



SUPREME COURT OF CANADA

CITATION: R. v. Lafrance, 2022
SCC 32

APPEAL HEARD: December 3,
2021

JUDGMENT RENDERED: July
22, 2022

DOCKET: 39570

BETWEEN:

Her Majesty The Queen
Appellant

and

Nigel Vernon Lafrance
Respondent

- and -

**Attorney General of Ontario, Canadian Civil Liberties Association and
Criminal Lawyers' Association**
Interveners

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

REASONS FOR Brown J. (Karakatsanis, Martin, Kasirer and Jamal JJ.
JUDGMENT: concurring)
(paras. 1 to 103)

JOINT DISSENTING Côté and Rowe JJ. (Wagner C.J. and Moldaver J. concurring)
REASONS:
(paras. 104 to 194)

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Her Majesty The Queen

Appellant

v.

Nigel Vernon Lafrance

Respondent

and

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

Indexed as: R. v. Lafrance

2022 SCC 32

File No.: 39570.

2021: December 3; 2022: July 22.

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

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

*Constitutional law — Charter of Rights — Detention — Right to counsel
— Police entering suspect's home in early morning to execute search warrant and*

driving him to police station for interview without advising him of right to counsel — Police later arresting suspect and conducting second interview after legal aid lawyer consulted — Suspect requesting during second interview to call his father for assistance in obtaining legal advice but request refused — Suspect confessing during second interview to killing victim but seeking exclusion of confession at trial on basis that police breached his right to counsel — Whether police detained suspect and breached his right to counsel on day of execution of warrant — Whether police breached suspect's right to counsel on day of arrest by refusing to allow him to have further consultation with lawyer — If so, whether admission of evidence would bring administration of justice into disrepute warranting its exclusion — Canadian Charter of Rights and Freedoms, ss. 10(b), 24(2).

The police suspected that L might have been involved in the death of an individual. Two days after the death, a team of armed police officers entered L's home to execute a search warrant. L was a 19-year-old recent high school graduate, was Indigenous, had had minimal police exposure and was of much smaller stature than the officers. The officers awoke him and ordered him to dress and leave the premises. He was led to a police officer who asked him to identify himself and to come to the police station to provide a statement regarding the alleged murder. The police drove him to the police station, took him to a secure environment and interviewed him for over three hours. Approximately three weeks later, the police arrested L for murder. That day, after allowing him to call Legal Aid, they interviewed him. Several hours into the interview, L asked to call his father because that would be his only chance of getting a

lawyer and because Legal Aid told him to get a lawyer before he continued talking. The police refused the request and pushed for answers. L eventually confessed to killing the victim.

At trial, L sought to exclude his confession by arguing that the police had detained him on the day of the execution of the warrant and breached his right to counsel pursuant to s. 10(b) of the *Charter* on the day of the execution of the warrant and on the day of his arrest. The trial judge admitted the evidence, finding that L had not been detained on the day of the execution of the warrant, and the police were not required to allow him a second opportunity to call a lawyer on the day of the arrest. L was convicted by a jury of second-degree murder. The majority of the Court of Appeal allowed his appeal, excluded the evidence under s. 24(2) of the *Charter* and ordered a new trial.

Held (Wagner C.J. and Moldaver, Côté and Rowe JJ. dissenting): The appeal should be dismissed.

Per Karakatsanis, **Brown**, Martin, Kasirer and Jamal JJ.: The police detained L on the day of the execution of the warrant and then breached s. 10(b) by failing to inform him of his right to counsel. The police committed another breach of s. 10(b) on the day of the arrest by refusing to allow L to contact a lawyer in circumstances which showed that his initial conversation with Legal Aid was insufficient for the purposes of s. 10(b). These were serious breaches, substantially

impacting L's *Charter*-protected interests, and admitting the evidence thereby obtained would bring the administration of justice into disrepute.

The test that should be applied in every instance of alleged detention by police is the test stated in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, and *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692. It is comprehensive in scope and addresses the full breadth of circumstances that engage the right against self-incrimination protected by s. 10 of the *Charter*, including investigative detention. Trial judges must not consider the factors in *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.). The test for detention set out in *Grant* and expanded in *Le* is objective, and it was restated to direct the inquiry to the perspective of the reasonable person in the accused's shoes. Under this test, three factors are to be considered and balanced.

The first factor a court must consider is how the circumstances of the encounter would have been reasonably perceived by the individual — more specifically, whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or singling them out for focused investigation. The analysis properly begins at the moment the encounter itself begins. In the instant case, on the day of the execution of the warrant, it is inconceivable that a reasonable person in L's shoes — woken and confronted by armed police officers in his home telling him to leave — would believe that the police had arrived to provide general assistance, maintain general order or make general inquiries. The reasonable person would immediately understand that he or she is being singled

out for investigation. This weighs in favour of a finding of detention. While, of course, the police were authorized by warrant and as such had legitimate reasons for the steps they took, this is not determinative of — and indeed is unlikely to affect — how a reasonable person perceives his or her interactions with the police. Indeed, the warrant itself, by authorizing the police to search L’s home, reveals a targeted investigation.

The second factor directs a court’s attention to the nature of the police conduct throughout the encounter. Specifically, their actions and language used, their use of physical contact, the place where the encounter occurred, the presence of others, and the duration of the encounter, may all play a role in shaping the perceptions of the reasonable person in the individual’s shoes. The assessment requires a broad view directed to all circumstances of the case, from which view a court should focus on the contextual factors that would affect the perception of the reasonable person in the individual’s shoes. No single consideration, including a police statement to an individual that he or she is not detained or otherwise under any obligation to cooperate or may leave, is determinative of whether a detention has occurred. The test is principally objective and therefore, rather than focusing on what was in the individual’s mind at a particular moment in time, the inquiry is into how the police behaved and, considering the totality of the circumstances, how such behaviour would be reasonably perceived.

The investigating officer’s statements to L that he was free to leave militate against a finding of detention, but they are outweighed by circumstances that support

the opposite conclusion. While considerations of the physical proximity of the police to L have little if any impact, the presence of others is a significant consideration. L was in the presence of at least one police officer throughout his interaction with the police; their continued presence and supervision would tend to contribute to the perception of a reasonable person in L's shoes that he or she was not free to decline to speak or to leave. Furthermore, this was a single, lengthy police encounter. This interaction spanned several locations and each of them have features — the overwhelming show of force in the intrusion into the home, the long ride to the police station and the secure environment for a lengthy interview — that, taken as a whole, support the view that someone in L's position would reasonably have perceived that he or she could not leave. This supports a finding of detention.

The final factor requires a court to consider, where relevant, the individual's age, physical stature, minority status and level of sophistication. Actual consideration of how these various characteristics might impact the reasonable view of the matter as held by someone in like circumstances is required. Youth — even the youth of early adulthood — aggravates the power imbalance between the state and the individual, making it more pronounced, evident and acute. With respect to the race of the accused, the question that must be answered is how a reasonable person of a similar racial background would perceive the interaction with the police. To answer this question, courts must take into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in Canadian society. In evaluating interactions between Indigenous people and the police,

courts must be alive to (1) the relational aspect between the police and Indigenous persons, characterized as it has been by an overwhelming power imbalance and history of discrimination; and (2) the resulting possibility that their interactions would reasonably be perceived by Indigenous persons as depriving them of choice to cooperate.

In this case, L's youth is a crucial consideration that should have received more attention. It is simply unrealistic to suggest that a reasonable 19-year-old will, even in the presence of police statements to the contrary, feel anything but constrained to respond positively to the request to give a statement, following immediately upon the sort of police entry into his home that occurred here. L's Indigenous background is a factor that weighs somewhat in favour of detention, albeit not heavily as it did not appear to play a significant role in shaping his perception of his obligation to cooperate with the police. Further, L's sophistication does not undermine the case for finding a detention. Rather, his lack of experience with the police and unfamiliarity with his *Charter* rights bolsters it.

All three factors weigh decisively in favour of finding that L was detained. It follows that police were required to inform him of his s. 10(b) right to counsel and to afford him the opportunity of exercising it, and breached that right by failing to do so.

Whether the police breached s. 10(b) of the *Charter* by refusing to allow a further consultation with a lawyer requires an application of the test in *R. v. Sinclair*,

2010 SCC 35, [2010] 2 S.C.R. 310. As explained in *Sinclair*, the purposes of s. 10(b) include to inform the detainee not only of his rights and obligations under the law (informational component) but, equally and if not more important, to allow him to obtain advice as to how to exercise those rights (implementational component). This latter component implicitly includes a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel. While a single consultation with a lawyer is constitutionally sufficient, the implementational component of s. 10(b) imposes upon police a further obligation to provide a detainee with a reasonable opportunity to consult counsel again if a change in circumstances or a new development suggests that the choice faced by the accused has been significantly altered, requiring further advice on the new situation. Three non-exhaustive categories of exceptional circumstances triggering this duty were identified in *Sinclair*: (1) the police invite the accused to take part in non-routine procedures that counsel would not consider at the time of the initial consultation; (2) there is a change in jeopardy that could affect the adequacy of the advice received during the initial consultation; and (3) there is reason to question the detainee's understanding of his rights.

The third category broadly covers circumstances where the detainee may not have understood the initial s. 10(b) advice of his right to counsel, which imposes on the police a duty to give him a further opportunity to talk to a lawyer. The inquiry is into circumstances, stated broadly, and an inquiry into whether a detainee understood that he or she could remain silent is not sufficient. It is only by ensuring that detainees obtain legal advice that accounts for the particular situation they face, conveyed in a

manner they can understand, that s. 10(b) can meaningfully redress the imbalance of power between the state (whose agents know the detainee's rights) and the detainee (who may not). It is uncontroversial that the purpose of s. 10(b) is to mitigate the imbalance between the individual and the state. Investigating officers and reviewing courts must be alive to the possibility that a detainee's vulnerabilities, which may relate to gender, youth, age, race, mental health, language comprehension, cognitive capacity or other considerations, coupled with developments that may occur in the course of police interrogation, will have rendered a detainee's initial legal advice inadequate, impairing his or her ability to make an informed choice about whether to cooperate with the police.

On the day of L's arrest, the police fulfilled the informational component of s. 10(b) and initially at least satisfied the implementational component upon arrival at the police station. While the police did not employ any new or unusual investigative techniques and there was no change in jeopardy during the interview, there was ample reason to question L's understanding of his s. 10(b) right. His confusion was an objective indicator that renewed legal consultation was required to permit him to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so. There were also clear signs that either the legal advice he obtained was incorrect, or he did not understand how his s. 10(b) rights applied to his current circumstances. The concern that should reasonably have arisen in the mind of the investigating officer that L may not have understood his rights and how to exercise them is affirmed, if not heightened, when considered in light of L's particular

characteristics such as his youth, his Indigenous background and his level of sophistication. The police breached his right to counsel by refusing to provide him with another opportunity to consult with a lawyer despite there being reason to conclude that he had not understood his s. 10(b) advice, even after having spoken with Legal Aid.

The evidence obtained as a result of the breaches of L's *Charter* rights must be excluded as the admission of the evidence would bring the administration of justice into disrepute. The two breaches were serious and had a correspondingly significant impact on his s. 10(b) rights. This presents a strong case for exclusion of the evidence. On the other hand, society's interest favours admission of the evidence, but not strongly. Taken cumulatively, the seriousness of the *Charter* infringing conduct and the impact of the breaches on L's *Charter*-protected interests overwhelms the moderate impact on society's interest in the truth-seeking function of the criminal trial process.

Per Wagner C.J. and Moldaver, **Côté** and **Rowe JJ.** (dissenting): The appeal should be allowed and L's conviction for second degree murder restored. L was not detained on the day of the execution of the warrant, nor was his s. 10(b) right to counsel violated on the day of his arrest, when he was not permitted a second consultation with counsel.

The disagreement with the majority that L was detained by police on the day of the execution of the warrant turns on three key points. First, a deferential approach to the trial judge's findings of fact leads to the conclusion that police did not

engage in coercive behaviour in their interactions with L that day. Second, the perspective of a reasonable person in the particular circumstances of the individual must not be overemphasized because to do so provides too little guidance to police in determining whether they have psychologically detained someone in carrying out their regular duties. The police must be able to avoid infringing the s. 9 *Charter* right against arbitrary detention when they are seeking to obtain information from an individual and they have no intention to detain him or her but a reasonable person may nonetheless conclude a detention exists. Third, while there is agreement with the majority that a finding of detention is not precluded by statements by police that an individual does not need to speak to them and is free to leave, in the instant case, greater weight is to be accorded to the police officers' testimony that they made clear to L that he did not need to speak to them and he was free to go.

Applying the framework from *Grant* leads to the conclusion that L was not psychologically or otherwise detained at any point during his dealings with the police on the day of the execution of the warrant. Thus, there was no requirement that he be advised by police of his right to counsel under s. 10(b) of the *Charter*.

First, with respect to the circumstances giving rise to the encounter, the trial judge did consider the context in which police first interacted with L and its relevance to whether or not he was detained. He indicated that the search warrant was executed professionally and disclosed no signs of unnecessary coercion. While a

reasonable person in L's position would have felt singled out for investigation, this did not turn the encounter into a detention.

Next, regarding the police conduct, there is no basis to contradict the trial judge's conclusion that L was not subject to psychological detention. The police made statements on several occasions that L was under no obligation to cooperate and he was free to leave at any time, and their conduct did not undermine their statements. A careful and deferential review of the record requires a rejection of the factors that, according to the majority, outweigh the police statements that L was free to go. The conduct of the police in relation to the execution of the search warrant shows no evidence giving rise to an impression of control over the person. There is no credible evidence that police gave orders or closely monitored L for purposes other than the execution of the search warrant. As for the ride to the police station, the trial judge's factual findings about the police conduct during that time and his finding that L chose this option also do not militate in favour of a finding of detention. Further, the trial judge's findings indicate that police avoided anything akin to accusatory interrogation. Moreover, the evidence demonstrates that L was keen to collaborate. As to physical contact, there is agreement with the majority that there was no evidence of physical contact or oppressive proximity that could support a finding of psychological detention. With respect to the presence of others, there is disagreement with the majority that this was a significant consideration because this factor refers to witnesses, not police officers, and, in any event, the presence of other police officers is of no consequence, given how the police conducted themselves. Finally, the interview took place at the

police station and, while its duration of about three and a half hours was lengthier than generally occurs in non-accusatory sessions, having regard to the conversational interview style and the absence of any confrontation, there is no basis to differ from the trial judge's conclusion that its length does not suffice to constitute the basis of a psychological detention.

Finally, turning to L's particular circumstances, the trial judge acknowledged his youth, Indigenous background, lack of experience, and small stature. These factors are all material — without being determinative — in assessing whether police undermined statements that he was free to go. There is no evidentiary support for the majority's assertion that the execution of the search warrant was conducted in a manner that would make a reasonable person in L's position feel detained. L's objective personal characteristics, although significant to the inquiry, do not turn the tide. Overall, the trial judge's findings of fact confirm what is otherwise objectively ascertainable: a reasonable person in L's shoes would not have perceived the police conduct as a significant deprivation of his liberty.

L claims that his right to counsel was not implemented on the day of his arrest because he had a right to a second consultation with counsel during the police interview. This issue is governed by the Court's decision in *Sinclair* and its companion cases. It is not accurate to suggest that s. 10(b)'s purpose is to mitigate the imbalance between the individual and the state; rather, its purpose is to provide a detainee with an opportunity to obtain information and legal advice relevant to his or her legal situation

upon detention, in order to support the detainee's right to choose whether to cooperate with the police investigation or not.

In the instant case, L's situation does not fit within the category of changed circumstances that requires a second consultation when there is reason to question the detainee's understanding of his or her s. 10(b) right. There is no basis to conclude that the choice faced by L was significantly altered so as to require further advice in order to fulfill the purpose of his s. 10(b) rights. The fact that a detainee demonstrates hesitancy or concern during an interrogation is not, on its own, sufficient to establish that he or she did not have a full opportunity to consult with counsel and the detainee merely asking for a second consultation with a lawyer is not enough to support a right to a second consultation. Mere confusion or an incorrect belief in a constitutional right to have a lawyer present is also not enough to trigger a constitutional obligation under s. 10(b). A review of L's interactions with police indicates that his choice to speak to the police investigators was both free and informed. While his request to speak to his father was an implicit request for a second consultation with a lawyer, that is not enough to support a right to a second consultation. The police officer confirmed that L understood and exercised his right to counsel. L knew the legal jeopardy that he was facing and he knew he did not have to say anything to the police officer. L's discomfort in the face of difficult police questioning is not, on its own, grounds for a second consultation.

Even if it could be said that L was detained on the day of the execution of the warrant, the statement he subsequently provided on the day of his arrest was not sufficiently connected to that *Charter* breach and there is therefore no basis on which to exclude such evidence under s. 24(2).

Cases Cited

By Brown J.

Overruled: *R. v. Moran* (1987), 36 C.C.C. (3d) 225; **applied:** *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; **referred to:** *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Seagull*, 2015 BCCA 164, 323 C.C.C. (3d) 361; *R. v. Tessier*, 2020 ABCA 289, 12 Alta. L.R. (7th) 55, leave to appeal granted, *Bulletin of Proceedings*, March 4, 2021, at p. 2; *R. v. Eaton*, 2019 ONCA 891; *R. v. N.B.*, 2018 ONCA 556, 362 C.C.C. (3d) 302; *R. v. Folker*, 2016 NLCA 1, 373 Nfld. & P.E.I.R. 49; *R. v. Rajaratnam*, 2006 ABCA 333, 397 A.R. 126; *R. v. Van Wissen*, 2018 MBCA 110, 367 C.C.C. (3d) 186; *R. v. Theriault*, 2021 ONCA 517, 157 O.R. (3d) 241; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Dussault*, 2022 SCC 16; *R. v. Pagé*, 2018 QCCS 5553; *R. v. Smith*, 2015 ABQB 624; *R. v. Ejigu*, 2012 BCSC 1673; *R. v. Jongbloets*, 2017 BCSC 740; *R. v. A.R.M.*, 2011 ABCA 98, 599 A.R. 343; *R. v. Laquette*, 2021 MBQB 177; *R. v. Hunt*, 2020 ONCJ 627; *R. v. Fedoseev*,

2014 ABPC 192, 597 A.R. 1; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Tim*, 2022 SCC 12; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Reilly*, 2021 SCC 38; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555.

By Côté and Rowe JJ. (dissenting)

R. v. Sinclair, 2010 SCC 35, [2010] 2 S.C.R. 310; *R. v. Way*, 2011 NBCA 92, 377 N.B.R. (2d) 25; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Todd*, 2019 SKCA 36, [2019] 9 W.W.R. 207; *R. v. Tran*, 2010 ABCA 211, 482 A.R. 357; *R. v. Schrenk*, 2010 MBCA 38, 255 Man. R. (2d) 12; *R. v. Hermkens & Moran*, 2021 ABQB 885; *R. v. Heppner*, 2017 BCSC 894; *R. v. Roach*, 2012 NLTD(G) 21, 319 Nfld. & P.E.I.R. 231; *R. v. Bristol*, 2011 ABQB 73; *R. v. Bucknell*, 2021 BCPC 308; *R. v. Giulioni*, 2011 NLTD(G) 117, 313 Nfld. & P.E.I.R. 220; *R. v. Wheeler*, 2010 YKTC 7; *R. v. Rodh*, 2010 SKPC 150, 364 Sask. R. 96; *R. v. Jackman*, 2011 NLTD(G) 116, 313 Nfld. & P.E.I.R. 203; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. McCrimmon*, 2010 SCC 36, [2010] 2 S.C.R. 402; *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Dussault*, 2022 SCC 16; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Tim*, 2022 SCC 12; *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235; *R. v. Collins*, [1987] 1

S.C.R. 265.

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Canadian Charter of Rights and Freedoms, ss. 8, 9, 10, 24(2).

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Penney, Steven. “Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions” (2012), 57 *S.C.L.R.* (2d) 263.

Watkins, Kerry G. “The Vulnerability of Aboriginal Suspects When Questioned by Police: Mitigating Risk and Maximizing the Reliability of Statement Evidence” (2016), 63 *Crim. L.Q.* 474.

APPEAL from a judgment of the Alberta Court of Appeal (Bielby, Veldhuis and Wakeling JJ.A.), 2021 ABCA 51, 20 Alta. L.R. (7th) 211, [2021] 6 W.W.R. 594, 402 C.C.C. (3d) 527, 479 C.R.R. (2d) 277, [2021] A.J. No. 171 (QL), 2021 CarswellAlta 265 (WL), setting aside the conviction of the accused for second degree murder and ordering a new trial. Appeal dismissed, Wagner C.J. and Moldaver, Côté and Rowe JJ. dissenting.

Keith A. Joyce, for the appellant.

Gregory C. Lazin, for the respondent.

Davin Michael Garg and *Natalya Odorico*, for the intervener the Attorney General of Ontario.

Frank Addario and *Samara Secter*, for the intervener the Canadian Civil Liberties Association.

Anil K. Kapoor and *Victoria Cichalewska*, for the intervener the Criminal Lawyers' Association.

The judgment of Karakatsanis, Brown, Martin, Kasirer and Jamal JJ. was delivered by

BROWN J. —

I. Overview

[1] This appeal calls upon the Court to affirm and apply its holdings in *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, and *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, respectively, on two points: (1) evaluating whether an individual has been detained

by the police; and (2) applying the framework in *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, in the purposive and generous manner required by our jurisprudence.

[2] The police suspected that Nigel Vernon Lafrance might have been involved in the death of an individual that took place on March 17, 2015. In the early morning of March 19, 2015, a team of armed police officers entered his home to execute a search warrant. They awoke Mr. Lafrance, a recent high school graduate described by the trial judge as “youthful, [I]ndigenous and ha[ving] minimal police exposure” (2017 ABQB 746, 399 C.R.R. (2d) 184, at para. 79), and by the Court of Appeal as “19 years old, Indigenous, [with] very limited prior exposure to the police and . . . of much smaller stature than . . . the armed and uniformed officers” (2021 ABCA 51, 20 Alta. L.R. (7th) 211, at para. 29). Ordered to dress and leave the premises, he was then led to a police officer who asked him to identify himself and come to the police station to provide a statement regarding the alleged murder. The police drove him to the police station, took him to a secure environment therein, and interviewed him for over three hours.

[3] On April 7, 2015, the police arrested Mr. Lafrance for murder. After allowing him to call Legal Aid, they interviewed him. Several hours into the interview, Mr. Lafrance asked to call his father because that would be his “only chance of getting a lawyer” (A.R., vol. V, at p. 137). The police refused the request and pushed for answers. Mr. Lafrance eventually confessed to killing the victim.

[4] Mr. Lafrance sought to exclude this confession by arguing that the police had detained him on March 19 and breached his right to counsel pursuant to s. 10(b) of

the *Canadian Charter of Rights and Freedoms* on March 19 and April 7.¹ The trial judge admitted the evidence, finding that Mr. Lafrance had not been detained on March 19 (thereby also disposing of the s. 10(b) argument related to that date), and that police were not required to allow him a second opportunity to call a lawyer on April 7. Mr. Lafrance was convicted by a jury of second-degree murder. The majority of the Court of Appeal of Alberta allowed his appeal, excluded the evidence under s. 24(2) of the *Charter* and ordered a new trial. The Crown appeals, asking us to restore the conviction.

[5] I would dismiss the appeal. The police detained Mr. Lafrance on March 19, then breached s. 10(b) by failing to inform him of his right to counsel. They committed another breach of s. 10(b) on April 7 by refusing to allow him to contact a lawyer in circumstances which showed that his initial conversation with Legal Aid was insufficient for the purposes of s. 10(b), being “to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights” (*Sinclair*, at para. 26, citing *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43). These were serious breaches, substantially impacting Mr. Lafrance’s *Charter*-protected interests, and admitting the evidence thereby obtained would bring the administration of justice into disrepute.

II. Facts

¹ Mr. Lafrance also argued that his s. 8 rights were breached. Given my disposition of this appeal on ss. 10 and 24(2) of the *Charter*, it is unnecessary for me to decide this point.

[6] On March 17, 2015, Anthony Yasinski was stabbed in the neck and died. The police suspected Mr. Lafrance’s involvement, as he was the last person to have contacted Mr. Yasinski prior to his death.

[7] Two interactions between the police and Mr. Lafrance followed, on March 19, 2015, and April 7, 2015, respectively.

A. *March 19, 2015*

[8] The police sought and obtained a search warrant to search Mr. Lafrance’s place of residence on the morning of March 19. A police search team of 11 — many of which were wearing bulletproof vests and carrying firearms, including at least one “assault rifle” — arrived in marked and unmarked police vehicles at 6:50 a.m., blocked off surrounding roads and entered the residence, making their way to Mr. Lafrance’s room and waking him. When he opened the door, they directed him to dress and leave his house immediately. When he asked the police for permission to look for his cat (which had run outside when the police entered the residence), they permitted him to do so, led him outside, and accompanied him as he chased after it. At all times, Mr. Lafrance remained “in sight of police officers” and did not venture past the police cordon (A.R., vol. II, at pp. 93-94).

[9] Shortly after retrieving the cat, Mr. Lafrance was approached by Sergeant (then Corporal) Eros who, unbeknownst to Mr. Lafrance, had been assigned to interview him and had been waiting for him outside. Sgt. Eros was accompanied by

Staff Sergeant (then Cpl.) Zazulak, armed and wearing a bulletproof vest. It is undisputed that, at that time, Sgt. Eros did not have reasonable and probable grounds to proceed to arrest Mr. Lafrance.

[10] Sgt. Eros asked Mr. Lafrance to confirm his identity (which Mr. Lafrance did), advised him that he wanted to speak about an incident that occurred down the road — referring, of course, to Mr. Yasinski’s death — and asked him to come to the police station and provide a statement. Sgt. Eros told Mr. Lafrance that doing so would be a “completely voluntary” choice. Mr. Lafrance agreed to give a statement.

[11] Sgt. Eros and Mr. Lafrance discussed how he could make his way to the police station — whether by public transit, a ride with Sgt. Eros and S/Sgt. Zazulak in an unmarked police van, or by some alternative means. Having no money for bus fare, Mr. Lafrance chose to ride with Sgt. Eros and S/Sgt. Zazulak.

[12] After a 20- to 25-minute ride to the police station, Mr. Lafrance was escorted by Sgt. Eros and S/Sgt. Zazulak through two controlled access key-carded doors to an interview room at the back of the station. He was then left alone in the closed room for at least 17 minutes, unaware (because he had not been told) that the door was unlocked. When Sgt. Eros returned to the interview room and Mr. Lafrance asked to use the washroom, Sgt. Eros escorted him to the washroom, stood by while Mr. Lafrance used the washroom, then escorted him back to the interview room.

[13] Sgt. Eros then proceeded to interview Mr. Lafrance for approximately three and a half hours. He began by telling Mr. Lafrance that he did not need to speak with him, that the door to the interview room was unlocked and that he could leave at any time. But Sgt. Eros also informed him that they were currently in a “secure environment” and that, should Mr. Lafrance want to leave, use the washroom or take a smoke break, he would have to let Sgt. Eros know.

[14] Sgt. Eros then informed Mr. Lafrance that he was a suspect in Mr. Yasinski’s murder, and asked him about “what [his] days have been filled with and what [he had] been doing” prior to the police search of his home (A.R., vol. IV, at p. 82). Mr. Lafrance gave answers, some of which were relayed to the search team, leading them to seize items of interest. Sgt. Eros also took Mr. Lafrance’s fingerprints and DNA (prior to which he was offered a chance to speak with a lawyer) and seized his cellphone along with his clothes — all of which were taken after obtaining Mr. Lafrance’s consent. At the interview’s conclusion, police drove Mr. Lafrance home.

B. *April 7, 2015*

[15] On April 7, the police arrested Mr. Lafrance for the murder of Mr. Yasinski. Shortly after the arrest, the arresting officer informed Mr. Lafrance of his right to counsel and that he would be given an opportunity to call a lawyer. Mr. Lafrance indicated that he understood this and asked to contact a “free lawyer”.

[16] At the police station, Mr. Lafrance was escorted to a telephone room and spoke on the phone with a Legal Aid lawyer. This short conversation was Mr. Lafrance's first time ever speaking with a lawyer, having never before been arrested or otherwise required to obtain legal services. When he finished the call, the arresting officer asked Mr. Lafrance if he had spoken to a lawyer and understood the advice, to which Mr. Lafrance answered yes. Mr. Lafrance was then moved to an interview room to be interviewed by Sgt. Eros.

[17] Several hours into the interview, Sgt. Eros told Mr. Lafrance that he did not believe his version of the events and that there was no doubt in his mind that Mr. Lafrance was responsible for killing Mr. Yasinski. As the tone of the interview shifted, Mr. Lafrance asked to speak with his father before continuing to answer Sgt. Eros' questions. When Sgt. Eros asked him why, Mr. Lafrance explained that his father was his "only chance of getting a lawyer" and that he wanted a lawyer before going forward with anything else. He said that Legal Aid told him "to get a lawyer before [he] continue[s] talking" to sit down and talk about his situation (A.R., vol. V, at p. 139). In response, Sgt. Eros explained that he "ha[d] no problem" letting him talk to his father (A.R., vol. V, at p. 138), but that Mr. Lafrance had already spoken to a lawyer. Mr. Lafrance, he said, may have misinterpreted² the advice and so he explained to Mr. Lafrance that he could not have a lawyer present in the room with him during

² I glean this from Sgt. Eros' testimony: "There's a person that ah you know what – and the way that that kinda goes ah – I won't say it's, it's bad advice but it's maybe miss – a little bit miss ah – miss ah – interrupted" (A.R., vol. V, at p. 139).

the custodial interview. Sgt. Eros testified, however, that he was satisfied that Mr. Lafrance understood his right to silence and his legal advice.

[18] Sgt. Eros pressed ahead with his questioning and, shortly thereafter, Mr. Lafrance confessed to stabbing Mr. Yasinski.

III. Issues

[19] This appeal presents three issues:

1. Did the police detain Mr. Lafrance and breach his s. 10(b) right to counsel on March 19, 2015?
2. Did the police breach Mr. Lafrance's s. 10(b) right to counsel by refusing to allow him to have a further consultation with a lawyer on April 7, 2015?
3. If the answer to either or both of the foregoing is "yes", would the evidence obtained therefrom bring the administration of justice into disrepute, such that it must be excluded under s. 24(2)?

IV. Analysis

A. *March 19, 2015*

[20] Mr. Lafrance’s straightforward argument regarding the March 19 encounter is this: he was detained when the police executed their search warrant, and that detention persisted during his interview at the police station as he felt, in the circumstances, obliged to comply with the request to speak with police. It follows that the police breached s. 10(b) by failing to advise him of his right to retain and instruct counsel upon detention (*Grant*, at para. 28).

(1) Detention

[21] Detention refers to “a suspension of an individual’s liberty interest by virtue of a significant physical or psychological restraint at the hands of the state” (*R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 21; *Le*, at para. 27). In the heat of the moment, it is not always easy for ordinary citizens, who may be uninformed of their rights or the scope of the police’s powers, to know whether they have a choice to comply with a request by the police. An individual may perceive “a routine interaction with the police as demanding a sense of obligation to comply with every request” (*Le*, at para. 26, referring to S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (2nd ed. 2018), at p. 83). For that reason, this Court has recognized that, “even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused’s shoes would feel obligated to comply . . . and that they are not free to leave” (*Le*, at para. 26 (emphasis added)). Even so, not every encounter between state and citizen effects a detention (*Suberu*, at para. 3; *Le*, at para. 27); no detention is effected, and therefore s. 10(b) rights are not breached,

where an individual voluntarily assists the police by, for example, freely agreeing to provide a statement.

[22] In this case, Mr. Lafrance says that his choice to cooperate with the police on March 19 was, in substance, *imposed* by way of psychological constraints. Psychological detention exists where an individual is legally required to comply with a direction or demand by the police, or where “a reasonable person in [that individual’s] position would feel so obligated” and would “conclude that he or she was not free to go” (*Grant*, at paras. 30-31; *Le*, at para. 25). It is that latter category which Mr. Lafrance says describes his circumstances. Three factors — identified in *Grant* and expanded upon in *Le* — are to be considered and balanced:

1. The circumstances giving rise to the encounter as they would reasonably be perceived by the individual;
2. The nature of the police conduct; and
3. The particular characteristics or circumstances of the individual where relevant (*Grant*, at para. 44; *Le*, at para. 31).

[23] The applicable standard of review here is that of correctness; the existence of a detention is a question of law (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at paras. 18 and 20; *Grant*, at para. 43; *Le*, at para. 23). No deference is owed to the trial judge’s analysis and conclusion thereon. This is not to say that the *voir dire* is

irrelevant, since the trial judge's findings of facts receive deference, absent a palpable and overriding error (*Grant*, at paras. 43 and 45).

(2) *R. v. Moran*

[24] A jurisprudential point should be addressed before proceeding further. The Court of Appeal criticized the trial judge for not considering the factors pertinent to identifying a detention in *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.). In my view, however, the trial judge did not err in this respect, since *Grant* has displaced the authority of *Moran* as stating the test for detention.

[25] In *Moran*, an issue before the Court of Appeal for Ontario was whether the trial judge had erred in concluding that Mr. Moran, who had been interviewed twice by police in connection with the murder of which he was eventually convicted, had not been detained during those interviews. In dismissing this ground of appeal, Martin J.A. identified a series of non-exhaustive factors to assist in determining whether a person is detained at the time of questioning at a police station.

[26] I recognize that lower courts continue to refer to these factors when assessing detention under *Grant* (see, e.g., *R. v. Seagull*, 2015 BCCA 164, 323 C.C.C. (3d) 361, at para. 38; *R. v. Tessier*, 2020 ABCA 289, 12 Alta. L.R. (7th) 55, at paras. 66-69, leave to appeal granted, *Bulletin of Proceedings*, March 4, 2021, at p. 2; *R. v. Eaton*, 2019 ONCA 891, at para. 12 (CanLII); *R. v. N.B.*, 2018 ONCA 556, 362 C.C.C. (3d) 302, at para. 121). The view, whether stated explicitly or necessarily

implicit in these judgments, is that the *Moran* factors are “useful” benchmarks when assessing detention per *Grant* (*Seagull*, at para. 38; *N.B.*, at para. 121).

[27] Respectfully, the better view is that, as a result of *Grant*, *Moran* is no longer good law (S. Coughlan and G. Luther, *Detention and Arrest* (2nd ed. 2017), at p. 287), and it should no longer be applied or relied upon. In *Grant*, the test for detention was restated to direct the inquiry to the perspective of the reasonable person in the accused’s shoes. In contrast, the *Moran* factors focus principally on police conduct and information that will not be readily available to the accused at the time of detention (such as the stage of the police investigation). And, while the test in *Grant* is objective, *Moran* encourages courts to consider the subjective perceptions and beliefs of the accused, thereby emphasizing considerations that play a limited (if any) role in an objective assessment (*Le*, at paras. 111-17).

[28] Further, and as noted, the scope of *Moran* is, by its own terms, confined to deciding whether a person who is questioned at a police station is detained. By design, then, *Moran* applied in limited circumstances. *Grant* is comprehensive in scope, applying to every instance of alleged detention by police by addressing the full breadth of circumstances that engage the right against self-incrimination protected by s. 10 of the *Charter*, including investigative detentions (*R. v. Folker*, 2016 NLCA 1, 373 Nfld. & P.E.I.R. 49, at paras. 74-79, per White J.A. (dissenting in part)).

(3) Applying *Grant* to the Events of March 19, 2015

(a) *The Circumstances Giving Rise to the Encounter*

[29] At this stage, the Court must consider how the circumstances of the encounter would have been reasonably perceived by Mr. Lafrance — more specifically, “whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling [him out] for focused investigation” (*Le*, at para. 31(a); *Grant*, at para. 44(2)(a)).

[30] I observe that the trial judge began by looking to the background information available to Sgt. Eros and the police during the initial steps of their investigation, including his assignment to speak to Mr. Lafrance outside the home. In *Le*, however (which I note was unavailable to the trial judge at the time of decision), the Court explained that “investigative purposes are important when assessing whether the detention was arbitrary and whether the police were acting in good faith”, but “are less relevant” when reviewing the first *Grant* factor (paras. 37-38). Behind-the-scenes knowledge of a police investigation would not be known by a reasonable person in the accused’s position.

[31] The analysis properly begins at the moment the encounter itself begins — in this case, when the police arrived at Mr. Lafrance’s home in marked and unmarked police vehicles, and at an early hour when Mr. Lafrance was asleep. Armed and wearing bulletproof vests, they entered the house, knocked on his bedroom door, and ordered him to dress and get out. They monitored him inside and outside the house.

[32] In my view, it is inconceivable that a reasonable person in Mr. Lafrance’s shoes — woken and confronted by armed police officers in his home telling him to leave — would believe that they had arrived to “provid[e] general assistance”, “maintai[n] general order” or make “general inquiries”. The reasonable person would immediately understand that he or she is being singled out for investigation. While, of course, the police were authorized by warrant and as such had “legitimate reasons” for the steps they took, this is not determinative of — and indeed is unlikely to affect — how a reasonable person perceives his or her interactions with the police (*Le*, at paras. 37-38). Indeed, the warrant itself, by authorizing the police to search Mr. Lafrance’s home, reveals a targeted investigation.

[33] While the trial judgment recounts the facts of this initial police encounter (at para. 37), little consideration is given to the possibility that they gave rise to a detention. The trial judge’s focus, rather, was on the initial interaction between Mr. Lafrance and Sgt. Eros. But again, it is the moment that the interaction with police begins that must be considered. Mr. Lafrance’s interaction with Sgt. Eros was an extension of a series of events that began when the police entered Mr. Lafrance’s home, woke him up and ordered him to dress and leave. In any event, even had the conversation between Sgt. Eros and Mr. Lafrance corresponded to the moment that detention arose, my conclusion would be the same: a reasonable person in Mr. Lafrance’s position would have felt singled out for investigation purposes when Sgt. Eros approached him, asked him to confirm his identity, and informed him that the

police wanted to speak with him about a murder. This weighs in favour of a finding of detention.

(b) *The Nature of the Police Conduct*

[34] The second *Grant* factor directs a court's attention to the nature of the police conduct throughout the encounter. Specifically, their actions and language used, their use of physical contact, the place where the encounter occurred, the presence of others, and the duration of the encounter, may all play a role in shaping the perceptions of the reasonable person in the accused's shoes (*Grant*, at para. 44(2)(b); *Le*, at paras. 31(b) and 43).

(i) Actions and Language of the Police

[35] A central feature of the Crown's position is its argument that an encounter is *prima facie* voluntary where the police explicitly inform an individual that he or she need not cooperate. This, the Crown says, functions as an intervening event that informs the interpretation of preceding and subsequent events so as to eliminate any possibility of police detention. The Crown relies particularly on these passages from *Grant*:

The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections. However, the subjective intentions of the police are not determinative. (Questions such as police "good faith" may become

relevant when the test for exclusion of evidence under s. 24(2) is applied, in cases where a *Charter* breach is found.) While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.

...

Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(b) rights. That the obligation arises only on detention represents part of the balance between, on the one hand, the individual rights protected by ss. 9 and 10 and enjoyed by all members of society, and on the other, the collective interest of all members of society in the ability of the police to act on their behalf to investigate and prevent crime. [Emphasis added; paras. 32 and 39.]

[36] On their own, these passages might support the Crown's position. But in light of the entire judgment in *Grant*, they do not support the view that such a police statement precludes finding a detention. In *Grant*, the Court conceived the test for

detention so that no single consideration — including a statement from the police that the individual need not speak to them or could leave — would be determinative. Rather, what is required, as the first of these passages also states, is “a realistic appraisal of the entire interaction as it developed” (para. 32 (emphasis added)). The passages in *Grant* relied on by the Crown were, therefore, *immediately* coupled with the caution that it is ultimately “for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual’s right to choose, and conduct that does not” (para. 32). In other words, the assessment requires a broad view directed to *all* circumstances of the case, from which view a court should not be distracted by a police officer’s statement that might, taken in isolation, militate against the finding of a detention. It is entirely possible that such an assurance, given at a very specific point and time of the interaction with the police, might lose any significance to a reasonable person in the detainee’s circumstances once the entirety of the encounter is accounted for.

[37] So understood, the test in *Grant* is premised upon a practical reality of interactions between police and citizen, especially where the interaction concerns a criminal investigation. While words uttered by the police may hold a certain significance to trained and experienced police officers or to those trained in the law or otherwise already aware of their rights and how to exercise them, they may hold less significance, or different significance, to vulnerable individuals unfamiliar with their *Charter* rights. This particular instance of the imbalance of power between state and

citizen that characterizes our criminal justice system is exacerbated by the psychological dynamics of police interrogation, where even repeated assurances that a detainee is free to leave may be disregarded, especially by innocent persons seeking to absolve themselves of any wrongdoing.

[38] None of this is undermined by the appellate caselaw relied upon by the Crown, which either predates *Grant* (e.g. *R. v. Rajaratnam*, 2006 ABCA 333, 397 A.R. 126), or confirms that all the circumstances of a case must be examined to determine whether a detention occurred (e.g. *Seagull*, at paras. 49-60; *R. v. Van Wissen*, 2018 MBCA 110, 367 C.C.C. (3d) 186). I therefore reject the Crown’s submission that a detention *prima facie* cannot arise where police state that the individual may decline to speak with them or may leave whenever a statement is presented. In this regard, my colleagues also place substantial weight upon such statements. Indeed, they treat them as all but determinative (as one might in considering the words used by police under the *Moran* framework), rather than focussing on the contextual factors that would affect the perception of the reasonable person in the accused’s shoes (as required by *Grant* and *Le*).

[39] To summarize: no single consideration, including a police statement to an individual that he or she is “not detained” or otherwise under any obligation to cooperate or may leave, is determinative of whether a detention has occurred. Where present, it is a single consideration among others for which a court should account in deciding whether a reasonable person in the shoes of the accused would feel obliged to

cooperate. It does not automatically turn the tide, and may not turn the tide at all, where other factors point to a finding of detention.

[40] Indeed, Sgt. Eros' statements to Mr. Lafrance³ do not turn the tide here. While they militate against a finding of detention, they are outweighed by circumstances that support the opposite conclusion, namely that a reasonable person in his position would have felt compelled to comply and unfree to leave. For example:

- Mr. Lafrance awoke to 11 police officers at his residence, with vans, firearms and bulletproof vests, ordering him to dress and get out of the house;
- The police accompanied Mr. Lafrance while he searched for his cat;
- Sgt. Eros approached Mr. Lafrance after he went outside, asked him to confirm his identity and told him that he wanted to ask him questions relating to Mr. Yasinski's death;

³ i.e., “you don't have to provide me a statement . . . that it would be completely voluntary on your point”, “you don't hafta sit here and speak with me today”, “you are at any time Nigel free to leave”, “we (unintelligible) responsibility to ensure that you're aware of – of your rights and . . . and like I said that – that includes the ability to leave whenever you want to”, “[v]oluntary that you don't have to sit here and speak with me”, “you say you're willing to talk now . . . right in half an hour, 20 minutes, two hours you're – you decide that – that you no longer wanta speak with me . . . Um you just have to let me know . . . Okay and at that point in time, we'll stop and we'll move on”, and “some people think well now that I've agreed to it . . . I'm stuck here right . . . And – that's absolutely not the case” (A.R., vol. IV, at pp. 56, 64 and 72-74).

- The only practical means available to Mr. Lafrance for getting to the police station was for him to be driven, which he was in an unmarked police vehicle accompanied by two police officers;
- At the station, the police brought Mr. Lafrance to an interview room at the back of the police station that was behind two sets of locked doors;
- The police left Mr. Lafrance in the interview room for at least 17 minutes, having closed the door behind them, and did not inform him that the doors were unlocked; and
- The police told Mr. Lafrance that he was in a secure environment, controlled his access to the outside of the interview room, and kept him under surveillance during the course of the interview, including escorting him to the bathroom.

(ii) The Use of Physical Contact

[41] As is evident from the analysis in *Le* (at para. 50) and *Grant* (at paras. 50-52), considering the use by police of physical *contact* with a subject extends to their physical *proximity* to a subject. Even where, strictly speaking, there is no physical contact, deliberate physical proximity within a small space can create an atmosphere that would lead a reasonable person to conclude that leaving is not possible

(*Le*, at para. 50; *Grant*, at para. 50). This makes sense, since physical proximity can indicate the *possibility* of physical contact. And so, while nothing suggests that the police made any physical contact with Mr. Lafrance on March 19, that is not exhaustive of this consideration. For example, a reasonable person in Mr. Lafrance’s shoes might, particularly after he was escorted to the bathroom, view the investigating officers’ constant proximity as suggesting that any attempt to leave, at least on his own, would be met with physical resistance.

[42] All that said, and while the police chose to interview Mr. Lafrance in what Sgt. Eros described as the “secure environment” of an interview room, their conduct here is a far cry from *Le*, where the police officers intentionally positioned themselves in a way to block the exit from the backyard (para. 50). Neither the evidence here nor the trial judge’s findings suggest that the police sought to take advantage of the physical proximity in such a way. In my view, considerations of physical proximity alone would have little if any impact on whether a reasonable person in Mr. Lafrance’s position would feel free to decline to speak to police or to leave.

(iii) The Presence of Others

[43] This is a significant consideration here. Except while he was left alone in the interview room and in the bathroom, Mr. Lafrance was in the presence of at least one police officer throughout his interaction with the police, from the moment they awoke him in his home. Initially, he was under the supervision of an armed police search team that executed the warrant and monitored him while he was in and out of

the home. Following this, Sgt. Eros and S/Sgt. Zazulak were present throughout, from their initial encounter outside the home, to the ride to the police station, and the interview. These officers weighed approximately 220 lb. to 245 lb., respectively (while Mr. Lafrance weighed 130 lb.), and S/Sgt. Zazulak was armed and wearing a bulletproof vest. Their continued presence and supervision would tend to contribute to the perception of a reasonable person in Mr. Lafrance's shoes that he or she was not free to decline to speak or to leave.

[44] My colleagues appear to understand this consideration, as it was stated in *Le*, as applying only to the presence of witnesses, as opposed to the police (para. 152). Putting aside that the police *were* witnesses here, I see no good reason to keep to such a narrow purview. The “presence of others” was not a novel consideration in *Le*. It is one of the factors listed in *Grant* to evaluate “[t]he nature of police conduct” (para. 44(2)(b) (emphasis added)). For that reason, the Court, in support of its finding of psychological detention in *Grant*, pointed to the presence of other police at the time of the encounter (paras. 49-52). The point is that all police conduct relevant to whether a reasonable person in Mr. Lafrance's shoes would have understood himself or herself as free to leave must be considered. Indeed, that the witnesses were police, if anything, weighs more heavily in finding a detention than if they were mere bystanders.

(iv) The Place and Duration of the Encounter

[45] The entirety of Mr. Lafrance's encounter with the police spans several locations and various periods of time. In my view, considerations of place and time

would lead a reasonable person in Mr. Lafrance’s shoes to believe he had to cooperate with the police.

[46] The initial early morning encounter occurred inside Mr. Lafrance’s home. Any police intrusion into a home “is reasonably experienced as more forceful, coercive and threatening than when similar state action occurs in public” (*Le*, at para. 51). This remains true, irrespective of whether the intrusion is authorized by warrant, although depending on the circumstances of the intrusion, its impact may be mitigated where, as here, police inform the occupant that they have a search warrant.

[47] Even where that happens, however, the mode of entry into the household, while authorized by law, may be reasonably perceived as intimidating. It is to my mind indisputable that this would have been so in the circumstances of this intrusion. No reasonable person in Mr. Lafrance’s shoes would have had all misgivings just melt away with the assurance that the 11 police officers who had just awoken him inside his home and ordered him out had first obtained a search warrant. Thus, the impact of a police intrusion into a home may be mitigated where they inform the occupant that they have a search warrant. But police and reviewing courts must also be alive to the possibility that the execution of a warrant at a residence — being a means by which the police exercises control of *the home* — can itself *support* the finding of a detention where it is also applied in such a manner as to take control of *the person*. This is precisely what occurred here: police ordered Mr. Lafrance to get dressed and leave,

then monitored him as he made his way outside to a pre-arranged encounter with a waiting Sgt. Eros.

[48] The encounter continued after Sgt. Eros took over and made the request for a statement, and during the ride to the police station. I note that, in concluding that Mr. Lafrance was not detained at that time, the trial judge considered that he had agreed to go to the detachment to allay suspicion. My colleagues do the same, stressing Mr. Lafrance's subjective perceptions as "particularly significant" (para. 162). The test is principally objective (*Le*, at para. 114). Undue focus on an individual's subjective perception detracts from the rationales underlying the objective test (para. 115). Therefore, rather than focusing on "what was in the accused's mind at a particular moment in time", the inquiry is into "how the police behaved and, considering the totality of the circumstances, how such behavi[our] would be reasonably perceived" (para. 116).

[49] This is not to suggest that police are to be taken as detaining an individual by giving them a ride to the police station. The question is whether a reasonable person in the passenger's shoes would believe that he or she could cease cooperating by asking the police to stop the vehicle and leave; the answer will depend on all the circumstances of the case (*Coughlan and Luther*, at p. 291), including what has already transpired. And given what had already transpired in this case, a reasonable person in Mr. Lafrance's position would not in my judgment have felt remotely free to do so.

[50] The encounter then persisted through a three-and-a-half-hour interview at the police station, in an interview room described by Sgt. Eros as a “secure environment”, accessible as I have already noted through two sets of locked doors. The “security” of that environment — comprising both the interview room and the surrounding facility through which it was accessed — would tend to affirm in the mind of someone in Mr. Lafrance’s position that he or she is not free to leave at will.

[51] In sum, this was a single, lengthy police encounter. While it spanned several locations, each of them have features — the overwhelming show of force in the intrusion into the home, the long ride to the police station and the secure environment for a lengthy interview — that, taken as a whole, support the view that someone in Mr. Lafrance’s position would reasonably have perceived that he or she could not leave (*Le*, at para. 66). This supports a finding of detention.

(c) *The Particular Circumstances of the Accused*

[52] The final *Grant* factor requires a court to consider, where relevant, the individual’s “age[,], physical stature[,], minority status[, and] level of sophistication” (*Grant*, at para. 44(2)(c); *Le*, at para. 31(c)).

[53] While the trial judge acknowledged that Mr. Lafrance was young, Indigenous and had minimal police exposure at that time (para. 79), in my respectful view more was required to properly account for how the characteristics he quite rightly identified — Mr. Lafrance’s youth, his Indigenous background and his inexperience —

might shape the perspective of the reasonable person in his shoes, imbued with those characteristics. These are not factors to be checked off a list; *Grant* requires more than a straightforward acknowledgement of their presence, but actual consideration of how these various characteristics might impact the reasonable view of the matter as held by someone in like circumstances. I turn now to doing just that.

(i) Youth

[54] Mr. Lafrance’s youth — he was 19 years old — is a crucial consideration that I say, again respectfully, should have received more attention. A reasonable person’s perceptions are inevitably shaped by the knowledge and powers of discernment that comes with age and life experience (*Le*, at para. 122). Youth — even the youth of early adulthood — aggravates the power imbalance between the state and the individual, making it “more pronounced, evident and acute” (para. 122). It is simply unrealistic to suggest that a reasonable 19-year-old will, even in the presence of police statements to the contrary, feel anything but constrained to respond positively to the request to give a statement, following immediately upon the sort of police entry into his home that occurred here.

(ii) Race

[55] This Court in *Le* emphasized that the objective analysis in *Grant* must be applied in a manner that accounts for the distinct experiences and particular knowledge of racialized communities in Canada:

In *Grant*, this Court recognized how the legal standard on which a detention is measured is based on a reasonable person in like circumstances and that this norm needs to account for diverse realities. By expressly including the race of the accused as a potentially relevant consideration, this Court acknowledged that, based on distinct experiences and particular knowledge, various groups of people may have their own history with law enforcement and that this experience and knowledge could bear on whether and when a detention has reasonably occurred. Thus, to truly engage in the “realistic appraisal of the entire interaction”, as required in *Grant* (at para. 32), courts must appreciate that individuals in some communities may have different experiences and relationships with police than others and such may impact upon their reasonable perceptions of whether and when they are being detained. [para. 73]

[56] The question that trial judges must answer is “how a reasonable person of a similar racial background would perceive the interaction with the police” (*Le*, at para. 75). To answer this question, courts must take into consideration “the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society” (*Le*, at para. 75). The reasonable person in an accused’s shoes is presumed to be aware of this (*Le*, at para. 75). Moreover, this consideration is to be undertaken with sensitivity and prudence. Even in the absence of testimony on the point, trial judges assessing whether a racialized person was detained must be alive to the potential significance of this consideration (*Le*, at paras. 98 and 106; *R. v. Theriault*, 2021 ONCA 517, 157 O.R. (3d) 241, at para. 143).

[57] As recognized by the trial judge, Mr. Lafrance is Indigenous. As such, he is a member of a population that continues to be disproportionately subjected to police encounters and overrepresented in the criminal justice system (*R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 58-65; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at

paras. 57-60; *Le*, at paras. 90-97 and 108). The assessment of whether an Indigenous person was detained must be mindful of “[g]enerations of systematic racism, discriminatory policies and practices directed at Indigenous people” and of the role of police in implementing these policies and practices (Statistics Canada, *Perceptions of and experiences with police and the justice system among the Black and Indigenous populations in Canada* (February 2022), at p. 12). This has fostered mistrust, confirmed by the finding of a February 2022 study that “[a] higher proportion of Indigenous people under 40 felt police were doing poorly at enforcing the laws, promptly responding to calls, ensuring the safety of citizens, and treating people fairly compared to the similarly aged non-Indigenous, non-visible minority population” (Statistics Canada, at p. 11). This finding applied equally to older Indigenous people (Statistics Canada, at p. 11).

[58] This consideration will often weigh in favour of finding a detention, but not invariably. A court cannot simply assume that all Indigenous people’s experiences with the police are *Charter* non-compliant or otherwise oppressive. And not all Indigenous people will be vulnerable, at all or in the same way, when interacting with police (K. G. Watkins, “The Vulnerability of Aboriginal Suspects When Questioned by Police: Mitigating Risk and Maximizing the Reliability of Statement Evidence” (2016), 63 *Crim. L.Q.* 474, at p. 479). The point is not that *Grant* or *Le* leave no room for nuance in evaluating interactions between Indigenous people and the police; it is, rather, that trial judges must be alive to (1) “the relational aspect” between the police and Indigenous persons (*Le*, at para. 81), characterized as it has been by an

overwhelming power imbalance and history of discrimination; and (2) the resulting possibility that their interactions would reasonably be perceived by Indigenous persons as depriving them of choice to cooperate.

[59] Taking the foregoing and the record of this case into account, it would appear that Mr. Lafrance’s Indigenous background played no significant role in shaping his perception of his obligation to cooperate with the police on March 19. But, to be clear, that is not the question. Again, the inquiry is *objective*, not grounded in his subjective impressions. The question, then, is whether the reasonable person in Mr. Lafrance’s position would understand his or her options as limited to cooperating by reason of an Indigenous background. On this slender record, and absent any evidence to the contrary regarding Mr. Lafrance’s circumstances, his Indigenous background is a factor that weighs somewhat in favour of detention, albeit not heavily. This accounts for what I have already described as the overrepresentation of Indigenous peoples in the criminal justice system, and the “relational aspect” of the interaction between Indigenous people and police that must always be borne in mind.

(iii) Level of Sophistication

[60] The trial judge held that Mr. Lafrance was a “not unsophisticated” individual with minimal exposure to the police (paras. 79 and 81). He characterized Mr. Lafrance, a high school graduate who had studied power engineering, as intelligent. I see no palpable and overriding error in these findings.

[61] My point of respectful departure from the trial judge is in applying these findings to decide how a reasonable person in Mr. Lafrance’s position would perceive his options in his interactions with the police. “Sophistication”, without elaboration, may be an unhelpful ascription; here, the trial judge noted only that “[a]t best, the accused was naïve in deciding his participation would counter police suspicion” (para. 81), which tends to undermine, not explain, the ascription. “Intelligence”, while more precise, does not necessarily connote an understanding of legal rights, including the right to refuse to cooperate with the police. Mr. Lafrance, for example, had never before found himself in circumstances requiring him to know his rights (which, if anything, suggests a *lack* of sophistication in a crucial respect here).

[62] All told, the trial judge’s finding of Mr. Lafrance’s sophistication (or, more accurately, lack of *unsophistication*) does not undermine the case for finding a detention. Rather, his lack of experience with the police and unfamiliarity with his *Charter* rights bolsters it.

(4) Conclusion Regarding the Encounter of March 19, 2015

[63] All three *Grant* factors — the circumstances giving rise to the encounter, the nature of the police conduct, and the particular characteristics or circumstances of the individual — weigh decisively here, on the facts of this case, in favour of finding that Mr. Lafrance was first detained when he, a young Indigenous man with minimal police exposure, was awoken in the early morning by the police inside his home, and commanded to get dressed and leave. He continued to be detained throughout the

encounter, including outside the home, in the police van and in the interview room of the police station, all of which involved the near-continuous supervision and presence of the police, until the conclusion of his interview on March 19, and I so find.

[64] It follows that police were required to inform Mr. Lafrance of his s. 10(b) right to counsel and to afford him the opportunity of exercising it, and breached that right by failing to do so. My colleagues say that this conclusion means that the combination of an accused young person and the execution of a search warrant will always result in a finding of detention (para. 160). But that is not so; it is only where the police execute a warrant in a way that leads the reasonable person in the accused's shoes to believe that, in the entirety of the circumstances, he or she is not free to leave, that a detention would arise. Such was the case here: given the overwhelming force in which a team of police officers arrived at Mr. Lafrance's home, ordered him to get dressed and leave his home, and monitored his every movement, the officers should have recognized that a reasonable person in Mr. Lafrance's shoes would feel obliged to comply with their demands and would conclude that he or she was not free to go. In such situations, the police should have informed him of his rights under s. 10(b) of the *Charter*. I will turn to the consequences of this breach below, after considering his encounter with police on April 7.

B. *April 7, 2015*

[65] Mr. Lafrance says that he could not properly exercise his right to counsel under s. 10(b) on April 7, after he was arrested. Sgt. Eros, he says, should have allowed

him to speak with his father so he could obtain his own lawyer and receive further legal advice.

[66] Citing *Sinclair*, the trial judge concluded that the *Charter* did not compel Sgt. Eros to accede to Mr. Lafrance’s request for a further consultation. The majority of the Court of Appeal, however, viewed Mr. Lafrance’s request to speak with his father as falling within what *Sinclair* described as a “change in circumstances” suggesting a significant alteration of the choice to be made by the accused. Mr. Lafrance’s request, said the majority, “show[ed] that [he] may not have understood the initial s. 10(b) advice he received from legal aid counsel [. . .], that he needed the opportunity to pose further questions of counsel and have those questions answered, and that the initial advice he received, viewed contextually, was no longer sufficient” (para. 53). Alternatively, the majority would have held that Mr. Lafrance’s case would “fall within an open category, one not expressly defined in *Sinclair*” (paras. 53 and 64).

[67] For the reasons that follow, I am closer to the Court of Appeal’s view of the matter. As I will explain, this matter falls within the “change in circumstances” category described in *Sinclair*. Given this conclusion, I need not address the Court of Appeal’s alternative position that this case falls within an open-ended *Sinclair* category.

(1) The Purpose of Section 10(b) and the *Sinclair* Framework

[68] In *Sinclair*, the accused was arrested for second-degree murder, advised of his right to counsel and allowed two three-minute conversations with a lawyer of his choice. He was then interviewed for five hours, during which time his repeated requests to have his lawyer present or to speak with him again were refused. Eventually, he confessed after the interviewing officer made him believe that police had found incriminating evidence confirming his involvement. The accused sought to have his confession excluded, alleging a breach of s. 10(b).

[69] This Court ruled his confession admissible. Section 10(b) does not confer the right to have a lawyer present during a police investigation. And, a single consultation with a lawyer is constitutionally sufficient, absent a change in circumstances or new developments that suggest that the choice faced by the accused has been “significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(b) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not” (*Sinclair*, at para. 65). Such a change in circumstances or new development is not demonstrated, the Court added, where police engage in “the common . . . tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against [them]” (para. 60).

[70] This followed, said the Court, from the purpose of s. 10(b), being “to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation” (*Sinclair*, at para. 24) or, more particularly, “to allow the detainee not only

to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights” (para. 26, citing *Manninen*, at pp. 1242-43). In the context of a custodial interrogation, the Court added that s. 10(b) seeks “to support the detainee’s right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation [they are] facing” (para. 32).

[71] So understood, s. 10(b) reminds police of the constitutional limits to their interrogation of detainees. As this Court also recognized in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at pp. 394-95, underlying s. 10(b) is a concern to mitigate the unfairness that prevails where *the police* understand the accused’s right to choose whether to speak to them, but *the accused* may lack that understanding. Key to realizing s. 10(b)’s promise to detainees of fair treatment is furnishing access to legal advice, since that advice is meant to level the playing field by ensuring, first of all, that detainees *do* understand their rights, “chief among which is [the] right to silence” (*R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 176); and, secondly, that they understand how to exercise those rights (*Sinclair*, at para. 29). This includes knowing of “the benefits and drawbacks of cooperating with the police investigation, as well as strategies to resist cooperation should that be the detainee’s choice” (C.A. reasons, at para. 48).

[72] Properly understood and applied, *Sinclair* gives effect to s. 10(b) and achieves its purpose. It identifies within s. 10(b) an informational component (requiring police to advise detainees of their right to counsel), and an implementational

component (requiring police to allow detainees to exercise their right to consult counsel), which implicitly includes “a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel” (para. 27). And, as just noted, *Sinclair* also recognized that the implementational component of s. 10(b) imposes upon police a further obligation: to provide a detainee with a reasonable opportunity to consult counsel *again* if a change in circumstances or a new development makes this necessary to fulfill s. 10(b)’s purpose (para. 53). Three non-exhaustive categories of exceptional circumstances triggering this duty were identified (at paras. 49-52): (1) the police invite the accused to take part in non-routine procedures that counsel would not consider at the time of the initial consultation; (2) there is a change in jeopardy that could affect the adequacy of the advice received during the initial consultation; and (3) there is reason to question the detainee’s understanding of his rights. It is that third category which the Court of Appeal thought applicable here. I agree.

[73] In *Sinclair*, this category was “broadly” stated as covering, *inter alia*, “circumstances indicating that the detainee may not have understood the initial s. 10(b) advice of his right to counsel”, which “impose on the police a duty to give him a further opportunity to talk to a lawyer” (para. 52). This raises the question of how such circumstances are to be identified — that is, what it means for a detainee to not understand “the initial s. 10(b) advice” such that a second legal consultation is necessary. I note, parenthetically, that the third category also covers a different type of potential s. 10(b) breach, i.e., where “the police undermine the legal advice that the

detainee has received [in a way that] may have the effect of distorting or nullifying it” (para. 52; see *R. v. Dussault*, 2022 SCC 16, at para. 35). The Court’s recent judgment in *Dussault* comprehensively reviews the kind of police conduct that could be said to “undermine” the legal advice that a detainee receives (paras. 36-45).

[74] The caselaw reveals two general approaches to assessing detainees’ understanding of s. 10(b) advice. The first — narrower, relative to the second — tends to focus on the fact of the earlier consultation or, where applicable, on a detainee’s assertion of his or her right to silence (see, e.g., *R. v. Pagé*, 2018 QCCS 5553, at paras. 20-21 (CanLII); *R. v. Smith*, 2015 ABQB 624, at paras. 66-68 (CanLII); *R. v. Ejigu*, 2012 BCSC 1673, at para. 58 (CanLII); and *R. v. Jongbloets*, 2017 BCSC 740, at paras. 109-10 and 113 (CanLII)). The second approach inquires into “the overall context”, or “the situation ‘on the ground’” (*R. v. A.R.M.*, 2011 ABCA 98, 599 A.R. 343, at paras. 25 and 40) that properly inform the reasonable perceptions of police of whether detainees understand their right to silence and how to exercise it (see, e.g., *R. v. Laquette*, 2021 MBQB 177, at para. 93 (CanLII): “Perhaps, in this case, the Applicant, because of her youth and inexperience in engaging with law enforcement, should have been afforded [a further consultation with legal counsel]” (emphasis added); *R. v. Hunt*, 2020 ONCJ 627, at para. 51 (CanLII): “In most cases, it can be inferred from the circumstances that the detainee understands what he or she has been told, but where there are circumstances where the detainee may not understand his or her [right to counsel], the police must take steps to facilitate that understanding [including] giving consideration to the detainee’s understanding and capacity to

understand” (emphasis added); and *R. v. Fedoseev*, 2014 ABPC 192, 597 A.R. 1, at paras. 55-63).

[75] Bearing in mind that the third *Sinclair* category was “broadly” stated by this Court by reference to “circumstances” indicating that “the detainee may not have understood the initial s. 10(b) advice”, two points merit emphasizing (*Sinclair*, at para. 52). First, the inquiry is into *circumstances*, stated *broadly*. This connotes an examination not merely of whether the detainee consulted legal counsel, but of the entire context in which the police-detainee interaction occurred (as in *A.R.M.*), including the circumstances of the detainee (as in *Laquette* and *Hunt*). Secondly, and therefore, an inquiry strictly into whether a detainee understood that he or she could remain silent is not sufficient. The issue, after all, is not merely whether the detainee was *advised*; the third category presumes that to have occurred. Section 10(b) requires much more than that (a point repeatedly stressed in *Sinclair*: see paras. 2, 24-26, 28-29, 32, 47-48, 53, 57 and 65). Rather, it is that the detainee *may not have understood* the legal advice he or she received *including*, as the Court of Appeal correctly noted, whether and how to exercise the right to silence, which itself includes “the benefits and drawbacks of cooperating” and “strategies to resist cooperation” where that is the detainee’s choice.

[76] Such an approach is not only more faithful to *Sinclair*; it is also consistent with this Court’s direction in *Grant* that “[c]onstitutional guarantees such as ss. 9 and 10 should be interpreted in a ‘generous rather than . . . legalistic [way], aimed at

fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection” (para. 16, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). I have already stressed that s. 10(b)’s purpose is not achieved merely by allowing the detainee an opportunity to be advised of the right to silence, but also extends to advice regarding how to exercise that right in the face of police interrogation. And coupled with *Sinclair’s* concern for the circumstances of the detention, which I have explained include the circumstances of the detainee, it follows that the purposive and generous understanding of s. 10(b) mandated by *Grant* recognizes that the exercise by accused persons of that right depends on access to legal advice regarding “the [particular] situation [they are] facing”, conveyed *in a manner that they understand* (*Sinclair*, at para. 32 (emphasis added)).

[77] Absent that understanding, the work done by our jurisprudence (notably, in *Grant* and *Le*) on detention under s. 9 to account for and mitigate the power imbalance between the state and a detainee would be undone by an impoverished understanding of s. 10(b)’s protections, inconsistent with *Sinclair* itself and corrosive of the liberty of the subject. A purposive and generous understanding of s. 10(b) and, by extension, of the third *Sinclair* category, also reflects that practical reality of police-citizen interactions of which I have already spoken, and which obtains *a fortiori* in circumstances of arrest or detention: the detainee is in a position of disadvantage relative to the state (V. A. MacDonnell, “*R v Sinclair: Balancing Individual Rights and Societal Interests Outside of Section 1 of the Charter*” (2012), 38 *Queen’s L.J.* 137, at p. 156). This disadvantage is no small matter, particularly given that the police may

employ tactics such as lying during an interrogation. It is only by ensuring that detainees obtain legal advice that accounts for *the particular situation they face*, conveyed *in a manner they can understand*, that s. 10(b) can meaningfully redress the imbalance of power between the state (whose agents know the detainee’s rights) and the detainee (who may not).

[78] My colleagues say it is inaccurate to describe s. 10(b)’s purpose as being “to mitigate the imbalance between the individual and the state” (para. 168). With respect, this proposition is uncontroversial. Despite my colleagues’ view to the contrary, it follows from this Court’s statement in *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429, at para. 28, that “s. 10(b) provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy”, and that “[t]he purpose of s. 10(b) is to provide detainees an opportunity to mitigate this legal disadvantage”. While my colleagues claim that *Sinclair*, at paras. 30-31, rejects this view, this is, again said respectfully, a misreading of *Sinclair*. At issue in those passages was *not* whether s. 10(b)’s purpose is to cure that power imbalance, but *how* it does so. The dissenters LeBel and Fish JJ. maintained that it does so *by conferring a continuing right to counsel* throughout the accused’s police interview (paras. 30 and 154). The majority, however, held that it does so by conferring a right to consult counsel “to obtain information and advice immediately upon detention” (para. 31) in order to fulfill “the purpose of s. 10(b) . . . to support the detainee’s right to choose whether to cooperate with the police investigation or not, by

giving [them] access to legal advice on the situation he is facing” (para. 32 (emphasis added)).

[79] The degree of imbalance between police and detainee will of course vary from case to case, depending on the particular circumstances of the detainees themselves. Specific characteristics of individual detainees (described as “vulnerabilities” in the context of police interrogation) can influence the course of custodial interviews. Investigating officers and reviewing courts must be alive to the possibility that these vulnerabilities, which may relate to gender, youth, age, race, mental health, language comprehension, cognitive capacity or other considerations, coupled with developments that may occur in the course of police interrogation, will have rendered a detainee’s initial legal advice inadequate, impairing his or her ability to make an informed choice about whether to cooperate with the police. In such situations, *Sinclair* requires that an accused is entitled to an additional consultation to even the playing field.

(2) The Need for a Second Consultation on April 7, 2015

[80] With the foregoing in mind, I turn now to consider whether the police breached Mr. Lafrance’s s. 10(b) right to counsel by refusing to allow him to seek a second consultation with a lawyer.

[81] The police fulfilled the informational component of s. 10(b). Having arrested Mr. Lafrance for murder, they told him of the reason for his arrest, and of his

right to silence. Likewise, the police also, initially at least, satisfied the implementational component: upon arrival at the police station, Mr. Lafrance was taken to a telephone room and was able to speak with a lawyer from Legal Aid. Sgt. Eros deferred starting the interview until Mr. Lafrance confirmed that he had received and understood the advice given to him by Legal Aid.

[82] The question therefore arises whether any of the exceptions in *Sinclair* applied to require the police to allow Mr. Lafrance another opportunity to consult with counsel. I do not agree with Mr. Lafrance that his circumstances would fit into *any* of the three *Sinclair* categories of exceptional circumstances that require an additional consultation. The first category — where police invite the accused to take part in non-routine procedures that counsel would not consider at the time of the initial consultation — does not apply, because the police here did not employ any new or unusual investigative techniques. Likewise, the second category — a change in jeopardy which could affect the adequacy of the advice received during the initial to the actual situation — is inapplicable because there was no change in jeopardy during the interview. Mr. Lafrance had been informed that he was accused of murder and that remained true at all times during the interview on April 7.

[83] The difficulty arises, however, from Mr. Lafrance's request in the course of the police interview to speak with his father because that was his "only chance of getting a lawyer". The Crown argues that there is no constitutional right to speak to a

detainee's father, but that is not a fair characterization of Mr. Lafrance's request, which drew an explicit connection between talking to his father and talking to a lawyer:

- Q. Alright so what happens Nigel?
 A. Well –
 Q. What – what went on?
 A. Well I would – ah I want to talk to my dad before I continue.
 Q. Ok wh – why do you say that?
 A. Cause well he's – well he's my only chance of getting a lawyer and I just – I don't know. [Emphasis added.]

(A.R., vol. V, at p. 137)

It is also inaccurate to describe Mr. Lafrance, as the Crown and trial judge do, as simply requesting that a lawyer be present with him during the interview. He clarified to Sgt. Eros that what he really sought was an opportunity to *get*, and *speak to*, a lawyer:

- A. Well no they told me – they told me to get a lawyer before I continue talking.
 Q. Ok what do you mean by told you to get a lawyer?
 A. Like someone that can come down and sit with me.
 Q. Ok.
 A. Instead of just over the phone.
 Q. There's a person that ah you know what – and the way that that kinda goes ah – I won't say it's, it's bad advice but it's maybe miss – a little bit miss as – miss ah – interrupted. Um there's not any time or any process during our interview –
 A. Um?
 Q. Where we're gonna have a lawyer sitting in the room with us.
 A. No, no I – I mean, no mean like so –.
 Q. Ok.
 A. Like for me to sit down with them personally.
 Q. Ok.
 A. To talk to. [Emphasis added.]

(A.R., vol. V, at p. 139)

[84] Sgt. Eros then questioned Mr. Lafrance about his conversation with Legal Aid. While Mr. Lafrance acknowledged that he was told that he did not have to say anything, there were also clear signs that either the legal advice he obtained was incorrect, or he did not understand how his s. 10(b) rights applied to his current circumstances. Mr. Lafrance explained to Sgt. Eros that the advice he obtained from Legal Aid was to “get a lawyer before [he] continue talking” and get “someone that can come down and sit with [him]” (A.R., vol. V, at p. 139) — indicating either that Mr. Lafrance had incorrectly interpreted the advice he received or, as Sgt. Eros hinted at, that he had received “bad advice”.

[85] This represents, to my mind, a critical moment in Mr. Lafrance’s encounter with the police. Faced with a detainee who was obviously ignorant as to his rights, Sgt. Eros had a choice: to press ahead with the interview, whether despite or because of that ignorance; or, to allow the subject an opportunity to clarify his rights and how to exercise them in his circumstances. Sgt. Eros chose the former course; the Constitution demanded the latter.

[86] There was ample reason here to question Mr. Lafrance’s understanding of his s. 10(b) right, bringing his circumstances within the third *Sinclair* category. While it is true that general confusion or a “nee[d for] help” is not a ground for further consultation with counsel (*Sinclair*, at para. 55), Mr. Lafrance was not, as my colleagues say, experiencing “mere confusion” or “discomfort” (paras. 177-83 (emphasis deleted)). To explain, and as my colleagues acknowledge, a “changed

circumstance” can arise “[w]hen there is reason to question the detainee’s understanding of his s. 10(b) right” (para. 172). That is this case. His confusion was an “objective indicat[or] that renewed legal consultation was required to permit him to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so” (*Sinclair*, at para. 55). And this is because the information to which he had a right under s. 10(b) had not been conveyed, either at all or in a manner he understood (para. 52).

[87] The concern that should reasonably have arisen in the mind of the investigating officer that Mr. Lafrance may not have understood his rights and how to exercise them is affirmed, if not heightened, when considered in light of Mr. Lafrance’s particular characteristics. It is entirely plausible that a 19-year-old with no previous experience of detention or custodial interviews might have difficulty understanding his or her rights, not ever having had to exercise them or even speak with a lawyer before. While the trial judge found him “not unsophisticated”, as I have already explained he was obviously *unsophisticated* in ways that matter here. Finally, and while, as I have explained, it is not clear that this was a present factor in this case, in view of Mr. Lafrance’s Indigenous heritage I note that investigating officers and reviewing courts should be alive to the pronounced power imbalance that arises from the unique, historical vulnerability of Indigenous people in their encounters with the criminal justice system (Watkins, at pp. 493-95). All these considerations — none of which are taken into consideration by my colleagues — further support the conclusion that Mr. Lafrance’s circumstances fall within the third *Sinclair* category.

(3) Conclusion on Breach of Section 10(b) on April 7, 2015

[88] The police breached Mr. Lafrance's s. 10(b) right to counsel by refusing to provide another opportunity to consult with a lawyer despite there being reason to conclude that he had not understood his s. 10(b) advice, even after having spoken with Legal Aid. I now turn to the consequences that follow from this breach and from the March 19 breach of Mr. Lafrance's s. 10(b) right.

C. *Section 24(2) of the Charter*

[89] Section 24(2) of the *Charter* is remedial: its purpose is to uphold *Charter* rights by providing effective remedies to those whose rights have been breached (*R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 19 and 21). And its text is categorical: where evidence was obtained in a manner that infringed a *Charter* right or freedom, that evidence *shall* be excluded if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute (*Le*, at para. 139). The standpoint to be adopted throughout is, therefore, that of the administration of justice. As this Court emphasized in *Le*:

Where the state seeks to benefit from the evidentiary fruits of *Charter*-offending conduct, our focus must be directed not to the impact of state misconduct upon *the criminal trial*, but upon *the administration of justice*. Courts must also bear in mind that the fact of a *Charter* breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice. What courts are mandated by s. 24(2) to consider is whether the admission of evidence risks doing further damage by diminishing *the reputation* of the administration of justice — such that, for example, reasonable members of Canadian society might wonder whether

courts take individual rights and freedoms from police misconduct seriously. We endorse this Court’s caution in *Grant*, at para. 68, that, while the exclusion of evidence “may provoke immediate criticism”, our focus is on “the overall repute of the justice system, viewed in the long term” by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights. [Emphasis in original; para. 140.]

[90] Would, then, allowing the Crown to rely on the evidence obtained on March 19 and April 7 in breach of Mr. Lafrance’s *Charter* rights bring the administration of justice into disrepute? Deciding this entails considering and balancing the three lines of inquiry identified in *Grant*: (1) the seriousness of the *Charter*-infringing conduct; (2) the impact on the *Charter*-protected interests of the accused; and (3) society’s interest in the adjudication of the case on its merits (para. 71; *Le*, at paras. 139-42; *R. v. Tim*, 2022 SCC 12, at para. 74). While the first two lines of inquiry typically work in tandem, it is not necessary that both of them support exclusion in order for a court to determine that admission would bring the administration of justice into disrepute (*Le*, at para. 141). As the Court said in *Le*, “[i]t is the sum, and not the average, of those first two lines of inquiry that determines the pull towards exclusion” (para. 141). In other words, 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 when assessing whether evidence should be excluded. That is why the third line — which typically pulls towards a finding that admission would not bring the administration of justice into disrepute — will seldom tip the scale in favour of admissibility when the two first lines, taken together, make a strong case for exclusion (*Le*, at para. 142; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 56).

[91] An analysis pursuant to s. 24(2) — which is an exercise in judicial discretion by the trial judge — attracts deference as to the supporting findings of fact (*Grant*, at paras. 43 and 86). But the application of the law to the facts is a question of law (*Grant*, para. 43). Further, an appellate court owes no deference where it disagrees with the trial judge’s conclusions on the *Charter* breaches (*Le*, at para. 138; *Grant*, at para. 129; *Paterson*, at para. 42).

[92] Here, the trial judge did not consider s. 24(2), given his conclusion that the police did not breach Mr. Lafrance’s *Charter* rights. Instead, it was the Court of Appeal that considered the *Grant* factors and held that admission of the evidence would bring the administration of justice into disrepute. This Court does not lack jurisdiction to consider alleged errors in the s. 24(2) analysis of the Court of Appeal (*R. v. Reilly*, 2021 SCC 38). But we must bear in mind that this Court and the Court of Appeal are, essentially, on identical footing for an analysis under s. 24(2), neither court having had the benefit of observing the witnesses or hearing testimony first-hand. I will therefore conduct a fresh s. 24(2) analysis. As I will explain, however, I largely agree with the Court of Appeal’s analysis.

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

[93] The first *Grant* inquiry speaks to the importance of courts dissociating themselves from evidence obtained as a result of police failure to meet *Charter* standards, because of its negative impact on the reputation of the administration of justice (*Le*, at para. 143). In deciding whether this is necessary, they must “situate that

conduct on a scale of culpability” (*Paterson*, at para. 43; see also *Tim*, at para. 82). Inadvertent or minor violations tend only to minimally undermine public confidence in the rule of law and, consequently, bear only slightly upon the reputation of the administration of justice, while evidence obtained “through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law” (*Paterson*, at para. 43; *Grant*, at para. 74; see also *Le*, at para. 143; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22). And evidence obtained by police negligence in meeting *Charter* standards does not qualify as a “good faith” error, but instead supports a conclusion that a court should dissociate itself from such evidence (*Le*, at para. 143; *Tim*, at para. 85).

[94] The Court of Appeal described the denial of the right to counsel on March 19 and April 7 as “particularly serious given the grave nature of the offence under investigation, the potential consequences of conviction on [Mr. Lafrance] and his particular vulnerability given his young age and circumstances in life” (para. 79). While it did not believe that these breaches “occurred through a willful or reckless disregard of *Charter* rights”, the Court of Appeal nevertheless held that the *Charter*-infringing conduct remained serious (para. 80).

[95] I agree entirely. That the *Charter* infringing conduct here was not reckless does not mean that police acted in “good faith” or that the absence of recklessness is a mitigating factor (*Le*, at para. 143; *Paterson*, at para. 44; *Harrison*, at para. 25; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59). On both March 19 and April 7,

the police conduct resulted in serious breaches of Mr. Lafrance's *Charter* rights. This favours a finding that admission of the resulting evidence would bring the administration of justice into disrepute.

(2) Impact of the Breaches on the *Charter*-Protected Interests of the Accused

[96] The second *Grant* inquiry requires the Court to consider whether, from the standpoint of society's interest in respect for *Charter* rights, the admission of evidence tainted by the *Charter* breach would bring the administration of justice into disrepute (*Le*, at para. 151). Like the first inquiry, this inquiry is into the degree of seriousness. As a general rule, "[t]he more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute" (*Grant*, at para. 76; *Le*, at para. 151).

[97] This case involved two breaches of s. 10(b). While not determinative, I am alive to the Court's description of the right guaranteed by s. 10(b) as "the single most important organizing principle in criminal law" (*R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 577). Any breach of this provision "undermines the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination" (*Grant*, at para. 95). As the Court of Appeal's analysis makes plain, those particular consequences were of a serious nature here: "[Mr. Lafrance] was led to confess to killing a person

without having an opportunity for a thorough, reflective discussion with a lawyer fully apprised of his jeopardy” (para. 82). I see no basis to diverge from the Court of Appeal’s assessment that this had “a serious impact” on Mr. Lafrance’s *Charter* rights (para. 82). The second line of *Grant* supports the view that admitting this evidence would bring the administration of justice into disrepute.

(3) Society’s Interest in the Adjudication for the Case on its Merits

[98] The third *Grant* line is concerned with the societal interest in “an adjudication on the merits”, coupled with a focus on the impact of state misconduct upon the reputation of the administration of justice (*Le*, at para. 158). Society’s interest in an adjudication of the case on its merits typically pulls towards a finding that admission of the evidence would not bring the administration of justice into disrepute, but not all considerations will pull in this direction (*Le*, at paras. 142 and 158). As the Court explained in *Le*:

While this inquiry is concerned with the societal interest in “an adjudication on the merits” (*Grant*, at para. 85), the focus, as we have already explained, must be upon the impact of state misconduct upon the reputation of the administration of justice. While disrepute may result from the exclusion of relevant and reliable evidence (*Grant*, at para. 81), so too might it result from admitting evidence that deprives the accused of a fair hearing or that amounts to “judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies” (*[R. v.] Collins*, [1987] 1 S.C.R. 265], at p. 281). An “adjudication on the merits”, in a rule of law state, presupposes an adjudication grounded in legality and respect for longstanding constitutional norms. [para. 158]

[99] The Court of Appeal did not explicitly state whether this line of inquiry favours admission or exclusion, but the majority's reasons tend to suggest that it only slightly favours admission (paras. 83-84). While the evidence appeared *prima facie* reliable given its nature as a confession, it was "largely extraneous to the core of the Crown's case", given that Mr. Lafrance confessed only to having caused Mr. Yasinski's death and not to having planned or intended to kill him (para. 84). The remaining evidence, the majority observed, did not leave the Crown without a case on either manslaughter or second degree murder.

[100] I agree with what I understand to be the Court of Appeal's conclusion that the third *Grant* line supports admission, but not heavily so. The evidence relates to a serious criminal offence, but society's interests are not strongly affected given the other evidence available to the Crown on re-trial.

(4) Admission of the Evidence Would Bring the Administration of Justice Into Disrepute

[101] Taken together, the three *Grant* lines of inquiry confirm that the admission of the evidence would bring the administration of justice into disrepute. These were two serious breaches with a correspondingly significant impact on the s. 10(b) rights of Mr. Lafrance. The first and second lines of inquiry therefore present a strong case for exclusion of the evidence. On the other hand, society's interest favours admission of the evidence, but not strongly. Taken cumulatively, the strength of the first two lines

of inquiry overwhelms the moderate impact on society's interest in the truth-seeking function of the criminal trial process.

[102] It follows that the evidence obtained as a result of the breaches of Mr. Lafrance's *Charter* rights on March 19 and April 7 must be excluded.

V. Conclusion

[103] I would dismiss the appeal.

The reasons of Wagner C.J. and Moldaver, Côté and Rowe JJ. were delivered by

CÔTÉ AND ROWE JJ. —

I. Introduction

[104] This case involves what should be a straightforward application of this Court's jurisprudence under ss. 9 (the right against arbitrary detention), 10(b) (the right to retain and instruct counsel on detention) and 24(2) (exclusion of unconstitutionally obtained evidence when its admission would bring the administration of justice into disrepute) of the *Canadian Charter of Rights and Freedoms*. The majority of this Court begins its analysis by acknowledging this, but proceeds to adopt interpretations of those

sections that depart from that jurisprudence. We cannot agree with that approach and the proposed outcome of this case.

II. Facts and Decisions Below

[105] We do not find it necessary to repeat all the facts and issues as set out by our colleagues, but we wish to comment briefly on the findings of the trial judge and the analysis applied to those findings by the Court of Appeal.

[106] The respondent, Nigel Vernon Lafrance, an Indigenous man who was 19 years old at the time, was linked to the killing of Anthony Yasinski, his drug dealer, on March 17, 2015. Mr. Lafrance was the last person Mr. Yasinski communicated with on his cellphone. Therefore, police quickly identified Mr. Lafrance as a person of interest.

[107] Police obtained a search warrant for Mr. Lafrance's residence and, while executing it on March 19, 2015, asked him if he would provide a statement at the police station. Mr. Lafrance was informed that his participation was voluntary and that he did not have to provide a statement. Nonetheless, he chose to do so and accompanied police officers to the station where he was interviewed by Sgt. Eros. He was not informed of his s. 10(b) rights at this interview.

[108] Almost three weeks later on April 7, 2015, Mr. Lafrance was arrested for the murder of the victim and interviewed at the police station again. When Mr. Lafrance

arrived at the RCMP detachment, he was supplied with telephone books and a telephone number for Legal Aid Alberta. Mr. Lafrance spoke to a lawyer for approximately 15 minutes. After that conversation, an officer asked whether Mr. Lafrance understood the advice, to which he responded “yes”. The officer asked, then, if the lawyer would be attending the RCMP detachment, to which he responded “no” (see trial reasons, 2017 ABQB 746, 399 C.R.R. (2d) 184, at para. 124; R.F., at para. 7 (emphasis added)).

[109] The questioning did not begin until after Sgt. Eros was informed that Mr. Lafrance had consulted counsel. During the interview, five and a half hours after speaking with Legal Aid, Mr. Lafrance asked to call his father who, according to him, would be able to help him get a lawyer to come to the station. Police refused that request on the basis that he had already spoken to a lawyer. Mr. Lafrance subsequently confessed to the killing.

[110] At trial, Mr. Lafrance challenged the admission of the evidence obtained as a result of the March 19, 2015 statement and the April 7, 2015 statement, confession and evidence obtained as a result.

[111] The trial judge found that there were no breaches of Mr. Lafrance’s s. 10(b) or other *Charter* rights. Regarding the March 19, 2015 interview, the trial judge found Mr. Lafrance was not detained within the meaning of ss. 9 and 10(b). Police repeated several times that he could leave whenever he liked, and he understood these statements. Any statement to the contrary was not credible as it was belied by his “at

ease” and “cooperative” manner in the interview (para. 73). Mr. Lafrance was “naïve”, but “not unsophisticated” (para. 81). In fact, the trial judge found that Mr. Lafrance tactically participated in the interview because he believed this could counter police suspicion.

[112] Further, the trial judge found that police properly implemented Mr. Lafrance’s s. 10(b) rights on April 7, 2015. Mr. Lafrance was not entitled in law to a further consultation with a lawyer after his conversation with Legal Aid. The trial judge found that none of the circumstances that would require a further consultation under *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, arose in this case.

[113] The trial judge commented that even assuming there was a breach of s. 10(b) on March 19, 2015, its effect on the admissibility of evidence had to be considered. He found that since the Crown did not seek to introduce any evidence or the statement obtained on March 19, 2015, the issue of exclusion of this evidence under s. 24(2) was moot. The trial judge also found an insufficient causal, temporal or contextual connection between the March 19, 2015 statement and the April 7, 2015 statement such that any breach on March 19, 2015, did not taint the confession or other evidence obtained as a result of the April 7, 2015 interrogation. In reaching this conclusion, the trial judge relied on Mr. Lafrance’s own testimony that the March 19, 2015 statement “had nothing to do with” him providing the April 7, 2015 statement (para. 99).

[114] Consequently, the trial judge did not exclude any evidence and dismissed Mr. Lafrance's *Charter* application. Mr. Lafrance was convicted by a jury of second degree murder.

[115] Mr. Lafrance appealed his conviction based in part on the s. 10(b) *Charter* rulings. The majority of the Alberta Court of Appeal found the trial judge erred in concluding there were no s. 10(b) *Charter* breaches (2021 ABCA 51, 20 Alta. L.R. (7th) 211). The majority stated that the trial judge did not appreciate the stage of the police investigation and undervalued Mr. Lafrance's perceptions as a young Indigenous man and, therefore, erred in his analysis of whether there was a detention on March 19, 2015. The majority concluded that he was detained and, accordingly, should have been provided with his s. 10(b) rights.

[116] As for April 7, 2015, Mr. Lafrance was confused by the Legal Aid lawyer's advice. The majority of the Court of Appeal concluded that a second consultation was required under *Sinclair* because the advice was insufficient or, arguably, as a result of new procedures. It also concluded that even if no category expressly described in *Sinclair* applied, a new consultation was necessary to fulfill the purpose of s. 10(b). Failure to provide Mr. Lafrance with a further consultation was a s. 10(b) breach. The majority of the Court of Appeal therefore allowed the appeal, held that the evidence obtained as a result of the March 19, 2015 statement and the April 7, 2015 statement be excluded and ordered a new trial.

[117] Wakeling J.A., in dissent, concluded that the trial judge did not commit any errors and there were no s. 10(b) breaches. Regarding March 19, 2015, he was of the view that there was no detention because the police told Mr. Lafrance several times that he was free to leave. Absent exceptional circumstances, which did not arise, that should be a bright line test that is determinative of detention. With regard to April 7, 2015, Mr. Lafrance received and understood the Legal Aid lawyer's advice. He had no right to talk to his father or to further consult a lawyer. Wakeling J.A. would have dismissed the appeal.

III. Analysis

[118] We disagree with the majority on three key issues. First, we are of the view that Mr. Lafrance was not detained within the meaning of s. 10(b) of the *Charter* on March 19, 2015. Second, we conclude that Mr. Lafrance was not entitled to a second consultation with counsel under s. 10(b) during the April 7, 2015 interrogation. Third, if Mr. Lafrance was detained on March 19, 2015, there is an insufficient link between the resulting *Charter* breach and the evidence relating to the April 7, 2015 interrogation that he sought to exclude under s. 24(2).

A. *Mr. Lafrance Was Not Detained Within the Meaning of Sections 9 and 10(b) of the Charter on March 19, 2015*

[119] We are of the view that Mr. Lafrance was neither psychologically nor physically detained by police on March 19, 2015. Our disagreement with the majority turns on three key points.

[120] First, while the majority states that the trial judge's findings of fact are entitled to deference (at para. 23), it then goes on to substitute its own view of the evidence for that of the trial judge. The majority pays scant attention to the trial judge's findings as to the interactions between police and Mr. Lafrance. Further, the evidence that the majority relies on for its findings that the police engaged in coercive behaviour — except as necessary for the proper execution of the search warrant — was rejected by the trial judge. In our view, a deferential approach leads to the conclusion that police did not engage in coercive behaviour toward Mr. Lafrance, but rather acted in a professional, non-confrontational manner on March 19, 2015.

[121] Second, we consider that the majority overemphasizes the perspective of a reasonable person in the particular circumstances of the accused. This approach provides little to no guidance to police in determining whether they have psychologically detained someone in carrying out their regular duties. It risks turning every common police encounter into a detention and creating situations where police are unable to control whether they breach *Charter* rights. For example, what reasons for the detention should the police provide to an individual, as required by s. 10(a), where they have no intention to detain him or her, but a reasonable person may nonetheless conclude a detention exists? How can the police avoid infringing the right

under s. 9 against arbitrary detention when they are seeking to obtain information? It does a disservice to the administration of justice if we put police in a “Catch-22” situation regarding psychological detention when they want to put questions to an individual.

[122] Third, we accord greater weight than does the majority to the police officers’ testimony that they made clear to Mr. Lafrance that he did not need to speak to them and was free to leave. We agree with the majority that a finding of detention is not precluded by such statements by police. However, the interaction between police and the individual must be considered in light of all relevant circumstances. Thus, coercive behaviour or accusatory questioning may negate police assurances that the individual need not speak to them and is free to go.

[123] But police statements to such effect are not merely “a single consideration among others”, as the majority suggests (para. 39). In our view, as the New Brunswick Court of Appeal stated in *R. v. Way*, 2011 NBCA 92, 377 N.B.R. (2d) 25, “detention will certainly be much more difficult to establish when such information has been genuinely provided” (para. 40). This is consistent with the role of unambiguous police statements that an individual is free to leave as contemplated by this Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 32 and 39.

[124] Our position is supported by numerous cases decided since *Grant*. The vast majority of decisions applying the *Grant* framework have held that individuals are not detained within the meaning of s. 9 or s. 10(b) of the *Charter* where they are

unambiguously informed by police that they are free to go (see *R. v. Todd*, 2019 SKCA 36, [2019] 9 W.W.R. 207, at paras. 63-69; *R. v. Tran*, 2010 ABCA 211, 482 A.R. 357, at paras. 25-30; *R. v. Schrenk*, 2010 MBCA 38, 255 Man. R. (2d) 12, at para. 56; *R. v. Hermkens & Moran*, 2021 ABQB 885, at paras. 223-34 (CanLII); *R. v. Heppner*, 2017 BCSC 894, at paras. 125 and 127 (CanLII); *R. v. Roach*, 2012 NLTD(G) 21, 319 Nfld. & P.E.I.R. 231, at paras. 44-45; *R. v. Bristol*, 2011 ABQB 73, at paras. 22-23 (CanLII); *R. v. Bucknell*, 2021 BCPC 308, at paras. 99-109 (CanLII); *R. v. Giulioni*, 2011 NLTD(G) 117, 313 Nfld. & P.E.I.R. 220, at para. 29; *R. v. Wheeler*, 2010 YKTC 7, at para. 11 (CanLII); *R. v. Rodh*, 2010 SKPC 150, 364 Sask. R. 96, at para. 25). Consequently, unambiguous police statements that an individual is under no obligation to comply should weigh heavily against a finding of psychological detention, absent police conduct undermining this message (see *R. v. Jackman*, 2011 NLTD(G) 116, 313 Nfld. & P.E.I.R. 203, at paras. 42-43).

[125] This is not to say that statements by police that the individual is free to go are “all but determinative” or that they justify turning the focus away from contextual factors, as the majority suggests in describing our position (para. 38). We acknowledge that the particular circumstances of the individual are pertinent in determining whether a reasonable person could consider that police by their conduct have undermined such statements. A person subject to accusatory questioning or coercive behaviour could reasonably feel detained by police regardless of statements to the contrary. The threshold may be lower for vulnerable individuals who are unfamiliar with their *Charter* rights. This is particularly true in cases of “intensive interrogation” (S. Penney,

“Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions” (2012), 57 *S.C.L.R.* (2d) 263, at p. 287 (emphasis added)).

[126] None of these concerns apply here. Although Mr. Lafrance is a young, Indigenous person with no experience akin to that on March 19, 2015, the police did not undermine their statements that he was free to go and under no obligation to cooperate. In dealing with Mr. Lafrance, police repeatedly reminded him that he was under no obligation to cooperate and could leave at any time; they also ensured that he understood his *Charter* right to silence at the beginning of the interview of March 19, 2015. Mr. Lafrance was eager to cooperate in order to allay suspicion.

[127] Applying the *Grant* framework, we conclude that Mr. Lafrance was not psychologically or otherwise detained at any point during his dealings with the police on March 19, 2015; thus, there was no requirement that he be advised by police of his right to counsel under s. 10(b) of the *Charter*.

(1) Circumstances Giving Rise to the Encounter

[128] According to the majority, “little consideration is given to the possibility that [the facts of the initial police encounter] gave rise to a detention” (para. 33). In the majority’s view, the overwhelming force manifested by police in the execution of the search warrant of the residence, combined with Mr. Lafrance’s personal characteristics, are determinative (para. 51).

[129] But the majority’s critique is unfounded, as the trial judge *did* consider the context in which police first interacted with Mr. Lafrance and its relevance to whether or not he was detained. The trial judge explained that the encounter began when police awoke Mr. Lafrance in the course of executing the search warrant, at para. 37:

Before encountering Sgt. Eros, Mr. Lafrance had been awakened by three police officers executing the search warrant. [Mr.] Lafrance was told he could not remain in the home while the search warrant was being executed. This was standard police practice and applied to all residence occupants. Outside the residence [Mr.] Lafrance, in the vicinity of police, retrieved his cat which had escaped from inside the residence. Sergeant Eros approached [Mr.] Lafrance in the garage area. After confirming [Mr.] Lafrance’s identity they had a brief conversation concerning the stabbing nearby. Sergeant Eros told [Mr.] Lafrance he wanted to speak with him about his involvement in an incident that had occurred down the road.

Indeed, the brief remarks of the trial judge on the initial encounter, read in context, indicate that the search warrant was executed professionally and disclosed no signs of unnecessary coercion. With respect, the majority’s assertion concerning “the overwhelming show of force in the intrusion into the home” (para. 51) plainly contradicts the trial judge’s assessment of the initial encounter.

[130] After verifying Mr. Lafrance’s identity, “Sergeant Eros testified he asked whether [Mr.] Lafrance would be willing to provide a voluntary statement. Sergeant Eros explained that [Mr.] Lafrance was free to leave, and that it was up to him to decide whether he would accompany Sgt. Eros or make a statement” (trial reasons, at para. 38). At that point, police were only “in the preliminary stages of an investigation into [Mr.] Yasinski’s homicide” (para. 78).

[131] We agree with the majority that a reasonable person in Mr. Lafrance’s position would feel singled out for investigation. However, “[f]ocused suspicion, in and of itself, does not turn the encounter into a detention” (*Grant*, at para. 41). The significance of this consideration is diminished in these circumstances by statements by the police that Mr. Lafrance was free to leave — as did all the other occupants of the house.

(2) Police Conduct

[132] Key to our conclusion on detention are the police statements on several occasions that Mr. Lafrance was under no obligation to cooperate, and he was free to leave at any time. The passages highlighted by the majority bear repeating: “you don’t have to provide me a statement . . . that it would be completely voluntary on your point”, “you don’t hafta sit here and speak with me today”, “you are at any time Nigel free to leave”, “we (unintelligible) responsibility to ensure that you’re aware of – of your rights and . . . and like I said that – that includes the ability to leave whenever you want to”, “[v]oluntary that you don’t have to sit here and speak with me”, “you say you’re willing to talk now . . . right in half an hour, 20 minutes, two hours you’re – you decide that – that you no longer wanta speak with me . . . Um you just have to let me know . . . Okay and at that point in time, we’ll stop and we’ll move on”, and “some people think well now that I’ve agreed to it . . . I’m stuck here right . . . And – that’s absolutely not the case” (fn. 3, quoting A.R., vol. IV, at pp. 56, 64 and 72-74).

[133] The question, in our view, is whether police by their conduct undermined their statements. The record demonstrates that they did not.

(a) *Actions and Language of Police*

[134] Conspicuously absent from the majority’s list of factors relating to police actions and language (at para. 40) is the evidence as to how police actually interacted with Mr. Lafrance. The record demonstrates that Sgt. Eros did not pressure Mr. Lafrance to come to the police station. Not only did Sgt. Eros specify that coming to the station was “completely voluntary”, but he also mentioned that the interview did not need to take place that day. Indeed, Sgt. Eros asked Mr. Lafrance whether he had to go to work or to “any appointments or anything like that”, stressing that he did not “wanna hold [Mr. Lafrance] up from anything” (A.R., vol. IV, at p. 57). Sergeant Eros’ approach preserved Mr. Lafrance’s freedom of choice.

[135] In his own words, Mr. Lafrance “had no problems with how anybody treated [him] that day” because police treated him “respectfully and politely” at every stage of the interaction; “everything went smooth” (A.R., vol. III, at pp. 220-21). Thus, the trial judge found that Mr. Lafrance “was comfortable with what occurred that day” (para. 56). Police did not undermine their various statements that he was free to leave, either before or after the interview. In fact, in relation to the collection of physical evidence subsequent to the interview, the trial judge noted that “[Mr.] Lafrance and Sgt. Eros continue[d] their banter” (para. 58).

[136] In such circumstances, we do not find any reviewable error in the trial judge’s decision. With respect, a careful and deferential review of the record requires a rejection of the factors that — according to the majority — “outweig[h]” the police statements that Mr. Lafrance was free to go (para. 40). To further demonstrate why, we will address the conduct of the police in greater detail.

(i) Execution of the Search Warrant

[137] Apart from the instructions by police relating to the execution of the search warrant — which were authorized by law — there is no evidence of any “conduct [giving] rise to an impression of control” (*Grant*, at para. 51). We acknowledge that police exercised control over the home, thereby ordering all its occupants — including Mr. Lafrance — to leave their residence under supervision. But it does not follow from this that Mr. Lafrance was psychologically detained.

[138] In our view, it is appropriate to distinguish between control over the home and control over the person. However, the majority collapses the distinction between the two. This is particularly manifest in its conclusion, which refers only to police actions necessary and proper for *the execution of the search warrant*: “Given the overwhelming force in which a team of police officers arrived at Mr. Lafrance’s home, ordered him to get dressed and leave his home, and monitored his every movement, the officers should have recognized that a reasonable person in Mr. Lafrance’s shoes would feel obliged to comply with their demands and would conclude that he or she was not free to go” (para. 64 (emphasis added)).

[139] It is uncontroversial that Mr. Lafrance had to comply with these demands *because they pertained to the proper execution of the search warrant*. Indeed, all the occupants of the residence were subject to such orders, as the trial judge duly noted (para. 37). Police monitoring of the residents *inside* the home was also closely related to the integrity of their search, rather than specific to Mr. Lafrance.

[140] The majority’s remark that Mr. Lafrance’s every movement was monitored *outside* the home (see paras. 8, 31, 43, 47 and 63-64) attests to its lack of deference to the trial judge’s findings of fact. The only basis in the record for this conclusion is Mr. Lafrance’s claim that police “chaperoned” him while he was attempting to retrieve his cat (R.F. at paras. 7 and 32; A.R., vol. III, at pp. 91-93). The trial judge, we stress, expressed “insurmountable concerns about the credibility of [Mr.] Lafrance’s evidence” (para. 34). The trial judge found Mr. Lafrance to be generally “dishonest”, highlighting several “implausible” and “unreasonable and self-serving” statements from his testimony (paras. 28, 31 and 34). More specifically, Mr. Lafrance’s testimony was rejected “where it [was] not consistent with that of police officers” (para. 34).

[141] By contrast, Sgt. Eros — a “credible and reliable witness” whose testimony the trial judge found to be “honest and accurate” (paras. 19 and 24) — said that “the officers that were outside at that time were assisting [Mr. Lafrance] to try to locate the cat” (A.R., vol. II, at p. 103 (emphasis added)). Furthermore, Sgt. Eros could not recall seeing officers in the immediate proximity of Mr. Lafrance while he was trying to get the cat (at p. 103), but simply noted that “[h]e would have been in sight of

police officers” (p. 93). Sergeant Eros’ testimony is reflected in the trial judge’s findings that police were merely “in the vicinity” of Mr. Lafrance at the time (at para. 37) and that he “was not being told to stay with police; he was simply instructed to leave the residence” (para. 43). These findings by the trial judge do not support a conclusion that Mr. Lafrance was subject to psychological detention.

(ii) Ride to the Police Station

[142] The initial interaction at Mr. Lafrance’s residence was followed by a 20-minute ride to the police station in an unmarked police vehicle. We disagree with the majority’s assertion that this militates in favour of detention; in doing so, we are mindful of police conduct relating to the ride and the fact that Mr. Lafrance *chose* this option.

[143] The majority states that “[t]he only practical means available to Mr. Lafrance for getting to the police station was for him to be driven, which he was in an unmarked police vehicle accompanied by two police officers” (para. 40). Yet, this contradicts the trial judge’s factual findings. The trial judge found that “[Mr.] Lafrance agreed he had transportation ‘options of people who had vehicles at home’” (para. 39), based on his statement in cross-examination. The other occupants of the residence present at the time — Mr. Lafrance’s girlfriend and his father as well as one of the downstairs tenants — “all left the house and went their different ways” (A.R., vol. III, at p. 214). Stated differently, Mr. Lafrance had multiple transportation options, but he *chose* to accompany Sgt. Eros to the station in the police car (trial reasons, at para. 39).

[144] The conversation on the way to the police station was “lighthearted”, and Mr. Lafrance’s “comfortable demeanour and engagement indicate his participation was entirely voluntary and a produc[t] of deliberate choice” (trial reasons, at paras. 42 and 44). From the parking lot to the interview room, Mr. Lafrance “was not held, or in any sense physically controlled or guided” by police (para. 42).

(iii) Interview

[145] At the outset of the interview, Sgt. Eros “stresses something that is ‘important’: the statement is voluntary and [Mr.] Lafrance can leave at any time” (trial reasons, at para. 47). The trial judge noted that Sgt. Eros devoted “[a]pproximately the first 15 minutes of the interview [to] explaining the process and the related legal rights of [Mr.] Lafrance” (para. 51).

[146] What is more, the nature of the interview militates against a finding of psychological detention. As the trial judge pointed out, Sgt. Eros’ “interview style was deliberately non-accusatory”, and his “questioning [was] focused on information-gathering” (paras. 75 and 77). Sergeant Eros provided Mr. Lafrance with an “opportunity to answer questions ‘freely and flexibly’ and of his ‘free will’” (para. 75). Mr. Lafrance “was not confronted with evidence pointing to his guilt. He was not accused of an offence” (para. 77). These findings indicate that police carefully avoided anything akin to accusatory interrogation.

(iv) Collection of Physical Evidence

[147] After the interview, police asked Mr. Lafrance whether he would consent to provide DNA and fingerprint samples, as well as some of his clothes and his cellphone, which he did without reservation. Mr. Lafrance also agreed to have the police photograph his hands. It is noteworthy that police expressly gave him an opportunity to speak to a lawyer prior to the DNA testing, but he declined the offer.

[148] The evidence demonstrates Mr. Lafrance was keen to collaborate. The trial judge noted that Mr. Lafrance “volunteer[ed] for fingerprinting even before Sgt. Eros completed his request” (para. 57). Moreover, Mr. Lafrance voluntarily provided additional, unsolicited information on his cellphone, as the trial judge noted, at para. 68:

I note [Mr.] Lafrance did not merely provide the RCMP with the cell phone and assured them it was not locked with a password or passcode, [Mr.] Lafrance also explained a quirk of that cell phone to assist the RCMP investigators. The cell phone had a bent battery, and that meant the cell phone would reset itself unexpected[ly]. The implication behind [Mr.] Lafrance sharing that fact is he wanted the RCMP to be able to fairly evaluate whatever kind of information they might obtai[n] from the cell phone.

[149] A further indication of police conduct is the nature of the communication between Sgt. Eros and Mr. Lafrance during collection of the physical evidence. The trial judge noted that “[Mr.] Lafrance and Sgt. Eros continue[d] their banter”. Nothing in the foregoing supports the conclusion that a reasonable person in Mr. Lafrance’s position would feel detained.

(b) *Physical Contact*

[150] Physical contact is particularly significant in determining whether individuals informed by police they are free to go are nevertheless psychologically detained. Statements about freedom to leave would not be reasonably perceived as genuine where police, directly or indirectly, restrict the subject’s liberty of movement. This can include situations where physical proximity has an objectively oppressive effect on the individual — for example, where police officers deliberately position themselves within a small space “in a manner to block the exit” (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 50).

[151] We agree with the majority that there was no evidence of physical contact or oppressive proximity that could support a finding of psychological detention in this case. On the contrary, the trial judge found no evidence of physical obstruction by police at any stage of the encounter (paras. 43, 45 and 70).

(c) *Presence of Others*

[152] The majority uses the presence of others as a “significant consideration” (para. 43) in that Mr. Lafrance was in the presence of police throughout the interaction. We disagree. Nothing in the record indicates the police brought in more officers than reasonably necessary to ensure police and public safety and the effectiveness of the search. Moreover, *Le* makes clear, at para. 63, that the “presence of others” refers to witnesses, *not* police officers:

In this case, the presence of others would likely increase, not decrease, a reasonable person's perception that they were being detained. Each man witnessed what was happening to them all. The presence of others clearly did not prevent the police entry in the first place or provide any privacy, security or protection against incursions thereafter. Each man saw that the police asked each of them who they were and what they were doing.

Indeed, an assessment of the presence of police officers throughout the encounter at this stage, although relevant, is redundant with the considerations already assessed by the majority in discussing the actions and language of police as well as their proximity to Mr. Lafrance.

[153] In any event, the presence of other police officers (in addition to Sgt. Eros) is of no consequence in this case given how the police conducted themselves. As well, there were no other members of the public around Mr. Lafrance from the moment he accepted to go to the police station.

(d) *Place and Duration of the Encounter*

[154] The interview at the police station and the taking of physical evidence at the end of the interview warrant close attention. At the outset, Sgt. Eros informed Mr. Lafrance that the door of the interview room was unlocked and that he was “at any time . . . free to leave” (trial reasons, at para. 47). At the same time, Sgt. Eros indicated that they were in a “secure environment”, so that Mr. Lafrance would need to be accompanied by police for “smoke or bathroom breaks” (para. 48). Given that Mr. Lafrance knew he could leave at any time, we agree with the trial judge that the

fact that he would need to be accompanied while in the secured area of the station is “inconsequential” (para. 70). This is further supported by the trial judge’s statement that “this procedure was not a product of the [non-accusatory] interview process and was not unique to [Mr.] Lafrance” (para. 71). Simply put, an individual is not detained just because he or she is the subject of a police interview (*Grant*, at para. 26, quoting from *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 19).

[155] Regard must be had to the duration of the interview — about 3 and a half hours, including “approximately 30 min[utes] (involving two separate occasions) during which [Mr.] Lafrance was alone in the interview room” (trial reasons, at para. 46). Intensive interrogation, particularly if it lasts for a long time, can reasonably lead to the conclusion that the individual is being detained.

[156] The trial judge, however, was alive to this issue. He noted that the “interview was lengthier than generally occurred in non-accusatory sessions” (para. 19; see also para. 89). The trial judge commented on the nature of the interview as follows:

The March 19, 2015 interview recordings indicate there is a steady dialogue exchange between Sgt. Eros and [Mr.] Lafrance. Sergeant Eros intended this be a conversation, and not an interrogation. His interview style was deliberately non-accusatory. It was designed to offer [Mr.] Lafrance the opportunity to answer questions “freely and flexibly” and of his “free will”. His interview style was deliberately non-accusatory.

...

The manner in which the March 19, 2015 interview was conducted was also not oppressive. Instead, it was a conversation. Sergeant Eros directed his inquiries in an open-ended and non-accusatory manner. In effect, this

interview was a direct, fair information gathering procedure. [paras. 75 and 90]

In these circumstances, having regard to the conversational interview style and the absence of any confrontation, we see no basis to differ from the trial judge's conclusion that the length of the interview does not suffice to turn it into a coercive interrogation or, ultimately, constitute (alone or with earlier events) the basis of a psychological detention.

(e) *Summary*

[157] In assessing police conduct, the majority substitutes its own view of the evidence for that of the trial judge, relying in part on the controverted evidence of Mr. Lafrance — a witness found to be dishonest. There is no credible evidence that police gave orders or closely monitored Mr. Lafrance for purposes other than the execution of the search warrant.

[158] Rather, the events — viewed in their entirety in line with the trial judge's findings of fact — indicate that police asserted control over the home without coercing Mr. Lafrance, except to the extent necessary for the execution of the search warrant. In dealing with Mr. Lafrance, Sgt. Eros repeatedly reminded him that he was under no obligation to cooperate and could leave at any time, as well as ensuring that he understood his *Charter* right to silence at the beginning of the interview. Far from disclosing coercive behaviour, the evidence suggests Sgt. Eros had a lighthearted

conversation with Mr. Lafrance during the ride to the police station, and the pair continued to banter after the conversational, non-confrontational interview. Nothing in the foregoing constitutes a basis to contradict the trial judge's conclusion that Mr. Lafrance was not subject to psychological detention.

(3) Particular Circumstances of the Individual

[159] The trial judge “acknowledge[d] Mr. Lafrance was youthful, [I]ndigenous and had minimal police exposure at that time” (para. 79). As to physical stature, “[i]t is clear [Mr.] Lafrance is physically smaller than Sgt. Eros and his partner” (para. 73). Moreover, the trial judge found that Mr. Lafrance was “demonstrably intelligent” and “not unsophisticated”, although he “was naïve in deciding his participation would counter police suspicion” (paras. 80-81 and 91).

[160] An individual's youth, Indigenous background, lack of experience, and small stature are all material in determining whether police undermined statements that the subject was free to go. But such factors are not determinative. Yet the majority seems to say (at para. 54) that detention *automatically* arises where police interview a young adult after executing a search warrant at his or her residence. That the detention inquiry is objective does not mean the reviewing court must conduct an abstract analysis unsupported by evidence (*Grant*, at para. 32; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 28). Contrary to the majority's claim (at para. 64), there is no evidentiary support for the assertion that the execution of the search warrant in this case was conducted in a manner that would make a reasonable person in

Mr. Lafrance's position feel detained. It follows that the majority's conclusions appear to be based on the circumstances of Mr. Lafrance only.

[161] Having regard to Mr. Lafrance's particular circumstances, we acknowledge that police needed to tread carefully, but they did so, such that even having regard to Mr. Lafrance's personal characteristics, he was not psychologically detained.

[162] This conclusion is buttressed by the trial judge's factual determinations as to Mr. Lafrance's perceptions of the events. Such subjective considerations, although not determinative, help to assess whether a reasonable person in Mr. Lafrance's position would have perceived the police conduct as coercive (*Grant*, at para. 32; *Suberu*, at paras. 28 and 32). The following findings of fact are particularly significant in this regard:

- Mr. Lafrance “agreed he went to the detachment and then interviewed so he could allay suspicions and be discounted as a suspect. His comfortable demeanour and engagement indicate his participation was entirely voluntary and a produc[t] of deliberate choice” (trial reasons, at para. 44);
- “[T]hroughout the process [Mr.] Lafrance never appears to be compelled, frightened or intimidated. He appears at ease. [Mr.] Lafrance is cooperative throughout the interview. His manner is

friendly and open. There is no indication of defensive body language. Instead, at points [Mr.] Lafrance leans forward, into the conversation” (para. 73);

- Mr. Lafrance “understood police direction that he was free to leave at any time. He also acknowledged tactically answering questions to counter police suspicion” (para. 74).

[163] These findings of fact confirm what is otherwise objectively ascertainable: a reasonable person in Mr. Lafrance’s shoes would not have perceived the police conduct as a significant deprivation of his liberty. Police did not exert pressure or control over him. Indeed, Mr. Lafrance himself was eager to cooperate so as to allay suspicions. This, too, militates against a finding of psychological detention.

(4) Conclusion

[164] We conclude Mr. Lafrance was not detained within the meaning of ss. 9 and 10(b) of the *Charter* in his interactions with police on March 19, 2015. Based on a deferential approach to the trial judge’s findings of fact, a reasonable person in Mr. Lafrance’s position would not have felt compelled to go to the police station and participate in the interview. This conclusion is reinforced by the fact that he chose to cooperate, seeking to allay police suspicion. Mr. Lafrance’s objective personal characteristics, although significant to the inquiry, do not turn the tide in these circumstances.

B. *Mr. Lafrance's Section 10(b) Right to Counsel Was Not Violated on April 7, 2015, When He Was Not Permitted a Second Consultation With Counsel*

[165] Mr. Lafrance's next argument is that when he was interviewed on April 7, 2015, the police should have permitted him to have a second consultation with counsel. He argues that when police did not permit this, his s. 10(b) rights were infringed. The majority agrees. With respect, we do not.

(1) Legal Principles

[166] This issue is governed by this Court's decisions in *Sinclair* and its companion cases *R. v. McCrimmon*, 2010 SCC 36, [2010] 2 S.C.R. 402, and *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429.

[167] Section 10(b)'s purpose is to provide a detainee with an opportunity to obtain information and legal advice relevant to his or her legal situation upon detention (*Sinclair*, at paras. 25 and 31). The protection offered by s. 10(b) ensures "that a suspect is able to make a choice to speak to the police investigators that is both free and informed" (*Sinclair*, at paras. 25 and 32, citing *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-77).

[168] The majority suggests that s. 10(b)'s purpose is to mitigate the imbalance between the individual and the state, similar to the purposes of s. 9 (see the majority's

reasons, at paras. 76-77). This is not accurate. To the contrary, this Court in *Sinclair* expressly rejected this view, stating at paras. 30-31:

Mr. Sinclair argues that the purpose of s. 10(b) is broader than this. In his view, accepted by our colleagues LeBel and Fish JJ., the purpose of s. 10(b) is to advise the detainee on how to deal with police questions. The detainee, it is argued, is in the power of the police. The purpose of s. 10(b) is to restore a power-balance between the detainee and the police in the coercive atmosphere of the police investigation. On this view, the purpose of the right is not so much informational as protective.

We cannot accept this view of the purpose of s. 10(b). As will be discussed more fully below, this view of s. 10(b) goes against 25 years of jurisprudence defining s. 10(b) in terms of the right to consult counsel to obtain information and advice immediately upon detention, but not as providing ongoing legal assistance during the course of the interview that follows, regardless of the circumstances. [Emphasis added.]

[169] There is no basis to depart from *Sinclair* on this point, or to find that s. 10(b) is intended to shield the detainee from legitimate interrogation by police (*Sinclair*, at para. 25). Nor does *Willier* say that the purpose of s. 10(b) is to protect a detainee from an exercise of state power. Rather it is to “provide [the detainee] an opportunity to mitigate [the] legal disadvantage” relative to the state and “to support the detainee’s right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing” (*Willier*, at para 28; *Sinclair*, at para. 32).

[170] Section 10(b)’s purpose is achieved in two ways. It imposes on the police a duty to advise the detainee of his or her right to counsel (informational component) and to give the detainee an opportunity to exercise his or her right to consult counsel

(implementational component). It is not in issue that in this case, the informational component was met.

[171] The implementational component is “[n]ormally . . . achieved by a single consultation at the time of detention or shortly thereafter” (*Sinclair*, at para. 47). A few minutes on the phone with counsel may suffice, even for serious charges (see *Willier*). *Sinclair* is clear that s. 10(b) does *not* provide a constitutional right “to ongoing legal assistance during the course of the interview”, or to have counsel present throughout the interview (paras. 31 and 36).

[172] Sometimes, however, a second consultation with counsel will be required. In *Sinclair*, this Court described three categories of “changed circumstances” that will require a second consultation, at paras. 2 and 50-54:

- 1) When there are new procedures involving the detainee;
- 2) When there is a change in the detainee’s jeopardy; or
- 3) When there is reason to question the detainee’s understanding of his or her s. 10(b) right.

[173] Where the circumstances do not fall into a previously recognized category, the question is whether a further opportunity to consult a lawyer is necessary to fulfill s. 10(b)’s purpose of providing the detainee with advice in the new or emergent

situation. The principle underlying the cases is that to require a second consultation, there must be a change in circumstances such that the choice faced by the detainee has been “significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(b)” (*Sinclair*, at paras. 54 and 65).

(2) Application to the Case

[174] The majority concludes that Mr. Lafrance’s situation fits within the third *Sinclair* category, i.e. that there was reason to question Mr. Lafrance’s understanding of his s. 10(b) right. The police should have permitted him to have a second consultation with counsel, but did not. Therefore, his 10(b) rights were infringed, the majority concludes.

[175] The third category is engaged in circumstances such as when a detainee who has waived his or her right to counsel may not have understood this right when he or she waived it (*Sinclair*, at para. 52; *R. v. Prosper*, [1994] 3 S.C.R. 236, at pp. 282-84). It can also apply if police undermine the advice provided by counsel (*Sinclair*, at para. 52; *R. v. Dussault*, 2022 SCC 16). More generally, it applies when circumstances indicate that the “detainee may not have understood the initial s. 10(b) advice of his right to counsel” (*Sinclair*, at para. 52). There is no basis for the foregoing in this case.

[176] The fact that a detainee demonstrates hesitancy or concern during an interview or interrogation is not, on its own, sufficient to establish that he or she did

not have a full opportunity to consult with counsel. It is assumed that the legal advice received was sufficient in relation to how the detainee should exercise his or her rights in the context of the police investigative interview (*Sinclair*, at para. 57; *McCrimmon* at paras. 23-24). As the Court held in *Willier*, at para. 42, “unless a detainee indicates, diligently and reasonably, that the advice he or she received is inadequate, the police may assume that the detainee is satisfied with the exercised right to counsel and are entitled to commence an investigative interview”. Only where there is an objective change in circumstances, or objective reason to believe the initial consultation was deficient, will the need for a second consultation arise.

[177] When his interactions with police are reviewed, it cannot seriously be questioned that Mr. Lafrance’s choice to speak to the investigators was both free and informed.

[178] The majority refers to two portions of the April 7, 2015 interview in support of its conclusion that Mr. Lafrance’s 10(b) rights were infringed. First, the majority points out that, as the discussion between Mr. Lafrance and Sgt. Eros progressed, Sgt. Eros’ questions became more pointed. He began asking specific questions about the murder. At that point, Mr. Lafrance mentioned his father and a lawyer for the first time:

Q. Alright so what happens Nigel?

A. Well –.

Q. What – what went on?

A. Well I would – ah I want to talk to my dad before I continue.

Q. Ok wh – why do you say that?

A. Cause well he's – well he's my only chance of getting a lawyer and I just – I don't know. [Emphasis added.]

(A.R., vol. V, at p. 137)

[179] We accept that, in the circumstances, Mr. Lafrance's request to speak to his father was an implicit request for a second consultation with a lawyer. It does not follow, however, that his 10(b) rights were breached because this request was denied. The detainee merely *asking* for a second consultation is not enough to engage any *Sinclair* category that would support a right to a second consultation. To decide otherwise would be to depart fundamentally from *Sinclair*.

[180] The second interview excerpt referred to by the majority, which it concludes demonstrates “clear signs” that either the legal advice Mr. Lafrance obtained was incorrect, or he did not understand how his s. 10(b) rights applied to his current circumstances, reads as follows:

- A. Well I – I just – I want a lawyer before I go forward with anything else.
 Q. Ok you've had your opportunity Nigel right? Like I – like I explained to you, you've had an opportunity to speak to a lawyer – we don't ah – .
 A. Well no they told me – they told me to get a lawyer before I continue talking.
 Q. Ok what do you mean by told you to get a lawyer?
 A. Like someone that can come down and sit with me.
 Q. Ok.
 A. Instead of just over the phone.
 Q. There's a person that ah you know what – and the way that that kinda goes ah – I won't say it's, it's bad advice but it's maybe miss – a little bit miss as – miss ah – interrupted. Um there's not any time or any process during our interview –.
 A. Um?
 Q. Where we're gonna have a lawyer sitting in the room with us.
 A. No, no I – I mean, no mean like so –.

- Q. Ok.
 A. Like for me to sit down with personally.
 Q. Ok.
 A. To talk to. [Emphasis added.]

(A.R., vol. V, at p. 139)

[181] We disagree that this excerpt demonstrates that Mr. Lafrance misunderstood his s. 10(b) rights. In the discussion which immediately follows, Sgt. Eros confirmed Mr. Lafrance understood and exercised his right to counsel:

- Q. Part of the ah – part of the – the process right, is that we need to insure that you were provided some legal advice right.
 A. Ya.
 Q. And that you spoke to a lawyer and that you understood that legal advice right?
 A. Ya.
 Q. Um and that we've gone through that process right?
 A. Um.
 Q. So what has to happen now is we have to kinda evaluate that and see where we're at with respect to that ok.
 A. Ya.
 Q. But there is ah we – we still need to have this conversation right Nigel?
 A. Well – well ah the advice that was given to me is I don't have to say anything.
 Q. Ya and – and that's excellent advice right. [Emphasis added.]

(A.R., vol. V, at p. 140)

[182] The above excerpt demonstrates that Mr. Lafrance fully understood his rights under s. 10(b). Mr. Lafrance knew the legal jeopardy that he was facing. He knew he did not have to say anything to Sgt. Eros. His discomfort in the face of difficult police questioning is not, on its own, grounds for a second consultation. It bears repeating that right after his first consultation, an officer had asked Mr. Lafrance if he

understood the advice, to which Mr. Lafrance answered “yes”. He did not indicate reasonably and diligently that the advice he received was inadequate, or was not conveyed in a manner he understood. Contrary to the majority’s statements (at para. 86), there is no basis in the evidence for such a conclusion. The officer then asked him whether the lawyer he spoke to was attending the RCMP detachment, to which Mr. Lafrance answered “no”. Mr. Lafrance *knew* no one was coming.

[183] Even if one accepts that Mr. Lafrance incorrectly believed that he had a constitutional right to have a lawyer present, *mere confusion* on this point is not enough to trigger a constitutional obligation under s. 10(b). *Sinclair* expressly held that there must be an *objective* basis for a second consultation to be permitted (para. 55; see also *McCrimmon*, at paras. 22-23).

[184] In fact, the circumstances here are similar to those in *Sinclair*. In *Sinclair*, the accused also appeared to misunderstand what his s. 10(b) rights involved, stating during the interview that he had nothing to say “until my lawyer’s around and he tells me what’s going on” (*Sinclair*, at para. 8 (emphasis added)). The police explained to him that he had the right to consult a lawyer, but not to have a lawyer present during questioning. Mr. Sinclair then confessed. A majority of this Court found no infringement of Mr. Sinclair’s s. 10(b) rights.

[185] Contrary to the majority’s holdings, there is no basis to conclude that the choice faced by Mr. Lafrance was *significantly altered* so as to require further advice in order to fulfill the purpose of his s. 10(b) rights.

[186] While Mr. Lafrance is Indigenous, nothing on these facts suggests that these circumstances alone bring the case into the third *Sinclair* category.

[187] While purporting to follow *Sinclair*, the majority unduly expands its reach so as to undermine fundamentally the framework for analysis set out in that case. Without saying so directly, the majority's logic seems to be that a detainee is entitled to further consultation with counsel, upon request, or upon a mere confusion about his or her rights. This Court has never interpreted s. 10(b) in that manner. The detainee has a right to make a decision to cooperate with the investigation or to decline to do so in a free and informed manner. However, the state is entitled to rely on legitimate means of interrogation to investigate crimes (*Sinclair*, at para. 25). There was no breach of Mr. Lafrance's s. 10(b) rights on April 7, 2015.

C. *Whether or Not Mr. Lafrance's Right to Counsel Was Violated on March 19, 2015, Such That His Statements and Other Evidence Obtained Should Be Excluded Under Section 24(2)*

[188] As we explain above, we conclude that on March 19, 2015, Mr. Lafrance was not detained. The trial judge's conclusions on the issue of detention are owed deference and there is no basis to depart from them. However, even if it could be said that the trial judge erred, and that Mr. Lafrance was detained on March 19, 2015, without being afforded his right to counsel, we conclude that the evidence was not sufficiently connected to that *Charter* breach. There is therefore no basis on which to exclude such evidence under s. 24(2).

[189] Under s. 24(2) of the *Charter*, a court may exclude evidence obtained “in a manner” that violates *Charter* rights if its admission would bring the administration of justice into disrepute. “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” (*R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38; *R. v. Tim*, 2022 SCC 12, at para. 78).

[190] In *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21, this Court found that “[t]he required connection between the breach and [the evidence obtained] may be ‘temporal, contextual, causal or a combination of the three’: *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45. A connection that is merely ‘remote’ or ‘tenuous’ will not suffice.” The requisite connection must be shown before a court considers whether the admission of the evidence would bring the administration of justice into disrepute (*Grant*, at para. 131). The burden of proving that a remedy should be granted under s. 24(2) is on the party who seeks the remedy, here Mr. Lafrance (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 280).

[191] During the March 19, 2015 interview, Mr. Lafrance provided police with general information, a blood sample, fingerprints, cellphone and some of his clothing. The Crown did not seek to introduce any of this evidence, nor Mr. Lafrance’s March 19, 2015 police statement, at trial. There is therefore no need to consider whether this evidence should be excluded.

[192] As to the April 7, 2015 statement, the trial judge found it was not sufficiently connected to the March 19, 2015 statement. The majority of the Court of Appeal disagreed, holding that some information obtained as a result of the March 19, 2015 interview formed the basis of questions in the April 7, 2015 interview. In our view, the majority of the Court of Appeal should not have substituted its view for the view of the trial judge. The trial judge found that the March 19, 2015 statement did not substantially contribute to the April 7, 2015 statement. He based this on Mr. Lafrance’s testimony that the first statement “had nothing to do with” the second. There is no proper or principled basis to interfere with the trial judge’s findings in this regard.

[193] Mr. Lafrance has not shown that any evidence presented at trial has the requisite link with the alleged March 19, 2015 detention and any resulting breach of the right to counsel.

IV. Conclusion

[194] For the foregoing reasons, we are of the view that there was no basis upon which the Court of Appeal, nor the majority in this Court, should interfere with the ruling of the trial judge. The appeal should be allowed and Mr. Lafrance’s conviction for second degree murder restored.

*Appeal dismissed, WAGNER C.J. and MOLDAVER, CÔTÉ and ROWE JJ.
dissenting.*

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