application of the threshold requirement were helpfully summarized by Moldaver J. in *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38:

Whether evidence was “obtained in a manner” that infringed an accused’s rights under the *Charter* depends on the nature of the connection between the *Charter* violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A “remote” or “tenuous” connection between the breach and the impugned evidence will not suffice (*Wittwer*, at para. 21).

See also *R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561, at para. 72, per Laskin J.A.; *Tim*, at para. 78.

[97] A large body of appellate jurisprudence and academic commentary has recognized that evidence will not be “obtained in a manner” that breached the *Charter* when the police made a “fresh start” from an earlier *Charter* breach by severing any

temporal, contextual, or causal connection between the *Charter* breach and the evidence obtained or by rendering any such connection remote or tenuous. In some cases, the police may make a “fresh start” by later complying with the *Charter*, although subsequent compliance does not result in a “fresh start” in every case. The inquiry must be sensitive to the facts of each case (see *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at paras. 3 and 21-22; *Plaha*, at paras. 47 and 53; *R. v. Lewis*, 2007 ONCA 349, 86 O.R. (3d) 46, at para. 31; *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 259, at para. 69; *R. v. Woods*, 2008 ONCA 713, at paras. 10-11 (CanLII); *Manchulenko*, at paras. 68-70; *R. v. Hamilton*, 2017 ONCA 179, 347 C.C.C. (3d) 19, at para. 54; *McSweeney*, at para. 59; Paciocco, Paciocco and Stuesser, at p. 485; P. J. Sankoff, *The Law of Witnesses and Evidence in Canada* (loose-leaf), at § 20:10; S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶¶10.122-10.124; R. J. Marin, *Admissibility of Statements* (9th ed. (loose-leaf)), at §§ 2:36 and 5:68; D. Watt, *Watt’s Manual of Criminal Evidence* (2021), at §41.01; Ewaschuk, at § 31:1565).

[98] The concept of a “fresh start” under s. 24(2) of the *Charter* was adopted from the common law “derived confessions rule”, under which a court examines whether an otherwise voluntary confession is sufficiently connected to a prior involuntary confession to be tainted (Penney, Rondinelli and Stribopoulos, at ¶¶4.50-4.52 and 10.122-10.123; Paciocco, Paciocco and Stuesser, at p. 426, fn. 179, and p. 485, fn. 72). Under this rule, courts evaluate whether a voluntary confession is admissible, despite the prior involuntary confession, by making a “factual

determination based on factors designed to ascertain the degree of connection between the two statements”, such as “the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances” (*R. v. I. (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504, at p. 526; see also *R. v. R. (D.)*, [1994] 1 S.C.R. 881, at p. 882; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 28-30; *Manchulenko*, at paras. 67 and 69).

[99] In some cases, evidence will remain tainted by a *Charter* breach despite subsequent *Charter* compliance. For this reason, “[c]are should be taken in using the ‘fresh start’ label to resolve ‘obtained in a manner’ inquiries” (Paciocco, Paciocco and Stuesser, at p. 485). Whether evidence was “obtained in a manner” is not determined by whether the state eventually complied with its *Charter* obligations, but instead is based on whether there remains a sufficient causal, temporal, or contextual connection between the *Charter* breach and the impugned evidence. In this way, the “fresh start” analysis fits comfortably within this Court’s holistic approach to whether evidence was “obtained in a manner” that breached the *Charter*.

(b) *Cases Illustrating the “Fresh Start” Concept*

[100] In *Wittwer*, Fish J. for this Court accepted that, in principle, the police can make a “fresh start” after a *Charter* violation, even though he found no “fresh start” on the facts. The accused had made two incriminating statements to the police that were

inadmissible because they were made contrary to the accused's right to counsel under s. 10(b) of the *Charter*. Five months later, while the accused was in custody on another charge, a different officer informed him of his right to counsel and questioned him again, claiming that he did not know the content of the earlier statements. The accused provided no incriminating information until he was confronted with one of his earlier incriminating statements, at which point he made a third incriminating statement. Fish J. ruled that by referring to the earlier incriminating statement, the police "intentionally and explicitly bridged" the gap between the inadmissible statement and the third statement, thus preserving the temporal, causal, and contextual connections between them (para. 22). He explained that "[w]hat began as a *permissible* fresh start thus ended as an *impermissible* interrogation inseparably linked to its tainted past" (para. 3 (emphasis in original)). The third statement was thus "obtained in a manner" that breached the *Charter* and was then excluded under s. 24(2).

[101] By contrast, in *Simon* the Ontario Court of Appeal found that the police did make a "fresh start". In that case, the police had placed the accused under surveillance while investigating sexual assaults and arrested him for being in possession of a stolen van. They advised him of his right to counsel under s. 10(b) of the *Charter* in connection with the stolen van, but they did not advise him of his s. 10(b) right in connection with the sexual assaults before they questioned him about them. During questioning, the accused gave his written consent to provide the police with a saliva sample for DNA analysis for the sexual assault investigation. When giving this consent, the accused acknowledged that he did not have to provide the sample, that it could be

used against him in criminal proceedings, and that he had the right to discuss with a lawyer whether to provide it. The DNA analysis of the saliva sample ultimately incriminated the accused in the sexual assaults. In ruling that the saliva sample was admissible, Doherty J.A. acknowledged that the police breached s. 10(b) of the *Charter* by failing to advise the accused of his right to counsel in relation to the sexual assault investigation, but ruled that the police made a “fresh start” by severing this earlier *Charter* breach from their later conduct. In Doherty J.A.’s view, by obtaining the accused’s written consent for the saliva sample, “the officers administered a focussed and powerful antidote to their earlier s. 10(b) breach” (para. 70), and drove “a wedge between the giving of the sample and the earlier breach of s. 10(b)” (para. 74). Doherty J.A. concluded that because the police had “effectively disconnected the decision to give the sample from any potential effect of the prior s. 10(b) breach” (para. 74), the saliva sample was not “obtained in a manner” that breached the *Charter*.

[102] These principles apply to any form of evidence that the police obtain following a *Charter* violation; they are not limited either to successive statements or to s. 10(b) *Charter* violations. Although many “fresh start” cases have involved successive statements to persons in authority (see, for example, *Plaha*; *Lewis*; *Woods*; *Hamilton*; *McSweeney*), I agree with the observation of Watt J.A. in *Manchulenko*, at para. 70, that “[n]o principled reason exists to confine the ‘fresh start’ jurisprudence” to such cases and that “[t]he rationale that underpins the ‘fresh start’ principle is the same irrespective of the specific form the evidence proposed for admission takes”.

(c) *Potential Indicators of a “Fresh Start”*

[103] When undertaking the case-specific factual inquiry into whether the police effected a “fresh start”, some potentially illustrative indicators include:

- Whether the police informed the accused of the *Charter* breach and dispelled its effect with appropriate language (*R. (D.)*, at p. 882). What constitutes appropriate language will vary with the circumstances of the case. In some cases, it may be sufficient to say, “we’re going to start over”; in other cases, more detailed or specific language may be needed to remove the taint from the earlier *Charter* breach;
- Whether the police cautioned the accused after the *Charter* breach but before the impugned evidence was obtained (*Plaha*, at para. 53; *Hamilton*, at paras. 58-59; *Woods*, at para. 9). Ideally, this would involve both a primary caution (“You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence” (*Singh*, at para. 31; *Manninen*, at p. 1237)), and a secondary caution (“Your decision to speak to the police should not be influenced by anything you have already said to the police or the police have already said to you” (*Manninen*, at p. 1238));

- Whether the accused had the chance to consult counsel after the *Charter* breach but before the impugned evidence was obtained (*Manchulenko*, at para. 69; *Woods*, at paras. 5 and 9; *R. v. Dawkins*, 2018 ONSC 6394, at para. 62 (CanLII));
- Whether the accused gave informed consent to the taking of the impugned evidence after the *Charter* breach (*Simon*, at para. 74);
- Whether and how different police officers interacted with the accused after the *Charter* breach but before the impugned evidence was obtained (see *Lewis*, at para. 32; *Woods*, at para. 9; *McSweeney*, at para. 62; *I. (L.R.) and T. (E.)*, at p. 526; *Dawkins*, at para. 62); and
- Whether the accused was released from detention after the *Charter* breach but before the impugned evidence was obtained.

(3) Application

(a) *The Trial Judge’s “Fresh Start” Analysis Contained Errors of Law*

[104] Although the trial judge reviewed the case law on “fresh start” principles, I have concluded that he erred in law by failing to apply the correct legal test and by applying an incorrect legal principle (*R. v. Chung*, 2020 SCC 8, at paras. 13 and 18).

[105] First, the trial judge failed to apply the correct legal test by focussing solely on the conduct of the police that was *Charter*-compliant, without expressly analyzing whether or how that conduct severed the temporal, causal, or contextual connection between the earlier *Charter* breaches and the appellants' confessions or rendered those connections remote or tenuous. The trial judge appeared to proceed on the basis that the appellants' arrest for murder was sufficient to constitute a "fresh start". He framed the issue as "whether [the appellants'] arrests following Det. Vermette's direction [to arrest the appellants for murder] resulted in a 'fresh start' such that the *Charter* breaches are 'cured'" (para. 206). He concluded that the arrests resulted in a "fresh start" and compliance with the *Charter*, without considering the connection between the earlier *Charter* violations and the confessions (para. 209).

[106] Second, and relatedly, the trial judge applied the wrong legal principle by repeatedly referring to the police as having "cured" the earlier *Charter* breaches (paras. 191, 206, 215, 239 and 253). It is unhelpful and inaccurate to describe the police as having "cured" the earlier *Charter* breaches. It is unhelpful because it obscures the real issue: whether there is a sufficient connection between the *Charter* breaches and the impugned evidence, and not simply whether there was subsequent *Charter* compliance. It is inaccurate because subsequent *Charter*-compliant conduct by the police does not "cure" earlier *Charter* breaches; the *Charter* breaches still occurred and merit proper consideration under the threshold requirement. Instead, *Charter*-compliant conduct may dissociate the *Charter* breaches from the impugned evidence by severing any connection between them or by rendering any connection

remote or tenuous. Only then is the evidence not “obtained in a manner” that breached the *Charter*.

[107] Because the trial judge erred in law in his analysis of the threshold requirement, no deference is owed to his conclusion that the evidence was not “obtained in a manner” that breached the *Charter* (*Mack*, at para. 39; *R. v. Keror*, 2017 ABCA 273, 57 Alta. L.R. (6th) 268, at para. 35). That issue must be analyzed afresh.

(b) *Lambert’s Confession Was Not “Obtained in a Manner” That Breached the Charter*

[108] In my view, the police took several steps that collectively severed any contextual connection between the breach of Lambert’s *Charter* rights arising from his unlawful detention and his confession. These steps also rendered any temporal connection with the *Charter* breaches remote. Finally, there was also no causal relationship between the *Charter* breaches and Lambert’s confession. Lambert’s confession was thus not “obtained in a manner” that breached the *Charter*.

[109] Specifically, Det. Demarino severed any contextual connection with Lambert’s earlier unlawful detention under the supposed *Medical Examiners Act*. He did so by telling Lambert that they were going to “start from the very beginning”, by advising him that this is a “very, very serious matter”, and by informing him four times that he was under arrest for murder. By taking these steps, Det. Demarino addressed the previous failure to advise Lambert of the extent of his jeopardy when he had been

unlawfully detained. Det. Demarino then facilitated Lambert's second consultation with counsel, confirmed that he understood the advice he had been given, repeated to him that they "have to start everything all over again", and provided him with a primary caution three times and a secondary caution once. Collectively, these steps created a new context for the interaction with the police and "dispelled" the effect of the *Charter* breaches on Lambert's confession (*R. (D.)*, at p. 882).

[110] In addition, any temporal connection between the *Charter* breaches arising from Lambert's unlawful detention and his confession after he had been arrested for murder was at best tenuous. Lambert's confession was provided about 12 hours after the *Charter* breaches, which the Court of Appeal found left "arguably no temporal connection" (para. 26). In *Plaha*, at para. 49, Doherty J.A. cautioned that evaluating whether a temporal connection persists "requires more than simply counting the minutes or hours" between the breach and the subsequent statement. As he explained, "[e]vents that occur during the time interval can colour the significance of the passage of time" (para. 49; see also *Manchulenko*, at para. 73). Here, the intervening steps taken by Det. Demarino and Lambert's decision to confess even after he was fully aware of his rights rendered any temporal link between the *Charter* breaches and the confession extremely tenuous (*R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 45). Such "remote or tenuous connections are no connections at all" (*R. v. Keshavarz*, 2022 ONCA 312, 413 C.C.C. (3d) 263, at para. 53, per Fairburn A.C.J.O.).

[111] There was also no causal connection between the *Charter* breaches arising from Lambert's unlawful detention and his confession after he was arrested for murder. Lambert provided no incriminating information because of the *Charter* breaches and he continued to protest his innocence. Lambert confessed only after he consulted counsel, after he understood his rights, and after he appreciated that he had been arrested for murder.

[112] By taking the steps described above, the police ensured that Lambert's confession was not "obtained in a manner" that breached the *Charter*. It is therefore unnecessary to consider the evaluative component of s. 24(2) for Lambert. Since Lambert's confession was admissible, I would dismiss his appeal and confirm his conviction for manslaughter.

(c) *Beaver's Confession Was "Obtained in a Manner" That Breached the Charter*

[113] The same cannot be said of Beaver's confession. Although, like Lambert, Beaver was at first unlawfully detained and then arrested for murder, unlike Lambert, Beaver declined the several opportunities he was given to consult counsel. As a result, in Beaver's case it cannot be said that an intervening consultation with counsel severed any connection between the *Charter* breaches arising from his unlawful detention and his eventual confession (see *Manchulenko*, at para. 69).

[114] Most importantly, however, Det. Hossack referred back to Cst. Husband's earlier caution during Beaver's unlawful detention, when Beaver had been told that he was being "investigatively detained" for "whatever's going on" in the townhouse where Bowers had been found dead. By telling Beaver that "it's no different than what uh, Constable Husband read to [him]", Det. Hossack invoked a caution given when Beaver was unlawfully detained under non-existent legislation and when he had not been advised of the jeopardy he faced for any offence, let alone for murder. By recalling this caution, Det. Hossack failed to dissociate her interaction with Beaver from the earlier *Charter* breaches and actively maintained a contextual connection between Beaver's initial unlawful detention and his confession. Thus, even after Beaver had been lawfully arrested and made aware of the jeopardy he faced, his confession was contextually linked to the earlier *Charter* breaches.

[115] Beaver's confession was thus "obtained in a manner" that breached the *Charter*. It is therefore necessary to consider whether it should be excluded under s. 24(2) of the *Charter*.

(4) Beaver's Confession Should Not Be Excluded Under Section 24(2) of the *Charter*

[116] Whether the administration of justice would be brought into disrepute by admitting Beaver's confession involves examining the impact its admission would have on public confidence in the administration of justice over the long term, based on a balancing of the three lines of inquiry described by this Court in *R. v. Grant*, 2009 SCC

32, [2009] 2 S.C.R. 353: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the accused's *Charter*-protected interests; and (3) society's interest in the adjudication of the case on its merits (see *Grant*, at para. 71; see also *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 139-42; *Tim*, at para. 74; *R. v. Lafrance*, 2022 SCC 32, at para. 90).

[117] Section 24(2) of the *Charter* is not an automatic exclusionary rule precluding the admission of all unconstitutionally obtained evidence. Such evidence will only be excluded when the accused establishes that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute (see *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 280; *Tim*, at para. 75). Balancing the relevant considerations under s. 24(2) is a qualitative determination that is not capable of mathematical precision (*Grant*, at paras. 86 and 140; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 36; *Tim*, at para. 98).

[118] On appeal, a trial judge's findings of fact in applying s. 24(2) attract deference, but no deference is owed to the application of the law to the facts (*Grant*, at paras. 43 and 86; *Lafrance*, at para. 91). Deference is also not owed when the appellate court disagrees with the trial judge's conclusions on the *Charter* breaches (*Grant*, at para. 129; *Lafrance*, at para. 91). Nor is deference owed to a trial judge's s. 24(2) analysis conducted in the alternative, because such an analysis involves an artificial evaluation of the seriousness of a *Charter* breach and the impact on *Charter*-protected interests that the trial judge did not find (*Grant*, at para. 129; *R. v. Paterson*, 2017 SCC

15, [2017] 1 S.C.R. 202, at para. 42; *Le*, at para. 138; *Tim*, at para. 72; *Lafrance*, at para. 91; *R. v. G.T.D.*, 2017 ABCA 274, 57 Alta. L.R. (6th) 213, at para. 51, per Veldhuis J.A., dissenting, appeal allowed substantially for the reasons of Veldhuis J.A., 2018 SCC 7, [2018] 1 S.C.R. 220, at para. 3). Similarly, no deference is owed to a trial judge's s. 24(2) analysis conducted in the alternative when the trial judge found that the impugned evidence was not "obtained in a manner" that breached the *Charter*. Such an alternative analysis likewise involves an artificial evaluation of the seriousness of a *Charter* breach and its impact on *Charter*-protected interests that the trial judge found were unconnected to the impugned evidence.

[119] As a result, no deference is owed to the trial judge's alternative analysis of the threshold requirement under s. 24(2). This Court must conduct the s. 24(2) analysis afresh, while respecting the trial judge's factual findings.

(a) *The Seriousness of the Charter-Infringing State Conduct*

[120] The first line of inquiry under s. 24(2) considers whether the *Charter*-infringing state conduct is so serious that the court needs to dissociate itself from it. This inquiry requires the court to situate the *Charter*-infringing conduct on a scale of culpability. At one end of the scale is conduct that constitutes a wilful or reckless disregard of *Charter* rights, a systemic pattern of *Charter*-infringing conduct, or a major departure from *Charter* standards. At the other end of the scale are less serious *Charter* breaches, including breaches that are inadvertent, technical, or minor or those that reflect an understandable mistake. The more severe the state's

Charter-infringing conduct, the greater the need for courts to disassociate themselves from it (see *Grant*, at paras. 72-74; *Le*, at para. 143; *Harrison*, at para. 22; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 47; *Tim*, at para. 82; *Lafrance*, at para. 93).

[121] The breaches of Beaver’s ss. 9, 10(a), and 10(b) *Charter* rights arising from his unlawful detention were serious. Sgt. Lines directed Beaver’s detention under non-existent legislation, the *Medical Examiners Act*. This involved a reckless disregard for Beaver’s *Charter* rights and a significant departure from *Charter* standards. As a member of the Calgary Police Service with 17 years’ experience, Sgt. Lines should have known that the *Medical Examiners Act* did not exist and that he did not have the authority to detain Beaver at that point. Sgt. Lines’ direction was not an “understandable mistake”, nor was it a mistake made in “good faith”. Instead, as the trial judge found, Sgt. Lines made the direction because “he was looking for a way to maintain control over Mr. Beaver . . . , but was not sure exactly how to do it” (ABQB *voir dire* reasons, at para. 230). This was a serious *Charter* violation involving an inappropriate and unjustified overreach of police powers.

[122] The first line of inquiry strongly favours exclusion of Beaver’s confession.

(b) *The Impact of the Breach on the Accused’s Charter-Protected Interests*

[123] The second line of inquiry under s. 24(2) considers the impact of the *Charter* breach on the accused’s *Charter*-protected interests. This inquiry involves identifying the interests protected by the relevant *Charter* right and evaluating the

extent to which the *Charter* breach “actually undermined the interests protected by the right” (*Grant*, at para. 76). As with the first line of inquiry, the court must situate this impact on a spectrum. The greater the impact on the accused’s *Charter*-protected interests, the greater the risk that admission of the evidence would suggest that *Charter* rights are of little actual avail to citizens, thus breeding public cynicism and bringing the administration of justice into disrepute (see *Grant*, at paras. 76-77; *Le*, at para. 151; *Tim*, at para. 90; *Lafrance*, at para. 96).

[124] Three factors indicate that the *Charter* breaches arising from Beaver’s unlawful detention had only minimal impact on his *Charter*-protected interests.

[125] First, and most importantly, Beaver’s decision to confess was not caused by the *Charter* breaches arising from his unlawful detention. In appropriate cases, the lack of a causal connection between the breaches and the obtaining of the impugned evidence may mitigate the impact of the breach on the accused’s *Charter*-protected interests (*Grant*, at para. 122; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 87; *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 43; *R. v. Pileggi*, 2021 ONCA 4, 153 O.R. (3d) 561, at para. 120). As this Court explained in *Grant*, the strength of the causal connection between the *Charter* infringement and the impugned evidence plays “a useful role . . . in assessing the actual impact of the breach on the protected interests of the accused” (para. 122). Here, no such causal connection exists. The trial judge found that the *Charter* breaches arising from the unlawful detention “had little effect” on either appellant’s decision to confess (para. 247). As the trial judge

explained, Beaver's confession had nothing to do with the *Charter* breaches arising from the unlawful detention and everything to do with "the evidence that was beginning to unfold", including, most importantly, Lambert's videotaped confession (paras. 95 and 247). The lack of a causal connection between the *Charter* breaches and Beaver's confession mitigates the actual impact of the breaches on his *Charter*-protected interests.

[126] Second, Beaver understood the basis for his interaction with the police. This diminished the impact the breach had on his s. 10(a) *Charter* right to be informed promptly of the reasons for his detention and his s. 10(b) *Charter* right to counsel. The trial judge found as fact that, during the two hours when Beaver was arbitrarily detained, he "knew why [he was] being detained" (para. 244). Because Beaver and Lambert placed the 9-1-1 call themselves, "[they both] knew, or had to have known, that they were going to be questioned concerning . . . Bowers' death" (para. 246). And before Beaver was even questioned, he was recorded saying to himself "[t]hey're gonna take my statement". Because Beaver understood the "substance" of the reasons for his detention, this attenuated the impact of the ss. 10(a) and 10(b) breaches on his *Charter*-protected interests (para. 246).

[127] Finally, the impact of the breach on Beaver's "liberty from unjustified state interference" and "right to be left alone" protected under s. 9 of the *Charter* (*Le*, at paras. 152 and 155 (emphasis deleted)) was also attenuated because Beaver could not reasonably have expected to be left alone. This is not a case where there was an

“absence of justification to investigate the [accused] *at all*” (*Le*, at para. 155 (emphasis in original)); Beaver and Lambert invited the police to the scene of Bowers’ death, and the police had a common law duty to respond to their call of distress (*R. v. Godoy*, [1999] 1 S.C.R. 311, at paras. 17 and 23). Without diminishing the seriousness of the *Charter* breaches or disregarding the duty of the police to act in accordance with the law, it must be emphasized that Beaver could not reasonably have expected to be left alone. Indeed, Beaver expected to interact with the police as part of his plan to fabricate a false account of Bowers’ death.

[128] In my view, because the *Charter* breaches arising from Beaver’s unlawful detention had only minimal impact on his *Charter*-protected interests, the second line of inquiry favours neither exclusion nor inclusion of Beaver’s confession.

(c) *Society’s Interest in an Adjudication of the Case on Its Merits*

[129] The third line of inquiry under s. 24(2) considers societal concerns and asks whether the truth-seeking function of the criminal trial process would be better served by the admission or the exclusion of the evidence (*Grant*, at para. 79). Relevant factors under this inquiry include the reliability of the evidence, the importance of the evidence to the prosecution’s case, and the seriousness of the offence at issue (*Grant*, at paras. 79-84; *Harrison*, at para. 33; *Côté*, at para. 47; *Paterson*, at paras. 51-52).

[130] Here, the *Charter* breaches arising from Beaver’s unlawful detention did not undermine the legality of Beaver’s arrest for murder or the reliability of his

confession. Nor is this a case where the *Charter* breaches effectively compelled Beaver to talk to the state after he had been arrested for murder (*Grant*, at para. 81). Rather, Beaver spoke voluntarily with Det. Hossack for hours in an effort to deceive her and to obstruct justice. Beaver's confession was also essential to the Crown's case against him, as reflected in the agreed statement of facts at trial. And while the seriousness of the offence has the potential to "cut both ways" (*Grant*, at para. 84), the public has a heightened interest in seeing serious offences such as manslaughter and obstruction of justice adjudicated on the merits.

[131] Excluding reliable evidence critical to the Crown's case, such as Beaver's confession, can also undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute (see *Grant*, at paras. 80-81; *Harrison*, at paras. 33-34; *Tim*, at para. 96). These considerations apply forcefully here.

[132] The third line of inquiry therefore strongly supports admission of Beaver's confession.

(d) *Final Balancing*

[133] The final step in the s. 24(2) analysis involves weighing each line of inquiry to determine whether admitting the evidence would bring the administration of justice into disrepute. This balancing has a prospective function: it aims to ensure that evidence obtained through a *Charter* breach does not cause further damage to the justice system.

It is also societal in scope: its goal is not to punish the police but to address systemic concerns involving the broad impact of admitting the evidence on the long-term repute of the justice system (see *Grant*, at paras. 69-70 and 85-86; *Le*, at para. 139; *Tim*, at para. 98).

[134] When undertaking this weighing exercise, “it is the *cumulative* weight of the first two lines of inquiry that trial judges must consider and balance against the third line of inquiry” (*Lafrance*, at para. 90 (emphasis in original)). “[W]hen the two first lines, taken together, make a strong case for exclusion”, the third line of inquiry “will seldom tip the scale in favour of admissibility” (*Lafrance*, at para. 90). The third line of inquiry “becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence” (*R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 63, per Doherty J.A.; see also *R. v. Chapman*, 2020 SKCA 11, 386 C.C.C. (3d) 24, at paras. 125-26 and 130). It is possible that admitting evidence obtained by particularly serious *Charter*-infringing conduct will bring the administration of justice into disrepute, even if the conduct did not have a serious impact on the accused’s *Charter*-protected interests (*Le*, at para. 141). But where the cumulative weight of the first two lines of inquiry is overwhelmed by a compelling public interest in admitting the evidence, the administration of justice will not be brought into disrepute by its admission.

[135] In my view, the third line of inquiry is central to the s. 24(2) weighing exercise in this case. The first two lines of inquiry, taken together, do not make a strong

case for excluding Beaver's confession. Only the seriousness of the *Charter* breaches strongly favours exclusion. The second line of inquiry pulls neither towards nor against exclusion because the breaches had minimal impact on Beaver's *Charter*-protected interests. The cumulative weight of the first two lines of inquiry is overwhelmed by a compelling public interest in admitting Beaver's confession. This evidence is crucial to the prosecution's case against an offender who allegedly killed another person and then tried to obstruct the police investigation. On a proper balancing of the lines of inquiry under s. 24(2), I conclude that admitting Beaver's confession would not bring the administration of justice into disrepute.

[136] I would therefore admit Beaver's confession and confirm his conviction for manslaughter.

VI. Disposition

[137] I would dismiss both appeals.

The reasons of Karakatsanis, Côté, Brown and Martin JJ. were delivered by

MARTIN J. —

I. Overview

[138] On the morning of October 9, 2016, the appellants, Brian John Lambert and James Andrew Beaver, called 9-1-1 and reported arriving home from a night away

to find their roommate's dead body. Shortly after arriving at the scene, police unlawfully detained the appellants pursuant to non-existent legislation, transported them to police headquarters for questioning, and searched them upon arrival. During Mr. Lambert's transport, police questioned him before facilitating his request to exercise his right to counsel. This conduct resulted in multiple serious breaches of the appellants' rights under the *Canadian Charter of Rights and Freedoms*.

[139] I part ways with the majority on two points. First, on whether it was lawful for the lead investigator, after learning of the circumstances of the appellants' unlawful detention, to immediately arrest them for murder and direct their continued questioning. I conclude that the information relied on to direct the appellants' arrests does not come close to the particularized probability required to meet the reasonable grounds standard. The arrests were a blatant attempt to salvage the investigation in the face of what officers knew were multiple serious violations of the appellants' *Charter* rights. The accumulation of breaches of well-established *Charter* standards in this case requires that the evidence be excluded as a remedy under s. 24(2) of the *Charter* to avoid bringing further disrepute to the administration of justice.

[140] Second, the test for inclusion under s. 24(2) is long established and well known. The focus is on the connection between the breach and the evidence obtained, with reference to temporal, contextual, and causal elements (*R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. Goldhart*, [1996] 2 S.C.R. 463; *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235). There is simply no need to speak in terms of whether or not there was

somehow a “fresh start” for those who have breached *Charter* rights. Indeed, the notion of a “fresh start” is an unhelpful and potentially misleading concept that has no place in the s. 24(2) analysis. It divides what is to be a holistic analysis into before and after segments and operates to cure and/or remove *Charter* breaches from the analysis, thus placing a heavy finger on the scale of s. 24(2).

[141] The combination of these two conclusions is more than enough to allow the appeals, exclude all the evidence obtained in a manner that infringed the appellants’ *Charter* rights, set aside the convictions, and order new trials. Thus, while I should not be taken as accepting the majority’s voluntariness analysis, I find it unnecessary to address the voluntariness issue raised by Mr. Beaver.

II. Background

A. *Facts*

[142] Shortly before 10:00 a.m. on October 9, 2016, Mr. Lambert called 9-1-1 and reported finding his roommate and landlord, Sutton Raymond Bowers, lying face down in a puddle of blood inside their home. He told the 9-1-1 operator that he and Mr. Bowers had been having “altercations” all week. When he came home the previous evening, Mr. Bowers told him and his other roommate, Mr. Beaver, to “get the hell out” (R.R., at p. 18). They left Mr. Bowers at home with guests and returned that morning to find his body in the townhouse.

[143] Police officers arrived at the scene within minutes. They observed the deceased lying at the base of “a fairly steep set of polished hardwood stairs” (2019 ABQB 125, 88 Alta. L.R. (6th) 337, at para. 7). An empty bottle of rum was left out on a table (para. 10). Mr. Lambert informed one of the officers, Cst. Taylor, that it was not unusual for the deceased to be passed out from intoxication. None of the officers observed either of the appellants acting suspiciously. There were no signs of a struggle at the scene.

[144] None of the officers at the scene believed they had grounds to arrest the appellants.

[145] Sgt. Lines was in charge at the scene. He directed two officers, Cst. Husband and Cst. Taylor, to detain the appellants under the *Medical Examiners Act*. He testified that he meant to refer to the *Fatality Inquiries Act*, R.S.A. 2000, c. F-9, as he believed this legislation authorized police to detain people at the scene of a potential homicide. He acknowledged that he erred in two respects: there is no such legislation as the *Medical Examiners Act* in Alberta, and the *Fatality Inquiries Act* provides no detention power to police.

[146] Cst. Husband took Mr. Beaver into custody. She told him that she had to “read [him] the legalities” and that she was “investigatively detaining [him] for, uh, whatever’s going on in there, (laughing)” (A.R., vol. III, at p. 28). She testified that she did not know what Mr. Beaver was under investigative detention for; he was taken into

custody because police did not know whether he was a witness or an offender and they needed to find out his involvement.

[147] Cst. Taylor was in charge of Mr. Lambert's detention. He read Mr. Lambert his *Charter* warning and caution, informing him that he was detained under the *Medical Examiners Act*. Mr. Lambert replied that he understood and wished to speak to a lawyer.

[148] Cst. Taylor then transported Mr. Lambert to the station in his police vehicle. During the car ride, he asked Mr. Lambert about what had happened. Mr. Lambert described his version of what had occurred the previous night between himself, Mr. Beaver, and the deceased. He noted that a male he did not recognize had been at the residence with Mr. Bowers the previous evening.

[149] Det. Vermette was assigned as the primary investigator on the file. At 10:36 a.m., he received a phone call from S/Sgt. Chisholm calling out the homicide unit to investigate a death. During this call, S/Sgt. Chisholm indicated that he had spoken to the medical investigator and a man had been found face down in a pool of blood at the bottom of the stairs near the front entrance of a residence. He informed Det. Vermette that there had been some conflict or dispute between the victim and his roommates, who were being transported to the police detachment. S/Sgt. Chisholm also sent Det. Vermette an email relating this information.

[150] Csts. Husband and Taylor and the appellants arrived at police headquarters at about 11:15 a.m. The appellants were both searched and Mr. Lambert was given an opportunity to speak with a lawyer. They were placed in separate holding rooms.

[151] At 11:39 a.m., Det. Vermette spoke with Csts. Husband and Taylor. They informed him that the appellants had been “*Chartered* and cautioned” and provided with an opportunity to speak with legal counsel (A.R., vol. I, at p. 210). Det. Vermette was “assuming” that they had been arrested for murder (p. 251). He assigned Det. Hossack and Det. Demarino to interview Mr. Lambert and Mr. Beaver, respectively.

[152] Det. Vermette testified that when he met with Csts. Husband and Taylor, he did not have reasonable grounds to arrest the appellants.

[153] Det. Vermette then reviewed the material in the police file. The material included an “Event Information”, which provided a summary of the case based on the 9-1-1 call and some remarks inputted from officers, and an “Event Chronology”, which essentially repeated the content of the Event Information.

[154] The Event Information indicated that the 9-1-1 call was categorized as “medical – sudden death” (A.R., vol. III, at p. 321). It identified the townhouse as a location of interest, or “LOI”, because Mr. Lambert had previously made a complaint about his landlord, Mr. Bowers. It also indicated that police and emergency medical services had been called to the townhouse in August of that year, about three months

prior to the 9-1-1 call, to perform a mental health check on Mr. Bowers after he had drunk floor cleaner in what Det. Vermette described as an “attempted suicide kind of situation” (A.R., vol. I, at p. 217). The Event Information showed that Mr. Bowers had a criminal history for violence, but showed no criminal history for either of the appellants. Det. Vermette testified he believed the Event Information was important because it showed there was an “environment of violence” at the townhouse (p. 219).

[155] Mr. Lambert’s complaint about Mr. Bowers was further detailed in a Police Information Management System (“PIMS”) report, which also formed part of the file. The PIMS report indicated that three days before the 9-1-1 call, Mr. Lambert had reported to police that Mr. Bowers had been drinking and punched him in the groin. Mr. Lambert called police to inquire about the process if charges were pursued, but the report noted that he did not wish to lay charges, provide a statement, or further involve police. He planned to move out within the next two weeks. Det. Vermette explained that he viewed the PIMS report as important because it corroborated the “environment of violence” from the Event Information.

[156] Shortly after beginning Mr. Lambert’s interview, Det. Demarino learned of the circumstances of the appellants’ detention from Cst. Husband. Recognizing the serious legal issues engaged, he brought his concerns to Det. Vermette. Det. Vermette then instructed the interviewing detectives to arrest the appellants for murder, re-do their cautions, and proceed with the interviews. He testified that he took at most two minutes to make the decision to arrest the appellants after he learned of the

circumstances of their detention. He said he needed to act quickly because he knew the appellants were at the police headquarters “illegally” (A.R., vol. I, at p. 256).

[157] Det. Vermette took no notes of this interaction with Det. Demarino, or others, and did not record the grounds on which he based his decision to direct the appellants’ arrests.

[158] Det. Demarino returned to Mr. Lambert’s interview room and arrested him for murder. He provided Mr. Lambert with another opportunity to consult counsel and cautioned him on his right to silence. Cst. Arns photographed and swabbed Mr. Lambert. She told him, “right now it’s just you’re one of our witnesses and it’s a normal procedure that we usually do” (A.R., vol. II, at pp. 132-33; see also ABQB reasons, at para. 37). Mr. Lambert maintained for several hours that he wished to exercise his right to silence, but eventually began to speak.

[159] In a separate room, Det. Hossack arrested Mr. Beaver for murder and informed him of his right to counsel. She emphasized that nothing had changed from when he was previously cautioned — she was simply reading the caution to “start off fresh” (A.R., vol. III, at p. 50). When Mr. Beaver expressed surprise that he was under arrest, Det. Hossack reassured him all this meant was that he could not leave. Det. Hossack told Mr. Beaver she was only reading the caution again because she was a new person he was speaking to. Mr. Beaver told Det. Hossack that he did not think he needed counsel, but he was “not understanding the severity of it” (A.R., vol. III, at p. 53). In response, Det. Hossack explained to Mr. Beaver that he was brought to police

headquarters because he was at the scene where the body was found and told him, “we need to figure out what’s going on and because . . . you were there um, just kind of in a, in a cautionary way we have to charter everyone” (p. 54).

[160] Mr. Beaver waived his right to counsel. For the first 12 hours of the interview, he maintained that he could not remember what had happened as he had been drinking the previous night. At around 1:00 a.m., after Det. Hossack started taking a more aggressive approach, he began adopting the inculpatory statements she put to him.

B. *Lower Court Decisions*

[161] The trial judge denied the appellants’ application to exclude the evidence as a remedy for the *Charter* breaches. He concluded that the appellants’ detention at the scene was unlawful because there was no “clear nexus” between the appellants and Mr. Bowers’ death; nor was it clear that Mr. Bowers had died as a result of a criminal offence (para. 149). Nevertheless, he found that Det. Vermette had subjective and objectively reasonable grounds to arrest the appellants for murder based on the trauma Mr. Bowers suffered and the appellants’ motive and opportunity to commit the offence (para. 159). Unlike the officers at the scene who did not form reasonable grounds, Det. Vermette had access to the PIMS report, which demonstrated animosity between Mr. Bowers and Mr. Lambert (para. 158).

[162] Although he found it unnecessary to analyze whether to exclude the evidence under s. 24(2) of the *Charter* because the arrests constituted a “fresh start”

that “cured” the breaches (at para. 215), the judge conducted an alternative analysis of the factors as outlined in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. He concluded the breaches would not have warranted exclusion because the state conduct was not deliberate, severe, or a blatant disregard for *Charter* rights; the breaches had little impact on the appellants; and there were no reliability concerns with the evidence, despite their importance to the Crown’s case being unclear.

[163] The Court of Appeal of Alberta unanimously dismissed the appeal (2020 ABCA 203, 4 Alta. L.R. (7th) 301). The court agreed that there were reasonable grounds for the arrests, opining that Det. Vermette “made a practical and common-sense decision to arrest the appellants based on the information he had received by the time of the arrests” (para. 9). It found no error in the trial judge’s “fresh start” analysis, and did not consider his alternative analysis under s. 24(2).

III. Analysis

[164] My analysis will address three issues. First, were the appellants’ arrests unlawful? Second, was the evidence provided in their statements “obtained in a manner” that infringed their *Charter* rights? Finally, would admission of the evidence bring the administration of justice into disrepute?

[165] I have no hesitation in answering each of these questions in the affirmative.

A. *The Appellants’ Arrests Were Unlawful*

[166] It is well established that police must have reasonable grounds to believe an individual committed or was about to commit an indictable offence in order to lawfully arrest them without prior judicial authorization (*Criminal Code*, R.S.C. 1985, c. C-46, s. 495(1)(a)). The reasonable belief must relate to two elements: whether an offence has been committed, and whether the person under arrest committed the offence. The test must be met on both a subjective and an objective basis. This means that it is necessary, but not sufficient, for the police to have a personal, honestly held belief in the presence of reasonable grounds. The Crown must also establish that the asserted grounds were objectively reasonable from the perspective of a reasonable person standing in the position of the officer (*R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51).

[167] Reasonable grounds is a high threshold that is met at the point where a credibly based probability replaces suspicion (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 166-67; *Baron v. Canada*, [1993] 1 S.C.R. 416, pp. 446-47). It requires the police to point to particularized evidence to support “an objective basis for the belief which is based on compelling and credible information” (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114). Whether the legal standard of reasonable grounds was met on the particular facts of a given case is a question of law to be assessed on a correctness standard (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 54).

[168] The need to establish reasonable grounds before effecting an arrest is not a mere procedural requirement — it is a constitutional imperative. An arrest is a key investigative step on which much hinges, both for the police and for the arrestee. It triggers intrusive police powers relating to detention, interrogation, search, and the use of force. An arrest empowers police to search the individual and their immediate surroundings without requiring them to obtain a warrant or show independent reasonable and probable grounds. Police can detain arrested individuals without any review for up to 24 hours — potentially longer if a justice is unavailable (*Criminal Code*, s. 503(1)). During this prolonged detention, the police may subject the arrestee to hours on end of questioning involving forms of manipulation, including lying to the arrestee in order to extract information. This is why, in the foundational decision of *Storrey*, Cory J. described the reasonable grounds requirement as a vital protection necessary to safeguard citizens' liberty and without which "even the most democratic society could all too easily fall prey to the abuses and excesses of a police state" (p. 249). The powers an arrest affords to the police is only justifiable on the basis of demonstrating reasonable grounds to believe an offence has been committed. Absent this information, the intrusion on liberty interests tolerated in the name of the investigation of crime cannot be justified. The reasonable grounds standard is a key constitutional safeguard and it must not be watered down because of mere investigative expediency or to salvage an investigation in the face of *Charter*-infringing conduct.

[169] It is worth setting out at some length Det. Vermette's testimony describing the basis on which he asserted that there were reasonable grounds to direct the appellants' arrests. He explained his grounds for arrest in this way:

. . . when I get called out, it's called out on a suspicious death. The -- the -
- there is -- it is clear that there's a conversation between Staff Sergeant
Chisholm and the medical examiner. That is important to me. I know the
process that we go through and how the medical examiner or the Medical
Examiner's Office triage those type of calls. So that call coming in as
suspicious is important to me.

I know that someone is deceased at the scene, and I start getting
relationships based on that. I can tell you that Brian Lambert is the caller.
He identifies himself as the roommate. And without getting into too much
detail, I believed that Jim Beaver is the other roommate that is present as
well. . . .

. . .

. . . we talk about a prior altercation with roommates. So what I am
looking at here, if I look at the totality, I look at the environment, I look at
the violence, I look at the anger, I look at some of the vernacular that was
used, I can see that both roommates were there at the time of this 911 call.
I look -- I start looking at opportunity. Is there possible opportunity that
Mr. Beaver or Mr. Lambert could have committed this offence? Why do I
say "this offence"? I believe it to be suspicious in nature. There's red flags
all over the document.

Now, when I look at the PIMS report and then I look at that as
corroborating some of the information that I saw, I start looking at motive.
I start looking at motivation. And, again, in culmination with all of the
information that I am getting -- and to review, phone call from Staff
Sergeant Chisholm, email from Staff Sergeant Chisholm, review of the
I/Net Event Information, review of the I/Net Event Chronology, review of
the PIMS report, the belief that investigatively that the victim is going to
be Sutton Bowers, I believe there are subjective and objective grounds to
arrest both Mr. Lambert and Mr. Beaver for murder.

(A.R., vol. I, at pp. 226-27)

[170] The grounds relied on by Det. Vermette to direct the appellants' arrests do not come close to providing the particularized evidence required to ground a reasonable belief based on credible and compelling information that the reasonable grounds standard demands. I explain this conclusion in the following manner. I begin by briefly commenting on the relevance of the absence of notes taken by Det. Vermette to the assessment of reasonable grounds. Then, I explain why the above information fails to meet the objective reasonable grounds standard. First, all of the information, in its totality, is not sufficient to meet the particularized probability required to form reasonable grounds. Second, the timeline of events in Det. Vermette's testimony undermines the reasonableness of his stated belief that there was reason to believe the appellants killed Mr. Bowers at the time of their arrest. Third, the individual pillars of evidence relied on for the asserted grounds do not support the officer's reasoning.

(1) There Were No Notes to Review on the Claimed Grounds for Arrest

[171] Det. Vermette did not take notes detailing the actual and individual information he claimed to rely on to support his decision-making at the time of the arrest. There is therefore no contemporaneous record of the particular grounds asserted to justify why the arrest power was believed to be a legally available option for each accused at the relevant point in time.

[172] It is well recognized that police notes are crucial to the court's ability to meaningfully review the exercise of police power without prior judicial authorization, including the arrest power (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at

para. 82; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 70; see also *Wood v. Schaeffer*, 2013 SCC 71, [2013] 3 S.C.R. 1053, at paras. 63-66).

[173] The absence of notes is a factor to be considered in deciding whether to accept the witness's testimony (*R. v. Lotfy*, 2017 BCCA 418, 357 C.C.C. (3d) 516, at para. 54; see *R. v. Faulkner*, 2020 ABQB 231, at para. 37 (CanLII); *R. v. Abdulatif*, 2017 ONSC 2089, at paras. 39-42 (CanLII); *R. v. Mascoe*, 2017 ONSC 4208, 350 C.C.C. (3d) 208, at paras. 114-15; *United States of America v. Sheppard*, 2013 QCCS 5260, 295 C.R.R. (2d) 113, at para. 20; *R. v. Davidoff*, 2013 ABQB 244, 560 A.R. 252, at para. 25; *R. v. Odgers*, 2009 ONCJ 287, at para. 16 (CanLII); *R. v. Fisher*, 2005 CanLII 16070 (Ont. C.A.), at para. 1).

[174] In reviewing reasonable grounds, the absence of notes may inform the court's assessment of the officer's credibility, which is relevant to both the subjective and the objective elements of the test. Without notes, it is difficult to cross-examine or question what is often a bare assertion by the officers that they had grounds to arrest the individual. Notes are therefore critical to checking the exercise of police power by ensuring that statements of personal belief do not go routinely or effectively unchallenged. With respect to the objective element of the test, notes provide contemporaneous documentary evidence of what information the officer actually considered at the time the decision to arrest was made. The question at this stage is whether there were objectively reasonable grounds based on the information the police *did* rely on, not what they *could have* relied on. This is to prevent *Charter* breaches to

the extent possible by ensuring a thorough assessment is conducted before the decision to arrest is made. To do otherwise would incentivize police to make snap decisions and piece together information in an attempt to justify those decisions after-the-fact. The absence of notes detailing the information used to form the decision at the time it was made may therefore hinder the arrestee's ability to challenge the decision to arrest, and the court's ability to get to the truth of the basis for that decision.

[175] It is unnecessary to decide whether the judge's acceptance of the officer's subjective belief was tainted by palpable and overriding error because it is clear that the asserted grounds, even if believed, do not come close to meeting the test on an objective standard.

(2) The Totality of the Information Relied on Is Insufficient to Meet the Reasonable Grounds Standard

[176] The grounds forming the basis on which Det. Vermette directed the appellants' arrests in their totality do not rise to the level of a credibly based probability required to meet the reasonable grounds standard. Det. Vermette's testimony continuously restated the same information in various verbal formulations. The reasons proffered were embellished, long-winded, abstract and repetitive. They exaggerated the extent and utility of the information relied upon and obscured the lack of particularized evidence grounding the stated belief. When the inflated explanations are stripped back, the reasoning is essentially that the police were called on the scene to investigate a suspicious death and the individuals who found the body had an acrimonious

relationship with the deceased, in which the deceased appeared to be the aggressor. I cannot accept that the police, whenever they are called upon to investigate a traumatic death, are entitled to arrest the individuals who reported the body for murder simply because they had a tumultuous history with the deceased.

[177] Det. Vermette admitted that when he spoke to Csts. Taylor and Husband at 11:39 a.m. — after his conversation with S/Sgt. Chisholm but before reviewing the materials in the police file — he did not have grounds to arrest the appellants. The implication from his testimony was, however, that the material he subsequently reviewed in the file provided the additional information necessary to meet the threshold of reasonable grounds.

[178] All of the information taken together does not amount to reasonable grounds. In addition, the information in the police reports could not have made up the difference needed to ground a credibly based probability. Det. Vermette's testimony indicates that most of the circumstances he relied on to form reasonable grounds were known to him before he reviewed these documents. In particular, he already knew: the homicide unit had been called out to investigate a death; the body was found face down in a pool of blood near the bottom of the stairs at the front entrance of a residence; there was a prior conflict or dispute between the deceased and his roommates; and the roommates had been brought into custody by the officers who attended at the scene. While slightly more detailed, the additional information in the police file did not significantly alter the factual matrix. Corroborating the undisputed information that the

appellants and the deceased were roommates and that they had been arguing that week could not raise the level of suspicion to that of reasonable grounds to believe that the appellants had killed Mr. Bowers.

[179] Further, the grounds asserted by Det. Vermette and accepted by the lower courts fail to engage with the exculpatory evidence pointing away from Mr. Bowers' death being a homicide, and from the appellants being involved. In assessing whether the reasonable grounds standard is met, the police must take into account the totality of the circumstances. This means that they are not entitled to disregard exculpatory, neutral, or equivocal information unless they have good reason to believe it is unreliable (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 26, 29 and 33). Here, there were serious questions relating to both the offence and the individuals.

[180] With respect to the offence, information at the scene suggested that Mr. Bowers may have died in an intoxicated fall. This is reflected in the trial judge's finding that, at the time of the appellants' detention, it was unclear whether the death was the result of a criminal offence. No further information suggesting the death was the result of a homicide was uncovered between the initial detention and the appellants' arrests. Det. Vermette's assertion that the death was "suspicious" because there were "red flags all over the document" is not the type of credible, compelling, particularized information that police can rely upon to support a reasonable belief that an offence has been committed for the purpose of justifying an arrest for murder.

[181] With respect to the individuals, the appellants' connection to the death was tenuous. There was no information about the time of death suggesting that it had occurred when the appellants would have had the "opportunity" to commit the offence. It will be true in every case that a particular individual or individuals report finding the body. This fact alone does not provide evidence of an "opportunity" to commit the offence. The information known to police at the time of the arrests was that the deceased was last seen alive with an unknown man.

[182] Further, in all of the history in the police file, the deceased was the aggressor in the altercations. He was the only one with a history of violence. Neither of the accused had a criminal record. The information in the PIMS report relied on to support the "motive" suggested that Mr. Lambert didn't think much of the assault and did not want to involve the police, have charges laid or provide a statement. Any indication that the assault provided Mr. Lambert with a motive to kill was minimal.

[183] Moreover, there was nothing at all to suggest Mr. Beaver was involved in any of the prior incidents other than the argument the evening before the 9-1-1 call, which was already known to officers at the scene. It is untenable to conclude, as the trial judge did, that the information in the PIMS report could make up the difference between the absence of reasonable suspicion to detain the appellants at the scene, and the presence of reasonable grounds to arrest them at police headquarters.

(3) The Timing of the Arrests Suggests the Decision Was Made for Expediency

[184] The timing of Det. Vermette's direction to arrest the appellants also calls into question the reasonableness of the decision. On Det. Vermette's own evidence, he made the decision to arrest the appellants within two minutes of learning that the appellants had been illegally detained and transported to the station. Up to this point, he had been under the mistaken impression that officers at the scene had already arrested the appellants for murder. Det. Vermette testified that he made the decision to arrest quickly in order to "rectify" the situation (A.R., vol. I, at p. 225).

[185] The circumstances of the appellants' unlawful detention and transport should have been a cause for concern not only because of the *Charter* breaches that resulted, but to prompt questioning into why the other officers did not believe they had grounds to arrest the appellants under their authority in s. 495 of the *Criminal Code*. Det. Vermette's failure to make any such inquiries in this case is indicative of the arrests being a means to salvage the investigation, rather than the result of asking himself whether he in fact had lawful grounds to keep the appellants in custody, even if not done in bad faith.

(4) The Evidence Relied on for the Asserted Grounds Did Not Support a Reasonable Belief

[186] Finally, the individual pillars of evidence relied on for the asserted grounds do not support the officer's reasoning, either standing alone or in combination.

[187] I have already explained why the information relied on to support the appellants' "motive" and "opportunity" is not compelling. In addition, much was made in Det. Vermette's testimony of the fact that the medical examiner had called the homicide unit to investigate the death, which in his view meant that the death was suspicious. The word "suspicious" was Det. Vermette's own — the police reports described the death as a "sudden death", not a suspicious one.

[188] For an investigator to rely on the "suspicious" nature of a death in support of reasonable grounds, this label must hold up to scrutiny on the basis of particularized, objectively verifiable information. The police, not the medical examiner, are legally trained on what the constitutional standard of reasonable grounds entails. The possibility of foul play will be true any time the homicide unit is called in to investigate a death. It is not the fact of the medical investigator calling for further investigation, but the basis on which she made that decision, that could reasonably support the belief that an offence had been committed. The medical examiner can explain to the police the information on which they believe foul play may or may not have been involved, and the police can and should use that information to inform their view of whether or not there are reasonable grounds. This appears to have happened in a phone call between the medical examiner and Det. Vermette at 12:35 p.m. in which she provided the details of her scene assessment. However, this occurred approximately 20 minutes *after* he had directed Dets. Hossack and Demarino to arrest the appellants for murder. At the time of the arrests, there was no information about why the medical examiner had engaged the homicide unit and what facts or factors grounded her assessment. It

could be that the medical examiner calls out the police to every “sudden death”, or it could be that there were particular facts about the scene that supported a belief that the death was not the result of an accident. We simply do not know.

[189] The information that Det. Vermette explained formed the basis of his decision to arrest the appellants may have given rise to a reasonable suspicion, but to accept that it formed the basis of reasonable grounds to believe that the appellants killed Mr. Bowers would erode the reasonable grounds standard to a level inconsistent with what is required to provide a meaningful check on the state’s investigatory powers in accordance with the *Charter*’s requirements. While the assessment is global and does not require an isolated parsing of each particular component or a *prima facie* case to answer on each element of the offence, there must be something of substance proffered in order to meet the objective reasonable grounds standard. The police have failed to offer a substantively reasonable basis to support the asserted belief that at the time of the appellants’ arrests, there were reasonable grounds to believe they had killed Mr. Bowers.

B. *The Evidence Was “Obtained in a Manner” That Infringed the Appellants’ Charter Rights*

[190] The Crown conceded, and the trial judge found, that the police breached the appellants’ ss. 9, 10(a) and 10(b) *Charter* rights. The trial judge also held that the arrests and the searches subsequent to those arrests were lawful and that the right to silence was not breached because the statements were voluntary. I conclude that the

arrests were not supported by reasonable and probable grounds and that as a result, the searches conducted pursuant to those arrests were also constitutionally infirm under s. 8 of the *Charter* (*R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 60; *R. v. Tim*, 2022 SCC 12, at para. 48). Further, the s. 9 guarantee against arbitrary detention is a manifestation of a person's s. 7 *Charter* right to liberty (*Grant*, at para. 54; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 502-3). As I explain, these additional breaches of a person's ss. 7 and 8 rights combine to be sufficient to exclude the impugned evidence and I need not address the majority's views on the voluntariness of the statements given.

[191] In determining whether evidence was “obtained in a manner” that breaches the *Charter*, I agree with my colleague that courts should examine the entire relationship between the evidence and the breach to determine the strength of the connection and assess whether the breach and the evidence are part of the same transaction or course of conduct. The connection may be temporal, contextual, causal, or a combination of the three (*Strachan; Goldhart; Wittwer*). A strict causal connection is not required (*R. v. Therens*, [1985] 1 S.C.R. 613, at p. 649; *Strachan*, at pp. 1005-6). Instead, a global assessment is necessary “to determine whether a *Charter* violation occurred in the course of obtaining the evidence” (*Strachan*, at p. 1005). Indeed, a *Charter* breach following the discovery of evidence may still meet the “obtained in a manner” requirement of s. 24(2) (*R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561). The “obtained in a manner” analysis necessitates the full contextual analysis each time it is performed, regardless of whether subsequent *Charter*-compliant actions exist.

[192] The trial judge and Court of Appeal departed from this holistic assessment. They defined a “fresh start” as an attempt by police to “cure” an earlier breach so that any subsequently discovered evidence would not be “obtained in a manner” that infringed a person’s *Charter* rights (C.A. reasons, at para. 12; see also I.F., Canadian Civil Liberties Association (“CCLA Factum”), at para. 13). Instead of examining the connection between the breach and the evidence holistically, the “fresh start” principle focuses on whether the police, after the breach, corrected their behaviour. This definition of “fresh start” reduces the broad “obtained in a manner” analysis and asks only two questions: (1) whether there was subsequent *Charter*-compliant state conduct following the breach but before the discovery of the evidence; and (2) whether that subsequent *Charter*-compliant conduct severed the relationship between the breach and the discovery of the evidence (CCLA Factum, at para. 13).

[193] The arrests, even if they were lawful, do not constitute a “fresh start” that shields subsequent actions by the police from *Charter* scrutiny.

[194] I do not think this vague notion of a “fresh start” is already part of our law and I am convinced it should not be so recognized. The idea of a “fresh start” is unnecessary because the established holistic approach is more than adequate to the task and this new flourish creates many deep pitfalls with no countervailing purpose.

[195] I disagree with my colleague’s contention that this Court has accepted that, in principle, the police can make a “fresh start” after a *Charter* violation (para. 100). I would not read *Wittwer* as endorsing the “fresh start” concept as one that can shield

evidence from the application of s. 24(2) of the *Charter*. No such conclusion was ever made in that case.

[196] *Wittwer* concerned the admissibility of an incriminating statement that the police obtained from the accused in a manner that violated his right to counsel. Another officer made a new attempt to get a statement from the accused without referring to the information gathered from the unconstitutionally obtained statement, but eventually referred to it after the officer determined there was no other way to convince the accused to talk. Fish J. concluded that the evidence was obtained in a manner that violated the *Charter* because “[w]hat began as a permissible fresh start thus ended as an impermissible interrogation inseparably linked to its tainted past” (para. 3 (emphasis added; emphasis in original deleted)).

[197] Some have sought to elevate this ambiguous wording as endorsing the view that “fresh starts” may be permissible in appropriate cases, even if the one in *Wittwer* was found not to be (see *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 259; *R. v. Manchulenko*, 2013 ONCA 543, 116 O.R. (3d) 721; *R. v. Hamilton*, 2017 ONCA 179, 347 C.C.C. (3d) 19; *R. v. McSweeney*, 2020 ONCA 2, 451 C.R.R. (2d) 357). In my view, the above statement does not establish the notion of a “fresh start” as an accepted doctrine or binding principle of our law. The Court in *Wittwer* found that there was no break between the manner in which the *Charter* was breached in these two offending interrogations. Fish J. used a colloquial description of what police were trying to do by their conduct and by doing so he did not create a new doctrine which operates outside

of the holistic analysis done under s. 24. The “fresh start” described related to the police’s conduct, and not the admissibility of the second statement under s. 24. Indeed, on the contrary, Fish J. determined that the taking of the second statement was tainted by reference to the “inadmissible statement” taken some five months prior (para. 22).

[198] The concept of a “permissible fresh start” detracts from the broad and generous approach that this Court has adopted for the “obtained in a manner” requirement of s. 24 of the *Charter*. Regardless of the presence of *Charter*-compliant conduct following a breach, the test must remain the same in every case: the evidence is “obtained in a manner” that infringes a *Charter* right if upon review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three, and the connection must be more than tenuous (*R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45, citing *Goldhart*, at paras. 32-49). I see no reason why this test should not govern in all cases even if, or maybe especially when, police have recognized a breach and have taken steps to stop it.

[199] This is precisely the approach adopted by Fish J. in *Wittwer* (at para. 21) and is the only legal test endorsed by this Court. Although arguably, Fish J. refers to a “fresh start”, he then unequivocally applies the generous and broad approach to the “obtained in a manner” requirement developed in *Strachan* and *Goldhart* to conduct his analysis. The text of s. 24(2) is not worded so narrowly as to preclude evidence

from consideration even when the police take steps to cease an ongoing *Charter* violation. Substituting a “fresh start” analysis for a complete and contextual “obtained in a manner” analysis creates an inflexible test that makes *Charter* remedies less accessible to those whose rights were violated. No single rule should disrupt the courts’ remedial inquiry (CCLA Factum, at para. 22).

[200] As with all remedial provisions, s. 24 of the *Charter* must be given a large and liberal interpretation consistent with its purpose. Taking a broad and generous approach to the “obtained in a manner” threshold requirement is important, as it is the gateway to the focus of s. 24(2): whether the admission would bring the administration of justice into disrepute (*Pino*, at para. 56). An overly narrow interpretation of s. 24(2) would prevent courts from even considering the seriousness of the *Charter*-infringing conduct, an unwelcome result which would automatically immunize prior *Charter* breaches. There is simply no need or utility in speaking about a “fresh start” because the current s. 24 jurisprudence contemplates that there may be circumstances in which the requisite connection is not established and the evidence was outside its “obtained in a manner” requirement. In my view, it is an unhelpful label that creates and supports an improper path of reasoning, serving to divide a holistic analysis into two parts. The trial decision in this case demonstrates the dangers that accompany the “fresh start” doctrine. In finding that there was a “fresh start” such that the *Charter* breaches were “cured”, the trial judge characterized the police conduct following the arrest as a second transaction, unrelated to the prior events (paras. 207-11). This allowed him to ignore the unlawful conduct that preceded the arrests while relying only on the *Charter*-

compliant conduct following the arrests to justify a lack of connection between the *Charter* violations and the statements.

[201] Respectfully, the approach my colleague has taken to the “fresh start” doctrine leads to a replication of the trial judge’s error. Though he rejects the trial judge’s conclusion that police can “cure” an earlier *Charter* breach with *Charter*-compliant conduct (para. 106, citing ABQB reasons, at paras. 191, 206, 215, 239 and 253), he similarly enumerates police conduct that would allow just that; indicators that the police have rectified their breaches with new, *Charter*-compliant conduct (factors enumerated at para. 103). There is no “focussed and powerful antidote” that can erase conduct violating the *Charter* (para. 101, citing *Simon*, at para. 70); this conduct must always form part of the “obtained in a manner” analysis.

[202] By shifting the focus to the eventual *Charter*-compliant conduct, the “fresh start” doctrine distracts from the remedial nature of s. 24(2) and allows police to insulate their conduct from review, regardless of the severity of that conduct. This approach clashes with the principle under the *Grant* inquiry that *Charter*-compliant conduct by *some* police officers does not negate or reduce the severity of the *Charter*-infringing conduct of *other* police officers (*R. v. Reilly*, 2020 BCCA 369, 397 C.C.C. (3d) 219, at paras. 93-102, aff’d 2021 SCC 38; see also CCLA Factum, at para. 20).

[203] After reviewing the entire course of events, I conclude that the evidence was “obtained in a manner” that infringed the appellants’ *Charter* rights. Because the trial judge erred in (1) concluding that there were reasonable grounds to arrest the

appellants and in (2) relying on the concept of a “fresh start” to sever the connection between the initial *Charter* breaches and subsequent statements provided, his conclusion that the evidence was not “obtained in a manner” within the meaning of s. 24(2) of the *Charter* is not owed deference. Here, there is a strong temporal, contextual, and causal connection between the breaches of the appellants’ *Charter* rights and the collection of their statements. The appellants were under the continuous control and supervision of the police from the time of their unlawful detention and transportation from the scene, to the time Det. Vermette unlawfully directed their arrests, to the time they ultimately admitted their involvement some 12 hours later. The police facilitating a second consultation with counsel for Mr. Lambert and advising him that they are “start[ing] everything all over again” does nothing to relinquish the firm grasp they continued to hold on him (A.R., vol. II, at p. 30). Although a causal connection is not required, the fact that the police would not have obtained the evidence but for the detention, transport, and arrests that were conducted in a manner that violated their *Charter* rights supports the conclusion that the *Charter* breaches and the evidence the appellants provided in their statements were “inextricably linked” (*R. v. Black*, [1989] 2 S.C.R. 138, at p. 163).

C. *Admission of the Evidence Would Bring the Administration of Justice Into Disrepute*

[204] The final question to be addressed is whether, having regard to all the circumstances, the admission of that evidence would bring the administration of justice into disrepute. I have no doubt that it would.

[205] Given my conclusion that the trial judge erred in his analysis on whether there were reasonable grounds for arrest, his alternative analysis under s. 24(2) is not owed deference (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 138; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 42; *Grant*, at para. 129). Even if this were not the case, there are legal errors in the trial judge’s alternative analysis, which I discuss below, that would justify revisiting his conclusions. Further, the judge’s finding that the arrests “cured” the previous *Charter* breaches undermined his ability to appreciate the impact of those breaches on the appellants. I will therefore conduct my own analysis of the *Grant* factors.

(1) Seriousness of the *Charter*-Infringing State Conduct

[206] The *Charter*-infringing state conduct for which the appellants seek a remedy includes:

- (i) their unlawful detention, transport, and search pursuant to a non-existent police power in non-existent legislation, resulting in breaches of ss. 7, 8, 9, 10(a) and 10(b);
- (ii) Cst. Taylor’s failure to hold off on questioning Mr. Lambert, violating his rights under ss. 7 and 10(b); and
- (iii) their arrest for murder absent reasonable grounds, resulting in further arbitrary detention contrary to s. 9.

[207] The police conduct in this case can only be described as a string of extremely serious violations of well-established *Charter* principles. In no circumstances were the officers acting in areas of urgency or legal uncertainty. Each of the principles that were breached in this case have been foundational legal requirements since the early years of the *Charter*. That these *Charter* requirements took a back seat to investigative convenience and expediency is unacceptable and brings the administration of justice into disrepute. The trial judge's conclusion that the breaches were not serious, and even the product of "good faith" errors, is untenable when applying the correct legal principles to the facts as he found them.

[208] The absence of bad faith conduct in breaching *Charter* rights does not mean that the breaches are not "severe" or at the serious end of the spectrum in the analysis under s. 24(2). Circumstances where police are found to have deliberately breached the *Charter* are exceedingly rare. However, we expect a great deal more of police than simply refraining from purposely abusing their powers. As state actors who are empowered with extraordinary authority to detain, interrogate, and use force against members of the public in the execution of their duties, it is imperative that police conduct remains scrupulously in line with the boundaries circumscribed by constitutional standards. For this reason, a failure to abide by established principles governing police conduct is considered extremely serious conduct that would tend to bring the administration of justice into disrepute (*R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33; *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87). Indeed, conduct that is "reckless", "negligent", or "ignorant" should support exclusion of the evidence (*Grant*, at

paras. 74-75). Conduct does not need to be deliberate, motivated by an ulterior purpose, or involve systemic or institutional abuse in order to favour a remedy (*Grant*, at para. 75; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 24-25; *Paterson*, at para. 47; *Le*, at para. 143).

[209] The concept of “good faith” has a particular legal meaning in the context of the s. 24(2) analysis. For conduct to be described as “good faith”, the police must have conducted themselves in a manner consistent with what they “subjectively, reasonably, and non-negligently believe[d] to be the law” (*Le*, at para. 147, quoting *R. v. Washington*, 2007 BCCA 540, 248 B.C.A.C. 65, at para. 78 (emphasis added); see also *Paterson*, at para. 44). The conduct cannot be considered “good faith” if it was based on an unreasonable error or ignorance as to the scope of police authority (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59; *Tim*, at para. 85). Failing to act in bad faith — for example, by knowingly or deliberately breaching the accused’s *Charter* rights — does not mean that there was good faith police conduct, unless the conduct was also reasonable and showed a genuine attempt to respect and even promote the rights guaranteed under the *Charter* (*Le*, at para. 147).

[210] The trial judge erred in failing to apply these principles to the actions of the officers in this case in the alternative analysis he conducted under s. 24(2).

[211] The trial judge found that in directing the appellants’ arrests under the *Medical Examiners Act*, Sgt. Lines “was looking for a way to maintain control over Mr. Beaver and Mr. Lambert, but was not sure exactly how to do it” (para. 230). He

characterized this conduct as “reckless”, but not “deliberate”, “severe”, or indicative of a “blatant disregard” for the appellants’ *Charter* rights (para. 230). While the judge correctly found that this conduct could not be characterized as good faith and favoured exclusion, I cannot accept his conclusion that the conduct was not severe and did not show a disregard for the appellants’ *Charter* rights. Detaining the appellants under a non-existent police power simply because the officer was searching for a way to maintain control over them does exactly that. The import of his finding was that the officer was operating with an end goal other than ensuring that the necessary legal standards governing police conduct were met. This shows a disregard for the bounds of police authority to limit individual liberty through arrest and detention. It is decidedly very serious conduct.

[212] As for Cst. Taylor’s decision to start questioning Mr. Lambert in the car before having provided him with an opportunity to speak to counsel, the judge found that the questioning was not serious or a blatant disregard for Mr. Lambert’s *Charter* rights. He noted that it was not an interrogation or a deliberate attempt to elicit incriminating information; Cst. Taylor simply asked what had happened. He described the seriousness of this conduct in the following terms (at para. 234):

This Court cannot find Cst. Taylor’s question completely blameless. Although innocent on its face, and likely intended not to illicit incriminating information, Cst. Taylor took the risk that Mr. Lambert would provide incriminating evidence. In posing this question, therefore, he was negligent. But does this negligent behaviour move the breach to the more serious side of the breach spectrum? In *Grant*, McLachlin CJC and Charron J said, “[g]ood faith’ on the part of the police will also reduce the need for the court to disassociate itself from the police conduct”: *Grant* at

para 75. This Court finds that Cst. Taylor was posing the question in good faith. He was not attempting to elicit evidence from Mr. Lambert. Rather, he was simply posing a question that might further the investigation as to how Mr. Bowers died. In so doing, he was negligent, but not grossly so. His behaviour would fall more to the less serious side of the spectrum.

[213] Respectfully, it is not possible to conclude that the failure to hold off on questioning Mr. Lambert was a “good faith” or non-serious error. In citing para. 75 of *Grant* for authority that good faith on the part of police will reduce the need to dissociate from police conduct, the judge unfortunately overlooked the very next sentence of that paragraph, which affirms that “negligence or wilful blindness cannot be equated with good faith”. The judge made the express finding, which is well grounded in the facts, that Cst. Taylor’s failure to hold off questioning demonstrated negligence in meeting the conduct required of police officers.

[214] The legal implication of the trial judge’s factual findings is that the s. 10(b) breach during the transportation of Mr. Lambert was serious and favoured exclusion of the evidence. Section 10(b) of the *Charter* is concerned with self-incrimination and these concerns are present at the outset of detention (*R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 2). The duty to hold off has long been a crucial aspect of the implementational duties required of police; once a detainee asserts their right to counsel, the police cannot compel them to partake in a process which could adversely affect the conduct of an eventual trial until that right has been exercised (*R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 269, citing *R. v. Ross*, [1989] 1 S.C.R. 3, at p. 12).

[215] There was no uncertainty in the law, nor was there any sense of urgency that might have required the police to begin questioning Mr. Lambert before they could facilitate a call with counsel. The fact that the questioning was done in a casual manner rather than an interrogation-style in no way diminishes the seriousness of this conduct, which by the trial judge's finding was designed to "further the investigation as to how Mr. Bowers died". The question asked was designed to get a response about what happened. Whether the officer said he did not expect to receive incriminating evidence does not negate the seriousness of failing to ensure that Mr. Lambert obtained the legal advice he requested and had a right to receive before he was subject to police questioning. Mr. Lambert could have made incriminating statements in the police cruiser, and the seriousness of the police's *Charter*-infringing conduct is not mitigated by the fact that he did not.

[216] Finally, the judge concluded that if he was wrong in finding there were reasonable grounds to arrest the appellants, Det. Vermette's conduct would not be serious. He relied on the fact that Det. Vermette was acting in a "fluid situation", did not "have the luxury of time and thorough consideration", and could not be expected to undertake a complete analysis of the bases supporting his grounds like a court could do in hindsight (paras. 232 and 240). I disagree in principle with these conclusions.

[217] The decision to arrest the appellants constituted a serious violation of their *Charter* rights. A subjective belief in reasonable grounds does not excuse the decision to arrest in order to justify continued detention in the absence of objective reasonable

grounds. Undertaking a thorough analysis of whether the information known to officers at the time was enough to support a credibly based probability that the appellants had killed Mr. Bowers was thus required.

[218] Contrary to the trial judge's conclusion, the officers were not acting in the type of "fluid situation" that might support a finding that there was insufficient time to undertake a complete analysis of the bases supporting, and pointing away from, the grounds for arrest. There was no need to act quickly to preserve officer safety, take control of a dynamic situation, or prevent the destruction of evidence. An investigation is always "fluid" in the sense that officers continuously gather information and make decisions on the basis of that information. This does not licence them to breach the *Charter*, nor does it make any breaches less serious or excusable. Fluidity is not a reason to fail to approach the applicable legal standard with rigour. There is no reason that the police did not have the luxury of time and consideration before making a determination about whether there were reasonable grounds to arrest the appellants.

[219] While the officer was right to be concerned with protecting the appellants' *Charter* rights when he was presented with the circumstances of their unlawful detention, there was an equally viable alternative that would better achieve that objective in this case: releasing the appellants from custody and arresting them once there were reasonable grounds to do so. No attempts were made to inquire into the reasons why the appellants were not arrested and were instead detained under a statute that Det. Vermette knew did not exist and did not grant the police any detention powers.

Any perceived urgency by the officers at this time was of their own making. It is not a basis for lowering the standards we expect them to uphold under the *Charter*.

[220] While I find it unnecessary to determine whether it impacted the voluntariness of the statements, the post-arrest conduct of the police also indicates a lack of attention to ensuring the appellants understood the seriousness of the circumstances they faced. At best, informing the appellants that they were arrested simply because they were witnesses and the police needed to determine what happened showed a lack of care towards ensuring the appellants understood the extent of the jeopardy that accompanies being arrested for murder.

[221] In sum, the state conduct in this case involved decisions by three separate officers to undertake actions in violation of well-established *Charter* standards, placing investigative expediency above the rights of the appellants in the face of no urgency and no legal uncertainty. Not only were these breaches serious on their own, but the pattern of disregard shown by these officers over the course of the investigation further supports the conclusion that admission of the evidence would bring the administration of justice into disrepute (*Grant*, at para. 75). This factor weighs heavily in favour of exclusion.

(2) Impact on the Appellants' *Charter*-Protected Interests

[222] Because of the *Charter* breaches, the appellants were deprived of their liberty for several hours without a lawful basis and without being informed of the

reason, preventing them from being able to make an informed decision about whether to cooperate with police. During this time, the police kept the appellants in custody, searched them, and continued their investigation to the point where they purportedly obtained sufficient grounds to arrest them for murder. They then continued to detain and interrogate them on the basis of those purported grounds until they admitted their involvement in Mr. Bowers' death. There is no doubt that the intrusion on their *Charter*-protected interests was serious.

[223] In the alternative analysis the trial judge conducted under s. 24(2), he failed to consider the impact of the appellants' inability to receive legal advice based on an informed understanding of their jeopardy during their unlawful detention and transport — a time at which they were highly vulnerable to the exercise of state power. He instead focused on his findings that the appellants knew they had staged the scene of the death, from which he surmised that they knew the reasons for their detention. He also gave significant weight to his findings that the appellants would have spoken to the police no matter what because they were intent on providing their exculpatory narrative. For these reasons, he concluded that the breaches “had little effect” on the appellants (para. 247).

[224] I have significant concerns with these aspects of the trial judge's analysis. It does not follow from knowledge that the police are investigating a death that the appellants should have understood the extent of their legal jeopardy. Even the officers at the scene testified that they did not understand the basis for the appellants' detention.

In the case of Mr. Beaver, the officer laughed while detaining him and providing his caution, signaling that she was not taking the situation seriously and that he need not either.

[225] It is speculative to conclude that the appellants would have chosen to speak to police and provide the exculpatory narrative had they been properly notified of the circumstances of their jeopardy and given the right to speak to counsel on the basis of that information. It could equally have been the case that the appellants gave their exculpatory narrative because they did not appreciate the seriousness of the jeopardy they faced or the implications of providing that information, or felt they had to continue with the narrative they had committed themselves to without being properly informed (see, e.g., *Plaha*, at paras. 59-61; *R. v. Noel*, 2019 ONCA 860, at para. 27 (CanLII)).

[226] The trial judge also commented on the impact of Cst. Taylor's breach of the duty to hold off on Mr. Lambert, determining that he "provided his explanation to Cst. Taylor spontaneously following Cst. Taylor's *Charter* breach" and would have done so in any event because he wanted to profess his innocence (para. 238). It is unclear what was spontaneous about this explanation given that it was provided in direct response to Cst. Taylor's questioning. The basis on which the judge concluded that Mr. Lambert would have provided his explanation to Cst. Taylor without prompting is also unclear. Again, the fact that the explanation provided was exculpatory does not lessen the impact of his uninformed choice to speak to police.

[227] The Crown argues that the impact of the unlawful arrests is lessened by the fact that the police found out shortly after the arrests, at about 12:35 p.m., that Mr. Bowers had sent incriminating messages on his computer to a friend on the evening of October 8, 2016. The messages stated that Mr. Bowers was “taking brian and jim down” because “they fucked [him]” (R.R., at p. 45). Another message was sent some three hours later, stating: “I just destroyed brian and jim now I can get some worthy roommates any suggestions” (p. 45). In the Crown’s submission, these messages further confirmed the animus between the deceased and the appellants and would have resolved any doubt about the grounds for the arrests shortly after they were originally carried out.

[228] I am doubtful that this information, which again corroborated an uncontroversial point and which pointed to the deceased — not the appellants — as the aggressor, would have made up the difference needed to reach the reasonable grounds threshold. Further, the additional information from the PIMS report establishes Mr. Bowers as having assaulted Mr. Lambert, and the report makes no mention at all of Mr. Beaver. In any event, even if this information were sufficient to provide objectively reasonable grounds, it would not significantly lessen the cumulative impact of the breaches on the appellants’ *Charter*-protected interests that led to that point.

[229] The comments by police after the appellants’ arrests telling them that they were mere witnesses and the arrests were merely procedural further exacerbated the impact of the breaches on the appellants by downplaying the extent of their jeopardy.

For Mr. Beaver, Det. Hossack’s reassurance that his arrest changed nothing about his circumstances — which was clearly false — heightened the impact on his *Charter*-protected interests.

[230] This factor also weighs in favour of exclusion.

(3) Society’s Interest in the Adjudication of the Case on Its Merits

[231] Society’s interests in the adjudication of the case on its merits favours admission of the evidence, but not overwhelmingly so. It is not clear that the Crown’s case would be “gutted” if the statements were excluded (*Grant*, at para. 83). And while the offence is undoubtedly serious, this factor “cut[s] both ways” as the public has a heightened interest in ensuring the justice system is above reproach when the penal stakes for the accused are high (*Grant*, at para. 84). On this point, Iacobucci J.’s comments in *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 50, are apposite:

. . . I underscore that we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).

(4) Balancing

[232] On balance, I conclude that admission of the evidence in the proceedings would bring the administration of justice into disrepute and therefore the evidence must be excluded under s. 24(2) of the *Charter*. The circumstances of the appellants' detention and questioning led to multiple officers breaching multiple *Charter* rights. The police conduct was extremely serious, violating foundational *Charter* principles that officers have been bound for decades to follow during the course of an investigation. There were no circumstances of uncertainty in the law or urgency in handling a dynamic situation that might explain these basic errors, which fundamentally undermined the appellants' *Charter*-protected interests. Given the strength of the first two *Grant* factors, society's interest in the adjudication of the case on its merits is insufficient to tip the balance in favour of admission (*Le*, at para. 142; *Paterson*, at para. 56).

IV. Conclusion

[233] I would therefore allow the appeals, exclude all the evidence obtained in a manner that infringed the appellants' *Charter* rights, set aside the appellants' convictions, and order new trials. While the appellants sought an order substituting acquittals, the trial judge's reasons indicated that the Crown may have evidence to make a case even having excluded this evidence (see ABQB reasons, at paras. 251-52), and there is insufficient information in the record available at this Court to determine otherwise.

*Appeals dismissed, KARAKATSANIS, CÔTÉ, BROWN and MARTIN JJ.
dissenting.*

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