

CANADA / JUDGMENT

R. v. Gerezghier

2024 BCSC 1255

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2024 BCSC 1255 R. v. Gerezghier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gerezghier,

2024 BCSC 1255

Date: 20240712

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Registry: New Westminster

Rex

v.

Yonas Gerezghier

Before: The Honourable Justice Thomas

Reasons for Judgment

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R. Zakirova

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Place and Date of Trial/Hearing:

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Introduction

- [1] This is an application pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms [Charter] to exclude the following evidence:
- a) The cell phone and contents seized by Corporal Abreo;
 - b) The photographs taken by Constable Bedoya;
 - c) The profile photographs taken by Constable Maitland; and
 - d) The tattoo photographs taken by Constable Maitland.
- [2] Section 24(2) requires courts to exclude evidence that was obtained in a manner that infringes an accused person's Charter rights if, having regard to all circumstances, its admission in the proceedings would bring the administration of justice into disrepute.
- [3] I adopt the findings and facts set out in *R. v. Gerezghier*, 2024 BCSC 780 at para. 96, in which I determined the police infringed Mr. Gerezghier's Charter rights in the following ways:
- a) Constable Bedoya violated Mr. Gerezghier's s. 10(a) and (b) rights by failing to inform him of the reasons for his initial investigative detention and his right to retain and instruct counsel without delay;
 - b) Constable Pugliese violated Mr. Gerezghier's s. 8 rights by searching and removing the contents of his pockets when conducting a safety search;
 - c) Constable Pugliese violated Mr. Gerezghier's s. 9 rights when Mr. Gerezghier's investigative detention turned into a de facto arrest without reasonable and probable grounds;
 - d) Constable Maitland violated Mr. Gerezghier's s. 10(a) and (b) rights by failing to inform him of the reasons for his arrest and his right to retain and instruct counsel without delay, given his change in jeopardy;
 - e) Constable Maitland violated Mr. Gerezghier's s. 8 rights by taking photographs of Mr. Gerezghier outside of the police cruiser;
 - f) Constable Maitland again violated Mr. Gerezghier's s. 8 rights by rolling up Mr. Gerezghier's sleeves and taking photographs of his tattoos; and
 - g) The officers violated Mr. Gerezghier's s. 8 rights by seizing his cell phone and data.
- [4] Because of these rulings, the Crown has conceded the following s. 8 breaches:
- a) The information to obtain ("ITO") in support of the search of Mr. Gerezghier's cell phone was insufficient, such that it could not have been issued after the cell phone evidence is excised, so the search becomes presumptively unreasonable; and

- b) Constable Maitland failed to include the data from the cell phone when he filed the form 5.2 following the seizure of the cell phone.

Analysis

- [5] The Supreme Court of Canada set out three factors in *R. v. Grant*, 2009 SCC 32 at para. 71 that courts must consider in determining whether admitting the evidence would bring the administration of justice into disrepute:
 - a) The seriousness of the Charter-infringing state conduct (admission may send a message that the justice system condones serious state misconduct);
 - b) The impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and
 - c) Society's interest in the adjudication of the case on its merits.
- [6] I will assess each of these factors in turn.

I. Seriousness of Charter-infringing Conduct

- [7] The majority in *Grant* explained that admitting evidence obtained in violation of the Charter may bring the administration of justice into disrepute because it could send a message to the public that courts effectively condone the police conduct at issue. The need for courts to dissociate themselves from the police conduct by excluding the evidence obtained as a result of it is greater where the conduct is more severe or deliberate: *Grant* at para. 72. Therefore, courts must assess the seriousness of the Charter-infringing conduct, the first *Grant* factor, in determining whether to admit the evidence at issue.
- [8] This factor requires the court to situate the police conduct on a spectrum of seriousness, with inadvertent or minor violations falling at one end of the spectrum and willful or reckless disregard for Charter rights falling at the other: *Grant* at para. 73.
- [9] Whether police acted in good or bad faith is relevant in determining where the police conduct falls on this spectrum and, as a result, the importance of the court disassociating itself from the conduct. In *R. v. Smith*, 2005 BCCA 334, our Court of Appeal defined good faith and bad faith as follows:
 - [60] Thus, Sopinka J. does not equate a lack of good faith with bad faith. It seems to follow from this passage that in order to qualify as "bad faith" the actions of the police must be knowingly or intentionally wrong.
 - [61] To sum up, good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong.

Constables Bedoya and Pugliese

- [10] In determining that Constable Bedoya failed to inform Mr. Gerezghier of the reasons for his detention and his right to retain and instruct counsel without delay, I made the following findings in Gerezghier:
- a) Constable Bedoya noted the time that he detained Mr. Gerezghier. He testified that he told Mr. Gerezghier that he had a right to speak to counsel and be silent. He does not recall if Mr. Gerezghier said anything. He made no notes of this statement, but it is his practice that when he notes the time of detention he invariably provides this warning;
 - b) He then took a picture of Mr. Gerezghier. He testified that this was done for his notes so that he could identify who was detained and verify the physical condition of the person at the time of detention;
 - c) Constable Bedoya then passed control of Mr. Gerezghier and the other detainee to Constable Pugliese. He stated he always tells the officer in these circumstances that he has not provided a proper Charter briefing and caution; and
 - d) Constable Bedoya did not advise Mr. Gerezghier that he had a right to speak with counsel and to be silent at any point prior to passing control of Mr. Gerezghier to Constable Pugliese.
- [11] With respect to Constable Pugliese, he assumed that Mr. Gerezghier was under arrest when Constable Bedoya transferred Mr. Gerezghier to him, and further, that Mr. Gerezghier had been provided his s. 10(a) and (b) warnings.
- [12] Constable Pugliese relied on Constable Bedoya's grounds for arrest and then on Constable Maitland's instructions not to release Mr. Gerezghier when he arrived at the scene.
- [13] Although Constables Bedoya and Pugliese made mistakes which resulted in a breach of Mr. Gerezghier's Charter rights, I do not find there was bad faith on behalf of either of the constables.
- [14] Constable Bedoya was in the process of executing a search warrant and acted quickly during a fluid and potentially dangerous situation. He was not able to take detailed notes and attempted to follow his usual practice. Although I determined that he did not follow his usual practice with respect to abbreviated Charter warnings, in my view, this was an oversight that arose due to the dynamic circumstances surrounding Mr. Gerezghier's detention. Constable Bedoya should have provided Mr. Gerezghier an abbreviated warning and instructed Constable Pugliese of the nature of Mr. Gerezghier's detention and to provide Mr. Gerezghier with full s. 10(a) and (b) warnings. However, the fact that Constable Bedoya did not do so in these circumstances does not amount to bad faith.

- [15] Likewise, Constable Pugliese should have verified the nature of Mr. Gerezghier's detention and confirmed that Mr. Gerezghier had received full s. 10(a) and (b) warnings. Although Constable Pugliese failed to verify this information, his failure does not, in these circumstances, amount to bad faith. It was a mistake that arose within the context of a fluid and potentially dangerous situation.
- [16] These initial errors led to Constable Pugliese conducting a search pursuant to arrest, in violation of Mr. Gerezghier's s. 8 rights, and handcuffing and placing Mr. Gerezghier in the back of the patrol car, in violation of Mr. Gerezghier's s. 9 rights.
- [17] I find the s. 8 breach was the direct result of the previous error and does not amount to bad faith. The s. 9 breach resulted from Constable Pugliese following Constable Maitland's instructions. While I do not believe Constable Pugliese's following those instructions itself amounts to bad faith, I do have concerns about Constable Maitland's conduct, as discussed below.

Constable Maitland

- [18] I made the following findings in Gerezghier with respect to Constable Maitland:
- a) Constable Maitland arrived once Mr. Gerezghier had been transferred to Constable Pugliese;
 - b) He recognized Mr. Gerezghier as the potential third suspect in the robberies, at which point there was a change in Mr. Gerezghier's jeopardy, as he was now identified as a suspect; and
 - c) Constable Maitland did not advise Mr. Gerezghier of his jeopardy at this time or later that day.
- [19] It is concerning that Constable Maitland did not advise Mr. Gerezghier of his change of jeopardy when he became a suspect in the robberies or provide him with a s. 10(a) and (b) warning with respect to his new jeopardy.
- [20] It may be that Constable Maitland was uncertain as to whether Mr. Gerezghier would be detained or arrested and went to obtain instructions with respect to what to do with Mr. Gerezghier. However, in my view, this is not an acceptable rationale for failing to provide Mr. Gerezghier with the Charter warnings necessitated by his change in jeopardy. There were no circumstances that would have prevented Constable Maitland from providing this information to Mr. Gerezghier at this time.
- [21] I made the following additional findings in Gerezghier with respect to Constable Maitland:
- a) Constable Maitland went into the residence to arrest the owner of the residence, liaise with the other officers, and obtain instructions from the lead officer in British Columbia;

- b) Constable Maitland arrested the owner of the residence at 11:12 am. He then consulted with the lead officer about what to do with Mr. Gerezghier. He was instructed to identify him, release him and ask if he would like to give a statement. Constable Maitland was specifically instructed not to arrest Mr. Gerezghier; and
 - c) Constable Maitland returned to the police cruiser which contained Mr. Gerezghier after approximately 20 minutes, around 11:30 am.
- [22] When Constable Maitland returned from the residence to speak with Mr. Gerezghier, he told Mr. Gerezghier that he needed to verify his identity. Mr. Gerezghier told the constable that his passport was in the pocket of a black jacket in the residence. Constable Maitland retrieved the passport from the residence and had a picture taken of it. I infer that this included obtaining a picture of Mr. Gerezghier's passport photograph.
- [23] Constable Maitland returned to the police cruiser and confirmed that the passport belonged to Mr. Gerezghier. He then removed Mr. Gerezghier from the car and had him pose for two photographs. Then, while Mr. Gerezghier remained handcuffed, he rolled up Mr. Gerezghier's sleeves, revealing distinctive tattoos, consistent with those on the third suspect. Constable Maitland then photographed the tattoos.
- [24] Constable Maitland asked Mr. Gerezghier if he would like to make a statement. There were no notes indicating that Mr. Gerezghier was provided a warning or advised to call a lawyer. Constable Maitland agreed that he would have noted these warnings if they had been given, and that he had no specific recollection of advising Mr. Gerezghier to call a lawyer or advising of his right to remain silent. I find that Constable Maitland did not provide Mr. Gerezghier a full s. 10(a) or (b) warning, or any type of abbreviated warning. Nonetheless, Mr. Gerezghier declined to make a statement and was released.
- [25] Although there is a possible explanation for not providing Mr. Gerezghier with s. 10(a) and (b) warnings until Constable Maitland had determined whether Mr. Gerezghier would be arrested, there is no excuse for failing to provide these warnings once Constable Maitland returned from the premises.
- [26] In my view, Constable Maitland attempted to obtain a statement from Mr. Gerezghier knowing that he was required to provide, but had not provided, Mr. Gerezghier with a s. 10(a) and (b) warning. This places Constable Maitland's conduct at the upper end of the seriousness spectrum. In my view, this is a relevant circumstance, despite the fact that no evidence was obtained directly from these breaches, in considering the seriousness of infringing conduct.
- [27] With respect to the photographs of Mr. Gerezghier's profile and those of his tattoos, I made the following findings:
- a) Mr. Gerezghier was being arbitrarily detained at the time Constable Maitland took the photographs of his profile. Therefore, his acquiescence in these photographs occurred within the context of unlawful coercion by the police. While the pictures were taken in

public and he was wearing street clothes, they were nevertheless taken following Constable Maitland removing Mr. Gerezghier from the police car to pose for the photograph, with the intention of comparing the photos against the CCTV footage in a criminal investigation. The police had no valid power at the time to search Mr. Gerezghier for reasons other than to protect officers and public safety;

- b) In these circumstances, Mr. Gerezghier had a reasonable expectation of privacy. Taking these photographs was a search in violation of s. 8 of Mr. Gerezghier's Charter rights;
 - c) Constable Maitland then took additional photographs of Mr. Gerezghier's tattoos. Mr. Gerezghier was handcuffed while Constable Maitland rolled up his sleeves revealing his tattoos and then photographed them. The purpose of obtaining the photographs was to compare them with the tattoos on the CCTV footage;
 - d) Although the circumstances in which these photographs were taken were similar to the previous ones, there is a relatively higher expectation of privacy over tattoos that are covered by sleeves than merely taking a picture of someone in his or her street clothes. There is also a larger element of conscripting Mr. Gerezghier against himself since the photographs require either the accused or the police to roll up the accused's sleeves;
 - e) The photographs of the tattoos are subject to a reasonable expectation of privacy, and the circumstances pertaining to how they were obtained raise even greater concerns than those of the first photographs.
- [28] In my view, these photographs were not taken in order to identify Mr. Gerezghier; they were taken as part of a police investigation to compare his appearance to CCTV evidence. The first two photographs engage a low expectation of privacy, such that it might not have been apparent to Constable Maitland that despite having Mr. Gerezghier pose in different positions, taking the photographs constituted a s. 8 breach.
- [29] The photographs of the tattoos required Constable Maitland to roll up the sleeves of Mr. Gerezghier while he was handcuffed to expose his forearms. In these circumstances, in my view, it should have been clear to Constable Maitland that these actions constituted a search to obtain evidence for an investigation.
- [30] I reject the Crown's assertion that the photographs were taken simply to identify Mr. Gerezghier. Constable Maitland established Mr. Gerezghier's identity when he verified the passport. The pictures were taken purely for investigative purposes to match Mr. Gerezghier to the CCTV evidence. Constable Maitland's conduct exceeded the instructions provided to him from the lead officer in British Columbia which were to simply: "identify" Mr. Gerezghier. Obtaining a photograph of Mr. Gerezghier was sufficient to "identify" him for these purposes.
- [31] In my view, photographing the tattoos could not be characterized as a "good faith" mistake by Constable Maitland. He exceeded the instructions provided to him by his superior and conducted a search, that he should have known was improper, when he rolled up Mr.

Gerezghier's sleeves to photograph the tattoos. Although not bad faith, in my view, Constable Maitland's conduct with respect to the photographs places his conduct towards the upper end of the seriousness spectrum. See Smith at para. 62 and R. v. Pelgrom, 2020 BCSC 2311 at para. 11.

Corporal Abreo

- [32] Corporal Abreo seized items in the residence, including a phone which belonged to Mr. Gerezghier. Prior to seizing the phone, Corporal Abreo took a picture of Mr. Gerezghier's passport for Constable Maitland and was aware that Mr. Gerezghier had been detained leaving the residence.
- [33] At the preliminary inquiry, she testified that she had "no idea who the phone belonged to" when she seized it. At trial, she testified that she believed the phone belonged to the owner of the residence because it is common for people to own more than one phone. The owner of the residence was the subject of the warrant and she seized his phone during the search.
- [34] The screen of the seized phone displayed a number of text messages addressed to Mr. Gerezghier. Corporal Abreo viewed the screen at least four times, was aware the messages were in English, and photographed the messages on the screen. However, she testified that she did not read the messages. In my view, had she read the messages displayed on the phone it would have been apparent the phone belonged to Mr. Gerezghier as opposed to the owner of the premises.
- [35] I do not accept the testimony provided by Corporal Abreo that she had reason to believe the phone belonged to the owner of the residence. Crown argues that she was uncertain about her evidence and merely gave inconsistent statements about her belief as to who owned the phone.
- [36] I disagree. In my view, Corporal Abreo provided false evidence in a misguided attempt to make the seizure of the phone Charter-compliant. I say this because:
- a) I reject her evidence that she believed that the owner of the residence owned the phone. This is inconsistent with the evidence she gave at the preliminary inquiry; and
 - b) I reject her evidence that she did not read the messages displayed on the phone. She saw the messages on four occasions, determined they were in English, and photographed them, before seizing the phone. In my view, it defies belief that she did not read the messages. These messages identified the phone as belonging to Mr. Gerezghier.
- [37] In my view, Corporal Abreo's seizure of the phone and subsequent testimony constitutes significant bad faith. I would characterize her conduct as one of willful disregard for Charter interests, placing it at the upper end of the seriousness spectrum.

Corporal Bloomfield

- [38] Corporal Bloomfield prepared the ITO and applied for a search warrant for the phone. The warrant was granted and, in accordance with the warrant, the phone was examined and data was extracted and analyzed.
- [39] Given that the Crown conceded the phone had been improperly seized, the basis for obtaining the warrant no longer exists. Therefore the search of the data amounts to a breach of s. 8 consequent to seizure of the phone.
- [40] Corporal Bloomfield acted in good faith. However, the breach of privacy flows from Corporal Abreo's misconduct. The data extracted from the phone amounts to a breach of a significant privacy interest. See *R. v. Bishop*, 2014 BCSC 2575 at paras. 46-48.

Form 5.2

- [41] There was a failure to list the contents of the cell phone on the Form 5.2 by the police. This in my view is a technical breach as it occurred prior to the court's direction in *R. v. Teixeira*, 2022 BCSC 887. There is no bad faith on behalf of the state with respect to this breach of the Charter.

Number of Charter breaches

- [42] While a court must consider the cumulative effect of multiple breaches, the effect of such a consideration varies depending on the extent to which it can be said that there was a larger pattern of abuse or disregard for Charter rights. This was noted in *R. v. Fan*, 2017 BCCA 99:
- [72] The seriousness of a Charter breach is not determined in a vacuum. On the contrary, the cumulative effect of multiple breaches is a relevant consideration. Where a breach is part of a larger pattern of abuse or disregard for Charter rights, this exacerbates its seriousness: *R. v. Bohn*, 2000 BCCA 239 at paras. 45, 47; *R. v. Lauriente*, 2010 BCCA 72 at para. 27. Accordingly, when evaluating the seriousness of a breach for s. 24(2) purposes, a court should consider the cumulative effect of multiple breaches: *Spence* at para. 51.
- [73] A pattern of breaches tends to support exclusion because courts need to distance themselves from the behaviour: *Grant* at para. 75. However, a finding of cumulative breaches will not necessarily result in the exclusion of evidence under s. 24(2): *R. v. Trieu*, 2010 BCCA 540 at para. 93. Each case turns on its own facts.
- [78] Multiple breaches may evidence a pattern of disregard for Charter rights which supports exclusion of evidence, but they do not necessarily do so: see, for example, *Trieu and Crocker*. No particular number of breaches signals a pattern and requires the exclusion of evidence under s. 24(2). Rather, a s. 24(2) analysis requires close examination of the nature and quality of each breach that is established, individually and cumulatively, and application of the *Grant* framework.

- [43] The Court of Appeal similarly noted in *R. v. Robertson*, 2019 BCCA 116 that the seriousness of a particular breach will be exacerbated where it is part of a larger pattern of disregard for Charter rights. Where such a pattern exists, there is a greater need for the Court to distance itself from the unconstitutional police conduct. As a result, trial judges are required to consider how a pattern of breaches affects the s. 24(2) analysis: *Robertson* at paras. 60-61.
- [44] In my view, the multiple s. 10(a) and (b) breaches and the s. 9 breaches show a pattern of police disregard for Mr. Gerezghier's Charter rights that negatively impacts the overall assessment of the first Grant factor, such that the cumulative effect of the breaches strongly favours exclusion. These breaches, taken together, make the task of maintaining the public confidence in the administration of justice difficult. As a result, there is a relatively high need for the court to distance itself from the unconstitutional conduct in this case.

Constable Bedoya's photograph

- [45] The defendant says that given the number of breaches, the photograph taken by Constable Bedoya should be included in the s. 24(2) analysis and excluded, despite the fact that it was obtained lawfully and in accordance with the Charter.
- [46] The question of whether evidence was "obtained in a manner" that infringed the accused's Charter right is a threshold requirement. The issue was summarized by the Supreme Court of Canada in *R. v. Tim*, 2022 SCC 12:
- [78] This Court has provided guidance as to when evidence is "obtained in a manner" that breached an accused's Charter rights so as to trigger s. 24(2):
1. The courts take "a purposive and generous approach" to whether evidence was "obtained in a manner" that breached an accused's Charter rights (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38).
 2. The "entire chain of events" involving the Charter breach and the impugned evidence should be examined (*R. v. Strachan*, 1988 CanLII 25 (SCC), [1988] 2 S.C.R. 980, at pp. 1005-6).
 3. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct" (*Mack*, at para. 38; see also *Wittwer*, at para. 21).
 4. The connection between the Charter breach and the impugned evidence can be "temporal, contextual, causal or a combination of the three" (*Wittwer*, at para. 21, quoting *R. v. Plaha* (2004), 2004 CanLII 21043 (ON CA), 189 O.A.C. 376, at para. 45). A causal connection is not required (*Wittwer*, at para. 21; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 83; *Strachan*, at pp. 1000-1002).

5. A remote or tenuous connection between the Charter breach and the impugned evidence will not suffice to trigger s. 24(2) (Mack, at para. 38; Wittwer, at para. 21; R. v. Goldhart, 1996 CanLII 214 (SCC), [1996] 2 S.C.R. 463, at para. 40; Strachan, at pp. 1005-6). Such situations should be dealt with on a case by case basis. There is "no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote" (Strachan, at p. 1006).
- [47] I do not accept the defendant's submission. The photograph taken by Constable Bedoya was obtained during the execution of a search warrant, and in my view, the subsequent conduct of Constable Bedoya and the other officers does not create a sufficient nexus to consider excluding this photograph.

II. Impact on Charter-protected Rights

- [48] The task for the court in assessing the second Grant factor is to determine the extent to which the unconstitutional conduct undermined the accused's Charter-protected interests. The second factor similarly involves a spectrum ranging from impacts that are fleeting and technical to those that are profoundly intrusive: Grant at para. 76.
- [49] To determine where along this spectrum a particular Charter breach falls, the court must identify the interests engaged by the violated right and assess the extent to which the state conduct impacted those interests. Where there is a greater impact, there is a correspondingly greater risk that the admission of the evidence would bring the administration of justice into disrepute: Grant at para. 77.

Section 10(a) and (b)

- [50] The Crown argues that the initial s. 10 breaches by Constable Bedoya were minor and the subsequent breaches by Constable Maitland were understandable in the circumstances and did not result in obtaining any inadmissible evidence.
- [51] In R. v. Alphonse, 2023 BCSC 2467, Justice Church rejected the argument that the impact on the accused's Charter-protected interests of police failing to provide s. 10(a) and (b) warnings was minimal because it did not result in the police obtaining evidence that the accused would not have provided otherwise. She cited the following passage from the Supreme Court of Canada's decision in R. v. Taylor, 2014 SCC 50 for the proposition that the interests protected by s. 10(b) include ensuring that individuals can make a free and informed choice to speak to police:
- [21] The purpose of the s. 10(b) right is "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" . . . The right to retain and instruct counsel is also "meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination" . . . Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police

investigators that is both free and informed"

[52] In this case, Constables Bedoya and Maitland each separately breached Mr. Gerezghier's s. 10(a) and (b) rights. The result of these breaches was not just a failure to facilitate Mr. Gerezghier's right to speak to a lawyer; it was that Mr. Gerezghier was never even informed of the reason for his detention, of the reason for his de facto arrest, or of his right to retain and instruct a lawyer without delay. These breaches resulted in a substantial risk that Mr. Gerezghier would be unable to make a free and informed decision about whether to speak to the police during the lengthy period of both his detention and arrest. This risk was further exacerbated when Constable Maitland attempted to obtain an incriminating statement from Mr. Gerezghier. The fact that Mr. Gerezghier did not provide any such statement does not end the analysis. As a result of these particular Charter breaches, Mr. Gerezghier was vulnerable to self-incrimination.

[53] In these circumstances, I find the s. 10(a) and (b) breaches to be significantly intrusive.

Section 9

[54] The detention and de facto arrest of Mr. Gerezghier clearly negatively affected his liberty. He was handcuffed for approximately 55 minutes and placed in a police cruiser. However, the unlawful arrest was of relatively short duration. Although the police did not have grounds to arrest Mr. Gerezghier, there were grounds to detain him. I find Mr. Gerezghier's detention and de facto arrest to be a relatively neutral factor. See Pelgrom at para. 18.

Section 8

[55] The first s. 8 breach occurred when Constable Pugliese conducted a safety search in which he removed the contents of Mr. Gerezghier's pockets. This breach was close to the technical and fleeting range of the spectrum. While s. 8 protects individuals from unreasonable searches, this particular unconstitutional search was not as invasive as searches that would fall at the upper end of the spectrum, such as strip searches.

[56] The second breach occurred when Constable Maitland took posed pictures of Mr. Gerezghier outside of the police cruiser involving an area where Mr. Gerezghier had a low expectation of privacy. I agree with the Crown that these factors weakly favour exclusion on the spectrum.

[57] The third breach occurred when Constable Maitland rolled up Mr. Gerezghier's sleeves while handcuffed and took pictures of his tattoos involving an area of his body where there is a higher expectation of privacy than the initial photographs, although the expectation is still low. I agree with the Crown that these factors favour exclusion on the spectrum.

[58] The fourth breach occurred when Corporal Abreo seized Mr. Gerezghier's phone. The Crown concedes, and I agree, that this is a significant breach of privacy and is at the high end of the spectrum.

- [59] The fifth breach by Corporal Bloomfield in preparing the ITO upon which the warrant to search and extract data from the phone was obtained--and subsequently searching and extracting the data pursuant to the warrant--and the sixth breach of failing to list the content of the cell phones on Form 5.1 are subsumed into Corporal Abreo's breach.

III. Society's Interest in the Adjudication of the Case on its Merits

- [60] The third line of inquiry asks whether the truth-seeking function of the justice system would be better served by the admission of the evidence or by its exclusion. The analysis is prospective and must take into account the long-term effect of the ruling on the repute of the administration of justice.
- [61] The reliability of the evidence and the role it plays in the prosecution's case must be considered. Where the evidence is reliable and exclusion of the evidence would effectively gut the prosecution, this weighs in favour of admitting the evidence. The importance of the evidence to the Crown's case is also a relevant consideration.

The profile photographs taken by Constable Maitland

- [62] The profile photographs relate to connecting Mr. Gerezghier to the CCTV evidence obtained by the police. The evidence is reliable and provides evidence in support of the Crown's theory. The exclusion of this evidence will not gut the Crown's case. I note the photograph of Mr. Gerezghier taken by Constable Bedoya has not been excluded. This is a factor that weakly favours inclusion.

The tattoo photographs taken by Constable Maitland

- [63] The tattoo photographs relate to connecting Mr. Gerezghier to the CCTV evidence obtained by the police. The evidence is reliable and provides evidence in support of the Crown's theory. Due to the uniqueness of the tattoos, the evidence is of more probative value than the profile photographs. However, the exclusion of the evidence, in insolation, does not gut the Crown's case. This is a factor that favours inclusion.

The phone and data

- [64] The evidence from the phone relates to connecting Mr. Gerezghier to the phone that was used throughout various stages of the alleged robbery of the IDA Pharmacy. The evidence is reliable and provides evidence to support the Crown's theory. However, the exclusion of the evidence, in insolation, does not gut the Crown's case. This is a factor that favours inclusion.

IV. Balancing the Grant Factors

- [65] Finally, there is the task of balancing the three Grant factors. This has been the subject of some discussion in the cases. The following passage by Chief Justice McLachlin, as she then was, in *R. v. Harrison*, 2009 SCC 34, cited in *R. v. Ahmed-Kadir*, 2015 BCCA 346 at para. 102 is useful in setting out the relevant considerations:
- [36] The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.
- [66] In *R. v. Robertson*, 2019 BCCA 116, Justice Fitch described the weighing exercise that courts must undertake in determining whether to exclude evidence obtained in a manner that infringed a Charter right. He noted that the repute of the justice system, in the context of the s. 24(2) analysis, must be viewed in the long term: *Robertson* at para. 51; see also *R. v. Pawar*, 2020 BCCA 251 at para. 99. Citing *R. v. McGuffie*, 2016 ONCA 365 at paras. 61-63, Justice Fitch also noted that the third Grant factor will generally only tip the scales in favour of admissibility where one--but not both--of the first two factors strongly supports the exclusion of the evidence, or where they both only weakly support exclusion.

Cell phone and data

- [67] Having weighed the Grant factors, in my view, it is clear the admission of the cell phone evidence and data would bring the administration of justice in disrepute. The first two Grant factors support excluding the evidence. The third Grant factor only weakly supports inclusion. Corporal Abreo's misconduct was egregious and inclusion of the evidence in light of her misconduct would bring the administration of justice in disrepute.

The tattoo photographs taken by Constable Maitland

- [68] Having weighed the Grant factors, in my view, the admission of the tattoo photographs would also bring the administration of justice in disrepute. The first Grant factor strongly supports the exclusion of the evidence. The second Grant factor favours exclusion--although perhaps less strongly--while the third Grant factor favours inclusion.
- [69] However, in my view, the conduct of Constable Maitland with respect to the multiple Charter breaches he conducted leading up to and including the photograph of the tattoos is the most significant factor. This is a case in which it is necessary for the Court to dissociate itself from the breaches to preserve the repute of the administration of justice in the long term. Despite the probative value of the evidence and the societal interest in the adjudication of the case

on its merits, admitting these photographs would send a message to the public that the court condones Constable Maitland's serious Charter breaches.

- [70] I am strengthened in this view when I include into this analysis my finding that this case represents multiple breaches of Mr. Gerezghier's Charter rights by other officers, most significantly of which is the conduct of Corporal Abreo, which overall raise concerns to a larger disregard of Charter rights.

The profile photographs taken by Constable Maitland

- [71] The analysis with respect to these photographs is similar to that involving the photographs of the tattoos. However, the first Grant factor does not favour exclusion as strongly as it did with respect to the photographs of the tattoos. I say this because the misconduct in taking these photographs was less serious than the misconduct associated with photographing the tattoos. Despite the fact that both sets of photographs were taken during an arbitrary detention, the profile photographs did not involve rolling up Mr. Gerezghier's sleeves while handcuffed. The second Grant factor only weakly favours exclusion, as Mr. Gerezghier had a much weaker privacy interest in these photographs, and the third Grant factor weakly favours inclusion.
- [72] However, when I consider the conduct of Constable Maitland with respect to the multiple Charter breaches leading up to the photograph of the tattoos and the photographing of the tattoos, the first Grant factor becomes much more compelling. These photographs formed part of a larger pattern of breaches from which the Court must dissociate itself. As with the tattoo photographs, I am satisfied that admitting the profile photographs in these circumstances would damage the repute of the administration of justice in the long term.

Disposition

- [73] For the foregoing reasons, I have determined that the following shall be excluded from evidence:
- a) The cell phone and contents seized by Corporal Abreo;
 - b) The profile photographs taken by Constable Maitland; and
 - c) The tattoo photographs taken by Constable Maitland.

"Thomas J."

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