Form / *Formule* 1
APPLICATION
DEMANDE

(Rule 2.1, *Criminal Rules of the Ontario Court of Justice*)
(Règle 2.1, Règles de procédure en matière criminelle de la Cour de justice de l'Ontario*)*

ONTARIO COURT OF JUSTICE
COUR DE JUSTICE DE L'ONTARIO

East / Est
Region / *Région*

22-A8428
Court File No. (if known)
N° du dossier de la cour (s'il est connu)

BETWEEN: / *ENTRE*

HIS MAJESTY THE KING / *SA MAJESTÉ LE ROI*

- and / *et* -

DANA-LEE MELFI
(defendant(s) / *défendeur(s)*)

1. APPLICATION HEARING DATE AND LOCATION
DATE ET LIEU DE L'AUDIENCE SUR LA DEMANDE

Application hearing date: **JANUARY 22, 2024**
Date de l'audience sur la demande

Time **10:00 am**
Heure

Courtroom number: **1**
Numéro de la salle d'audience

Court address: **161 Elgin Street, Ottawa, Ontario K2P 2K1**
Adresse de la Cour

2. LIST CHARGES
LISTE DES ACCUSATIONS

Charge Information / *Renseignements sur les accusations*			
Description of Charge *Description de l'accusation*	**Sect. No.** *Article n°*	**Next Court Date** *Prochaine date d'audience*	**Type of Appearance (e,g. trial date, set date, pre-trial meeting, etc.)** *Type de comparution (p. ex., date de procès, établissement d'une date, conférence préparatoire au procès, etc.)*
MISCHIEF/ OBSTRUCT PROPERTY	430(1)c	JANUARY 15, 2024	TMC
MISCHIEF	430(1)d	JANUARY 15, 2024	TMC
DISOBEY A LAWFUL ORDER	127(1)	JANUARY 15, 2024	TMC
OBSTRUCT	129(a)	JANUARY 15, 2024	TMC

3. NAME OF APPLICANT
NOM DE L'AUTEUR DE LA DEMANDE

DANA-LEE MELFI

4. CHECK ONE OF THE TWO BOXES BELOW:
COCHEZ LA CASE QUI CONVIENT CI-DESSOUS

☐ I am appearing in person. My address, fax or email for service is as follows:
Je comparais en personne. Mon adresse, mon numéro de télécopieur ou mon adresse électronique aux fins de signification sont les suivants :

☒ I have a legal representative who will be appearing. The address, fax or email for service of my legal representative is as follows:
J'ai un représentant juridique qui sera présent. L'adresse, le numéro de télécopieur ou l'adresse électronique de mon représentant juridique aux fins de signification sont les suivants :

Monick Grenier
280 Metcalfe Street, Suite 201, Ottawa, Ontario K2P 1R7
monick@grenierlaw.ca
613-552-5537 / fax: 613-702-5557

5. CONCISE STATEMENT OF THE SUBJECT OF APPLICATION
BRÈVE DÉCLARATION DE L'OBJET DE LA DEMANDE

(Briefly state why you are bringing the Application. For example, "This is an application for an order adjourning the trial"; "This is an application for an order requiring the Crown to disclose specified documents"; or "This is an application for an order staying the charge for delay.")
(Expliquez brièvement pourquoi vous déposez la demande. Par exemple : « Il s'agit d'une demande d'ordonnance d'ajournement du procès. », « Il s'agit d'une demande d'ordonnance exigeant de la Couronne qu'elle divulgue les documents précisés. », ou « Il s'agit d'une demande d'ordonnance d'annulation de l'accusation pour cause de retard. »)

Charter Application advancing breaches of section s 8, 9, 10 See Schedule "A" attached; and an abridgement of time to file this Application if necessary.

6. GROUNDS TO BE ARGUED IN SUPPORT OF THE APPLICATION
MOTIFS QUI SERONT INVOQUÉS À L'APPUI DE LA DEMANDE

(Briefly list the grounds you rely on in support of this Application. For example, "I require an adjournment because I am scheduled to have a medical operation the day the trial is scheduled to start"; "The disclosure provided by the Crown does not include the police notes taken at the scene"; or "There has been unreasonable delay since the laying of the charge that has caused me prejudice.")
(Énumérez brièvement les motifs que vous invoquez à l'appui de la demande. Par exemple : « J'ai besoin d'un ajournement parce que je dois subir une intervention médicale le jour prévu pour le début du procès. », « Les documents divulgués par la Couronne ne contiennent pas les notes de la police prises sur les lieux. » ou « Un retard excessif a suivi le dépôt des accusations qui m'a causé un préjudice. »)

See Scheudle "A" attached

7. DETAILED STATEMENT OF THE SPECIFIC FACTUAL BASIS FOR THE APPLICATION
DÉCLARATION DÉTAILLÉE DES FAITS PRÉCIS SUR LESQUELS SE FONDE LA DEMANDE

See Schedule "A" attached

8. INDICATE BELOW OTHER MATERIALS OR EVIDENCE YOU WILL RELY ON IN THE APPLICATION
INDIQUEZ CI-DESSOUS D'AUTRES DOCUMENTS OU PREUVES QUE VOUS ALLEZ INVOQUER DANS LA DEMANDE

☐ Transcripts (Transcripts required to determine the application must be filed with this application.)
Transcriptions (Les transcriptions exigées pour prendre une décision sur la demande doivent être déposées avec la demande.)

☒ Brief statement of legal argument
Bref exposé des arguments juridiques

☐ Affidavit(s) (List below)
Affidavits (Énumérez ci-dessous)

☒ Case law or legislation (Relevant passages should be indicated on materials. Well-known precedents do not need to be filed. Only materials that will be referred to in submissions to the Court should be filed.)
Jurisprudence ou lois. (Les passages pertinents doivent être indiqués dans les documents. Les arrêts bien connus ne doivent pas être déposés. Il ne faut déposer que les documents qui seront mentionnés dans les observations au tribunal.)

☐ Agreed statement of facts
Exposé conjoint des faits

☒ Oral testimony (List witnesses to be called at hearing of application)
Témoignage oral (Liste des témoins qui seront appelés à témoigner à l'audience sur la demande)

The Cross Examination of Officers Delia, Methot, and Dupasquier

☐ Other (Please specify)
Autre (Veuillez préciser)

January 3, 2024
(Date)

Signature of Applicant or Legal Representative / *Signature de l'auteur de la demande ou de son représentant juridique*

To: **Don Couturier, Crown Attorney, 161 Elgin St, Ottawa Ontario,ON; Tel : 613-239-1222 and Ontario Court of Justice, Ottawa Ontario.**
À :
(Name of Respondent or legal representative / *Nom de l'intimé ou de son représentant juridique*)

(Address/fax/email for service / *Adresse, numéro de télécopie ou adresse électronique aux fins de signification*)

NOTE: Rule 2.1 requires that the application be served on all opposing parties and on any other affected parties.
NOTA : La règle 2.1 exige que la demande soit signifiée à toutes les parties adverses et aux autres parties concernées.

Court File No. 22-A8428

ONTARIO
COURT OF JUSTICE

B E T W E E N:

HIS MAJESTY THE KING

Respondent

-and-

DANA-LEE MELFI

Applicant

FORM 1 APPLICATION - SCHEDULE "A"

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1. The following protected rights under the *Charter of Rights and Freedoms* are relevant to this Application: (1) Section 9 of the *Charter* protects against arbitrary detention or imprisonment; (2) Section 8 of the *Charter* guarantees the right to be secure against unreasonable search and seizure and (3) Section 10 (a) and (b) of the *Charter*, which guarantees the individual's rights upon detention and arrest.

SPECIFIC FACTUAL BASIS FOR THE APPLICATION

2. At approximately 11:31 am, on February 19, 2022, Cst. Delia from the OPS "hand off team" (HOT) took custody of Dana-lee Melfi ("Applicant") from an unknown officer.

3. At 11:44 am, Cst. Delia advised the Applicant that he was under arrest and provided his Right to Counsel.

4. At 11:45 am, Cst. Delia cautioned the Applicant and provided secondary caution, followed by a 524 warning at 11:46 am.

5. At or around 12:20 pm, Cst. Delia lodged the Applicant in a prisoner van for transport.

6. At approximately 1:11 pm, Cst. Methot paraded the Applicant at the at the temporary processing site, 185 Sliddel Street.

7. At 1:20 pm, Cst. Dupasquier fingerprinted the Applicant, after which he was released at or around 1:33 pm with a Promise to Appear.

GROUNDS TO BE ARGUED IN SUPPORT OF THE APPLICATION

Arbitrary Detention

8. The Applicant alleges that there were no reasonable and probable grounds to arrest him and that his arrest was therefore unlawful. Consequently, the search flowing therefrom was unreasonable and would not have occurred but for the unlawful arrest.

9. In *R. v. Baker*, grounds for arrest were not present, when a search following the detention resulted in the discovery of drugs, leading to three counts of possession of controlled substances for the purpose of trafficking and one count of possession of property (Canadian currency) obtained by crime.

10. Justice MacDonnell found that the section 9 breach was a serious one meriting exclusion of evidence.

> There are several circumstances, however, that make the *Charter*-infringing conduct serious. The power of arrest is a formidable power. An arrest not only has a profound impact on the arrested person's liberty but in almost every case it will lead to a search of his or her person. In this case, not only did McCann lack reasonable grounds to believe that the arrest was necessary to secure the applicant's safety, he never turned his mind to whether there were other ways of addressing that concern. I reject the Crown's submission that this is a case where McCann acted on grounds falling just short of constitutional adequacy. There is nothing in his evidence to support a suggestion that he was even close to having reasonable grounds to conclude that an arrest was necessary.
>
> *R v Baker*, [2013] OJ No 340 at para 25.

11. A warrantless arrest requires a subjective and objective component. An arrest without a warrant is lawful if the police officer has reasonable grounds to believe that the person arrested has committed an indictable offence. The subjective requirement requires that the police officer believes that he has reasonable grounds. The objective component requires that the belief be based on information that would lead a reasonable and cautious person in the position of the police to conclude that reasonable grounds existed for the arrest.

R v Storrey, 1990 1 SCR 241 at paras 18-19 [pages 250-251].

12. The Applicant submits that the onus is on the Crown to establish that the arresting officer's grounds would rise to the level of reasonable and probable grounds required for a lawful arrest.

R v Chehil, 2013 SCC 49 at para 45.

13. A detention, including an arrest, will be considered arbitrary within the meaning of section 9 of the *Charter* if it is not authorized by law.

R v Le, 2019 SCC 34 at paras 30, 38.

14. Furthermore, the Supreme Court of Canada in *R v Storrey* found:

> There is an additional safeguard against arbitrary arrest. **It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist**. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See R. v. Brown (1987), 1987 CanLII 136 (NS CA), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; Liversidge v. Anderson, [1942] A.C. 206 (H.L.), at p. 228.
>
> **In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.** On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.
>
> *R v Storrey*, *supra*, at paras 16-17 [Emphasis added].

15. When reviewing the existence of reasonable grounds, "the Court is concerned only with the circumstances known to the officer" at the time of the arrest.

R v Wong, [2011] B.C.J. No. 473 at para 19.

16. Where reasonable grounds are conveyed by another officer, the arrest will only be lawful if the instructing officer had reasonable and probable grounds.

R. v. Gerson-Foster [2019] O.J. No. 2877, 2019 ONCA 405 (CanLII), at para 84.

17. In the present case, there is no evidence that the arresting officer had subjective grounds for the arrest that were objectively reasonable, either directly or indirectly.

18. Therefore, in considering the totality of the circumstances, the arrest of the Applicant was unlawful and infringed the Applicant's right not to be arbitrarily detained contrary to section 9 of the *Charter*.

Unlawful Search

19. Section 8 of the *Charter* guarantees that "everyone has the right to be secure against unreasonable search and seizure."

20. If the arrest is unlawful or arbitrary, any search flowing from it will also be unlawful.

R. v. Gerson-Foster, *ibid*, at para 101

21. The Applicant advances breaches of both 8 and 9 of his Charter Rights. Accordingly, the Crown has the burden of proving both that the arrest and the search were legal.

> Where the arrest the Crown is relying upon to justify the search incident to arrest is subject to a s. 9 challenge, the Crown will carry the burden on both of the overlapping ss. 8 and 9 claims and must prove that the arrest was legal.
>
> *R. v. Gerson-Foster*, *ibid*, at para. 75

Reason for Arrest

22. The right to be advised of the legally valid reason for detention arises immediately upon arrest or detention.

> It is essential that the individual detained be informed immediately of that right, *R. v. Kelly* (1985) 17 C.C.C. (3d) 419, *R. v. Nguyen* [2008] O.J. No. 219, Ont.C.A., *R. v. Fildan* (2009) 69 C.R. (6th) 65.
>
> *R v Klug*, [2011] AJ No 303 at para 18.

23. The right in accordance with section 10(a) of the *Charter* enables the detainee to know the jeopardy he faces, failing which an informed decision to exercise one's right to counsel cannot be made.

> The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not [page887] know the reasons for it: R. v. Kelly (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the Court in R. v. Black, [1989] 2 S.C.R. 138, at pp. 152-53, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.
>
> *R v Evans*, [1991] 1 SCR 869 at para 31.

24. In this case, the Applicant was not adequately, or at all, advised of the reason for his arrest. There is no evidence that the unknown officer explained reasons for arrest, rights to counsel, and what the answers were.

> The police must inform a person of the reasons for his or her detention so that person may make an informed choice whether to exercise the right to counsel, and if so, to obtain sound advice based on an understanding of the extent of his or her jeopardy. Here, the accused was given no indication that the police were investigating any offence other than the one for which he had been arrested. When the nature of the police investigations expanded, the accused should have been reinformed of his right to counsel.
>
> *R v Borden*, [1994] 3 SCR 145, preamble.

25. The Applicant was simply not advised about the reason for his arrest and was therefore not able to assess “the extent of his jeopardy.”

> The rights accruing to a person under s. 10(b) of the Charter arise because that person has been arrested or detained for a particular reason. An individual, therefore, can only exercise his s. 10(b) rights in a meaningful way if he knows the extent of his jeopardy.
>
> *R v Black*, [1989] 2 SCR 138 at preamble.

26. The Applicant's section 10(a) rights were therefore breached.

Right to Counsel

27. The right to be advised of one’s Right to Counsel in accordance with section 10 (b) of the *Charter* “arises immediately upon detention, whether or not the detention is solely for investigative purposes.” That is the informational component.

28. Section 10(b) also includes an implementational component that affords a person with a "reasonable opportunity to obtain legal advice" and encompass "delaying asking or demanding that detainees participate in the investigation against them until they have had a reasonable opportunity to consult counsel."

R v Suberu, [2009] 2 SCR 460 at para 38.

29. The Applicant's section 10(b) rights were triggered at the outset of the officer's detention and arrest, subject only to concerns about officers or public safety or in accordance with reasonable limitations prescribed by law.

R v Suberu, *ibid*., at paras 38, 42.

30. As the Ontario Court of Appeal found in *Noel*:

> That interest is the right is to consult counsel without delay. **The loss of this right is in no way neutralized because the right to consult counsel is delayed, as opposed to denied**. Nor is the impact of delayed access to counsel neutralized where an accused fails to demonstrate that the delay caused them to be unable to have a late but meaningful conversation with counsel. It would be inconsistent with solicitor-client privilege to expect a detainee to lead evidence about the quality of their solicitor-client conversation. More importantly, this inquiry misses the mark.
>
> *R v Noel* [2019] O.J. No. 5612, 2019 ONCA 860 at para 22.

31. Furthermore, the "right to counsel without delay exists because those arrested or detained are apt to require **immediate** legal advice that they cannot access without help, because of their detention."

R v Noel, *ibid*., at para 23.

32. Similarly, the Ontario Court of appeal in *R v Rover* found that:

> The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.
>
> *R v Rover*, 143 O.R. (3d) 135 at para 45.

33. There is no evidence that the Applicant was advised of his rights to counsel immediately on arrest. Later in the chain of custody, Cst. Delia did not ask the Applicant if he wanted to speak to a lawyer; or in the alternative, the Applicant indicated that he wanted to speak to a lawyer but Cst. Delia, and other officers, failed to take any steps to implement that right.

34. The Applicant did not give an express, informed, and voluntary waiver of his s. 10(b) rights at any time.

35. The importance of the Right to Counsel cannot be overstated. This is a foundational Charter right afforded to detained or arrested persons that would have been easily foreseeable in the context of planning the arrest of the Applicant.

36. Unlike a situation where an arrest arises spontaneously and with little advance notice, the arrest of the Applicant was planned in advance, in the context of a peaceful demonstration, such that police organized various teams to effect the arrest, including Public Order Unit officers, a field processing center operated by the Hand Off Team (HOT), transportation officers, and a temporary processing centre (185 Slidell). Yet the police failed to have a plan in place to ensure that the well-established and fundamental right to counsel be afforded to each arrestee.

37. As found by our Court of Appeal:

> **25** Detention also raises questions of immediate importance relating to the detainee's rights during detention, including the right against self-incrimination: *Bartle*, at p. 191; *R. v. T.G.H*, 2014 ONCA 460, 120 O.R. (3d) 581, at para. 4.
>
> **26** Beyond this, the right to counsel is also important in providing "reassurance" and advice, on such questions as how long the detention is apt to last, and what can or should be done to regain liberty: *Debot*, at p. 1144; *Suberu*, at para. 41. As Doherty J.A. said in *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 45:
>
> > The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while

> detained. The psychological value of access to counsel without delay should not be underestimated.

R v Noel, *supra*, at paras 25-26.

38. The breach of the Applicant's Charter 10(b) rights is clear in the circumstances of this case.

REMEDY - SECTION 24(2) OF THE CHARTER

39. Section 24(2) of the *Charter* gives Courts the power to exclude evidence from trial if it is obtained in a manner that infringes the *Charter* and meets the test for exclusion in s. 24(2).

40. Section 24 of the *Charter* provides:

> (2) Where, in proceedings under subsection (1), a Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

41. In deciding whether to exclude evidence obtained, as a result of a *Charter* breach, the Court must take into account the following factors:

1. The seriousness of the *Charter*-infringing state conduct (i.e. admission may send the message that the justice system condones serious state misconduct);
2. The impact of the breach on the *Charter*-protected interests of the applicant (i.e. admission may send a message that individual rights count for little);
3. Society's interest in the adjudication of the case on its merits.

R v. Grant, [2009] 2 S.C.R. 353, 2009 SCC 32 (CanLII), at para 71.
R. v. Harrison, [2009] 2 S.C.R. 494, 2009 SCC 34 (CanLII), at para 36.

42. It is submitted that, in the circumstances of the *Charter* breaches in this case, to admit the evidence gathered and the statements made by the Applicant, from the arbitrary detention, and the illegal search and seizure would bring the administration of justice into disrepute for the reasons detailed below.

Seriousness of the Breach

43. An officer's determination to turn up incriminating evidence, in circumstances where there is no reasonable ground to search, shows a reckless disregard for the *Charter* and is a serious breach of the individual's Charter rights.

R. v. Harrison, *supra*, at paras 24, 27.

44. The more intentional, flagrant, reckless, or negligent the conduct, the greater the need for the Court to dissociate itself from such conduct. At the same time, "ignorance of Charter standards must not be rewarded or encouraged, and negligence or willful blindness cannot be equated with good faith."

*R v. Grant (*2009), supra, at paras 72-75.
R. v. Harrison, *supra*, at para 22.

45. In *R. v. Noel*, the Ontario Court of Appeal found that the trial judge committed errors of law with regards to her analysis of the seriousness of the breach and the impact of the breach on the Charter protected interest. The Court of Appeal stated that:

> [18] Specifically, the trial judge found the seriousness of the breach to have been "attenuated somewhat in this case, because the police complied with their obligation to hold off questioning the arrestee until after contact with counsel was facilitated." This passage contains two errors.
>
> [19] First, had the police attempted to use Mr. Noel as a source of self-incriminating evidence before he had a reasonable opportunity to speak to counsel, that would have been yet another s. 10(b) breach. The seriousness of the breach the trial judge did find cannot be attenuated by the fact that the police did not commit an additional breach of Mr. Noel's rights.
>
> *R. v. Noel*, *supra*, at paras 18-19

46. The Ontario Court of Appeal recently reiterated the seriousness of a section 10(b) breach.

R. v. Davis, 166 O.R. (3d) 401, 2023 ONCA 227 (CanLII), at para 51.

47. The fact that the unlawful search and seizure from the Applicant was conducted under the aegis of an arbitrary detention exacerbates the seriousness of the state misconduct and generates a cumulative sense that the police disregarded the Applicant's *Charter* interests.

R v Mohammed, [2015] O.J. No. 574, 2015 ONSC 905 (CanLII), at paras 156-158.

48. Several Charter breaches are raised in the within application: (1) the unlawful arrest and arbitrary detention of the Applicant; (2) the warrantless and unlawful search resulting from the unlawful arrest, including obtaining the Applicant's name, statements/utterances from the Applicant, and social media; (3) the breach of the Applicant's section 10(a) rights; and, (4) the breach of the Applicant's section 10(b) rights. The *Charter* breaches in this case are serious.

49. Considering the cumulation of the various breaches, this factor favours exclusion.

Charter Protected Interests of the Applicant

50. The dicta of the Court of Appeal in *Brown* with respect to this factor squarely applies to the facts of the present case:

> ... While we doubt that the grounds existed even for an investigation detention, we are prepared to assume that the officer had those grounds for the purposes of a s. 24(2) analysis. The existence of a basis to detain does lessen the negative impact of the improper arrest on the appellants' rights, however, it does not change the fact that he was physically restrained on a public thoroughfare by two police officers who had no grounds to do so. The interference remains significant even if some lesser interference was appropriate.
>
> *R. v. Brown*, [2012] O.J. No. 1569, at para 28.

51. The Court of Appeal in *Noel* also recognized that:

> [21] In addition, the trial judge erred in evaluating the impact of the breach. She said:
>
> > I have heard no evidence about the impact of the breach on the protected interest of the accused. He did not testify on this application about any impact. It is his onus to demonstrate that a breach occurred and that the evidence should be excluded. While the evidence is that his right to confer with counsel was delayed, and there is necessarily an impact on his constitutionally protected interests as a result, there is no evidence that it was denied, or that the delay impacted adversely on his ability to have a meaningful conversation with counsel. On balance, I conclude that this factor is quite neutral in the s. 24(2) analysis. [Emphasis added.]

> [22] With respect, this passage reflects a misunderstanding of the relevant Charter protected interest. **That interest is the right is to consult counsel without delay. The loss of this right is in no way neutralized because the right to consult counsel is delayed, as opposed to denied**. **Nor is the impact of delayed access to counsel neutralized where an accused fails to demonstrate that the delay caused them to be unable to have a late but meaningful conversation with counsel**. **It would be inconsistent with solicitor-client privilege to expect a detainee to lead evidence about the quality of their solicitor-client conversation. More importantly, this inquiry misses the mark.**
>
> *R. v. Noel*, *supra*, at paras 21-22 [bold emphasis added].

52. In the present case the Applicant was physically handcuffed, searched and detained in a public street. The interference with the physical integrity of the Applicant was significant and the impact and intrusion on his Charter protected interests were serious.

53. Adding to the unlawful arrest and search, that the Applicant's 10(a) rights were breached when he was not accurately advised of the reasons for arrest, thereby compromising his ability to make an informed decision pertaining to this section 10(b) rights to counsel.

54. Furthermore, the Applicant was denied access to counsel for over two hours while under police custody. This factor also favours exclusion.

Society's interests

55. The charges before the Court are not serious and an assessment of this factor should weigh in favor of exclusion of the evidence.

56. The Supreme Court of Canada recognized that, "the view that reliable evidence is admissible regardless of how it was obtained…is inconsistent with the *Charter*'s affirmation of rights" and "is inconsistent with the wording of the section 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.

R v Grant, *supra*, at para 80.

57. In the event the court finds that the charges before it are serious, the Supreme Court held in *Grant* that the seriousness of the offence must not take on disproportionate significance when considering the third line of inquiry because this factor has the potential to "cut both

ways." The Court further found that failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on the how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is the focus of section 24 (2) of the *Charter*.

58. In *McGuffie*, the Court of Appeal for Ontario found that:

> The seriousness of the charges to which the challenged evidence is relevant, does not speak for or against exclusion of the evidence, but rather can cut both ways. On the one hand, if the evidence at stake is reliable and important to the Crown's case, the seriousness of the charge can be said to enhance society's interests in an adjudication on the merits. On the other hand, society's concern that police misconduct not appear to be condoned by the courts, and that individual rights be taken seriously, come to the forefront when the consequences to those whose rights have been infringed are particularly serious.
>
> *R v McGuffie*, 131 O.R. (3d) 643, 2016 ONCA 365 at para 73.

Balancing the Factors in Grant

59. In determining whether the evidence should be excluded, the Court must assess and balance the effect of admitting the evidence on society's confidence in the justice system.

60. If the first two factors make a strong case for exclusion, the third factor will seldom, if ever, tip the balance in favour of admissibility.

R. v. McGuffie, *supra*, at para 63.
R. v. Le, *supra*, at para 142.

61. Even when the evidence is reliable and the charges are very serious, police conduct that shows a blatant disregard to a citizen's *Charter* protected rights favors the exclusion of the evidence because to admit the evidence in such circumstances may send the message that the Courts condones serious state misconduct.

R. v. Harrison, supra, at paras 34, 36, 39.

62. The Supreme Court recognized:

> …[t]hat even though the officer's mistake was not made in bad faith, this alone does not make the Charter breach in "good faith" (see Le, at para. 147). Good faith on the part of the police, if present, would reduce the need for the court to dissociate itself from the police conduct (see Grant, at para. 75; Paterson, at para. 44). **Good faith cannot be claimed if the Charter breach arises from a police officer's negligence, unreasonable error, ignorance as to the scope of their authority, or ignorance of Charter standards** (see Grant, at para. 75; Buhay, at para. 59; Le, at para. 147; Paterson, at para. 44). **I also accept that "[e]ven where the Charter infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct"** (Paterson, at para. 44; see also Harrison, at paras. 24-25).
>
> *R v Tim*, 2022 SCC 12 at para 85 [Emphasis added].

63. In *Noel*, the Ontario Court of Appeal recognized that rights to counsel is "a well-established rule. The law around s. 10(b) is clear and long-settled. It is not difficult for the police to understand their obligations and carry them out."

R. v. Noel, *supra*, at para 34.

64. In balancing these factors, the Court should not lose sight that "Charter protections belong to everyone" and guard against sending a message that "the ends justify the means". Ultimately, as Chief Justice McLachlin writes, failure of the court to disassociate itself from illegal state conduct "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."

R. v. Grant, *supra*, at para 76.

65. The Supreme Court made it clear that in balancing the three factors, the Court must keep in mind that:

> Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants. **But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices.**
>
> *R v. Morelli*, [2010] 1 S.C.R. 253, at para 110 [Emphasis added].

66. In the circumstances of the Charter breaches in this case, to admit the evidence gathered from the unlawful detention, the unlawful arrest, the unlawful search and seizure of the Applicant, including utterances/statements, and social media; the breach of his rights to be properly informed of the reason for arrest, and his right to counsel, would bring the administration of justice into disrepute. The only appropriate and just remedy in the circumstances of this case is the exclusion of all the evidence obtained as a result of the Applicant's arrest.

67. The Applicant proposes to proceed in a blended *voir dire* fashion with the trial of this matter.