

CANADA / JUDGMENT

R. v. Hardenstine

2025 BCSC 889

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 889 R. v. Hardenstine

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hardenstine,

2025 BCSC 889

Date: 20250512

Docket: 50810

Registry: Penticton

Rex

v.

Andrew Hardenstine

Before: The Honourable Justice Gottardi

Reasons for Judgment - Voir Dire

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Counsel for the Accused:

B.N. Belcher

Place and Dates of Hearing:

Penticton, B.C.

February 18-21, 2025

April 3, 2025

Place and Date of Ruling given to Parties with Reasons to follow:

Kelowna, B.C.

May 12, 2025

Place and Date of Judgment:

Penticton, B.C.

May 12, 2025

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I. Introduction

- [1] Mr. Hardenstine is charged with several offences relating to the illegal possession of two firearms. He is also charged with offences related to his alleged assault and obstruction of a police officer during the course of his roadside arrest.

- [2] Police received a tip in the late evening hours of April 4, 2024, from a person later determined to be Aaron Brown. Mr. Brown indicated that he had arranged to meet with Mr. Hardenstine in the early morning hours of April 5, 2024 for the purpose of purchasing two firearms. Mr. Brown further indicated that Mr. Hardenstine's expressed intention was to use the proceeds from the sale of the firearms to flee the jurisdiction and travel to the United States.
- [3] The location of the proposed sale changed several times over the course of the evening. Eventually, the police were told that it was to take place at a gas station in Okanagan Falls, B.C. ("OK Falls"). Police set up several observation posts at various points around the town. Approximately five minutes after they had set up, a grey Chevy Metro pulled in behind the gas station. The vehicle slowed and momentarily came to a stop before leaving the gas station and continuing on its way. Nothing could be observed about the driver or the vehicle's occupants at that time.
- [4] One of the officers followed the vehicle, and after discussions with the lead investigator, initiated a traffic stop of the vehicle. The other four officers attended the scene of the vehicle stop shortly after. The lead investigator, Constable Ballarin, was familiar with Mr. Hardenstine and recognized him as the person in the passenger seat of the vehicle.
- [5] Two of the officers drew their firearms and Cst. Ballarin opened the passenger side door. While attempting to arrest Mr. Hardenstine in relation to several outstanding warrants, a struggle ensued. Over the course of the next three minutes, Mr. Hardenstine was punched and kned by the officers numerous times. As the struggle continued, one of the officers deployed his taser. Mr. Hardenstine was tasered ten times before he was brought under control by the officers.
- [6] Emergency Health Services ("EHS") attended the scene approximately 23 minutes later. Mr. Hardenstine was eventually chartered and cautioned after paramedics had assessed him and loaded him into the ambulance. Mr. Hardenstine was transported to hospital and was later discharged back into police custody at approximately 10 a.m. the next morning.
- [7] Mr. Hardenstine seeks to stay his criminal proceedings as an abuse of process or, alternatively, to have the firearms excluded from evidence. Further, he submits that the police violated his s. 7 and s. 12 rights under the Canadian Charter of Rights and Freedoms by using excessive force and tasering him during his arrest. He also submits that he was arbitrarily detained and unlawfully searched in violation of his ss. 9 and 8 Charter rights, respectively. Finally, he submits that his s. 10(a) and 10(b) rights - to know the reason for his arrest and speak to a lawyer without delay - were violated following his arrest.

II. Background Facts

- [8] There were five members of the Penticton RCMP working the general duty night shift on April 4, 2024. Those officers were Cst. Ballarin (an officer with seven years' experience, all of which were at the Penticton detachment), Constable Poulton (an officer with three years'

experience, all of which were at the Penticton detachment), Constable Harrison (an officer with five years' experience, all of which were at the Penticton detachment); Constable Turundzev (an officer with two years' experience, both of which were at the Penticton detachment); and Constable Barrett (an officer with 19 years' experience, the last several of which were at the Oliver detachment). All were attired in the standard police uniform that included a bullet-proof vest, pepper spray, a baton, service weapon, clips, and handcuffs. Csts. Poulton and Turundzev were also equipped with a conducted energy weapon ("CEW" or "taser").

- [9] The sixth Penticton-based officer (not one of the five officers listed above) did not participate in the detention and arrest of Mr. Hardenstine.
- [10] I will begin my analysis with a review of some of the officers' evidence in relation to the key events of the incidents.

A. The Spontaneous Tip

- [11] On April 4, 2024, Cst. Ballarin was working the general duty night shift in the capacity of acting supervisor. Late in the evening, the general dispatch line received a call from a person who purported to know the whereabouts of a person named Andrew Hardenstine. Mr. Hardenstine was known to Cst. Ballarin and was wanted for arrest on several outstanding warrants. Once Cst. Ballarin was informed of the tip, he began speaking directly with the individual.
- [12] The tipster indicated to Cst. Ballarin that Mr. Hardenstine had contacted him about the sale of two firearms. The caller advised that Mr. Hardenstine was seeking to obtain \$1,600 USD in exchange for the firearms and that his expressed purpose was to use the money to fund his flight to the United States. Cst. Ballarin testified that the caller initially gave a false name to police. Ultimately, the caller was identified as Aaron Brown. The caller also gave police several different possible locations for the impending meet-up, which changed over time.
- [13] Cst. Ballarin testified that he attempted to ascertain why Mr. Brown was arranging with police to have Mr. Hardenstine arrested, but that Mr. Brown simply and repeatedly stated, "just go get him". Mr. Brown was advised by Cst. Ballarin that he was not a confidential informant and that his participation in the incident would be reported at trial.
- [14] In terms of the reliability of the tip, Cst. Ballarin had no prior dealings with Mr. Brown. Further, his attempts to contact Mr. Brown after the arrest in order to take a statement did not come to fruition. Cst. Ballarin frankly acknowledged in his testimony that despite his efforts to verify the caller's honesty, he could not. Cst. Ballarin conceded that with the false name and so many changes of location, "he thought [Mr. Brown] was lying."
- [15] Despite his concerns about the reliability of the tip, Cst. Ballarin chose to brief the other members in the detachment on the call. Cst. Ballarin had dealt with Mr. Hardenstine in the course of his prior employment as a corrections officer. He had also conducted over 20

curfew checks on the accused while he was on bail or probation in relation to other offenses. Mr. Hardenstine was known to flee from police and was considered armed and dangerous. Cst. Ballarin testified that he was aware that there had been two prior unsuccessful attempts to arrest Mr. Hardenstine by the emergency response team ("ERT").

- [16] On April 5, 2024, Cst. Ballarin spoke with Mr. Brown once again around 1:00 a.m. Mr. Brown indicated that he was to meet with Mr. Hardenstine at the back of a Centex gas station in OK Falls (the "Centex"), a small residential hamlet approximately 15-20 minutes from Penticton. No details were provided about the type of vehicle that Mr. Hardenstine would be driving. Cst. Ballarin briefed the other members at the detachment about the most recent call.
- [17] Cst. Ballarin testified that he made the decision to travel to OK Falls with three other members to see if Mr. Hardenstine showed up. He testified that the ERT would not deploy in these circumstances because they did not have "concrete evidence". Cst. Ballarin testified that he was simply "following a lead".
- [18] Csts. Ballarin, Poulton and Turundzev travelled to OK Falls in marked police vehicles, while Cst. Harrison attended in an unmarked police vehicle. The officers each set up in different locations around the entrances to and exits from OK Falls along Highway 97 and its intersecting cross streets. Cst. Harrison was parked closest to the Centex as his vehicle was unmarked.

B. Events Leading up to the Traffic Stop

- [19] Around 1:30 a.m. Cst. Ballarin, who was parked two blocks south of the Centex, facing east on Hwy 97, observed a silver Chevy sedan (the "Chevy") drive past him and toward the 'downtown' area of OK Falls. Cst. Ballarin testified that they had been set up and waiting for approximately five minutes before he observed the vehicle. He also testified that it was the only vehicle he had seen in that area during his brief time there.
- [20] Shortly after, Cst. Harrison radioed that the Chevy had pulled in behind the Centex for a few moments and then had "gone mobile" again. Cst. Harrison testified that he saw the Chevy pull in behind the Centex, slow down and stop for approximately 30 seconds. He could only see a driver and could not describe any details about the driver. After that, he saw the Chevy exit the Centex and drive south toward the location of Cst. Poulton's watch post.
- [21] Cst. Harrison testified that given the time of night, the paucity of other traffic and the location of the activity "any vehicle would have been of interest." Cst. Harrison also testified that he believed the accused was in the Chevy. He stated that the basis for this suspicion was that they had been told by Mr. Brown that a meeting was going to happen at the Centex, and here was a vehicle appearing at the designated location within a reasonable time frame after the call.

- [22] Cst. Harrison did not follow the Chevy as it was heading toward Cst. Poulton. Further, Cst. Harrison testified that they were going to conduct a traffic stop of the Chevy to "confirm and see if Mr. Hardenstine was in the vehicle." Cst. Ballarin also testified that they had not confirmed it was the right vehicle. He wanted Cst. Poulton to conduct a traffic stop of the vehicle.
- [23] Once the Chevy passed Cst. Poulton, it turned onto Oliver Ranch Road ("ORR") and began heading south towards the town of Oliver. Cst. Poulton began to follow the Chevy. Csts. Ballarin, Harrison and Turundzev all drove south along Highway 97 to set up a roadblock at the intersection of Highway 97 and ORR, should the Chevy fail to stop during the planned traffic stop.
- [24] Cst. Poulton was tasked with the traffic stop. Cst. Poulton testified that he was parked at the corner of Maple Avenue and 9th street. According to Cst. Poulton, the officers were not sure which gas station the suspect was supposed to stop at and so he set up in a location where both gas stations were visible.
- [25] After the Chevy passed his location and turned south on to Maple Avenue, Cst. Poulton decided to follow it. He had observed a large figure in the passenger seat but stated that they still did not know if this was the correct vehicle. Cst. Poulton stayed in communications with Cst. Ballarin over the radio. He indicated that there was a plan, or at least some discussion that he would conduct a traffic stop of the vehicle. Maple Avenue eventually turns into ORR on the outskirts of the residential portion of OK Falls. It was decided that Cst. Poulton would stop the vehicle on ORR, as a more secluded staging point, due to concerns about Mr. Hardenstine's prior history of flight.
- [26] Cst. Poulton conducted the traffic stop on ORR. When asked what his intention was for the stop, Cst. Poulton stated, "the intention was, obviously because we can't just stop to ID people, I stopped the vehicle for road safety." When asked further about this in direct, the officer stated the following:
- A. It is kind of unusual that there is a vehicle driving around Okanogan Falls at that time because it is a very sleepy, small community.
- Q. You talked about road safety. Can you elaborate on that?
- A. Yeah so, pulled the vehicle over for, like, safety reasons, insurance wise, does the person have an active drivers license, possible sobriety issues, but yeah that is what I was kinda basing my stop off of.
- Q. Did you have concerns about road safety?
- A. Well, it was a pretty tattered, rough looking vehicle, so there is always a possibility for mechanical issues.
- Q. Any concerns about insurance?

A. It's always hit and miss with insurance, so I can't say specifically if there was an obvious indication that there was no insurance.

Q. You talked about sobriety. Can you just elaborate on that concern?

A. Well, because Okanagan Falls is a small sleepy community and taking a road parallel to the highway, obviously people don't want to be seen all that much, so possible sobriety could be a factor if someone is drinking and driving through a small community trying to get to Oliver.

Q. Was there any other reason why you stop this vehicle? Answer. Yes. To confirm a possible ID on Hardenstine.

- [27] When Cst. Poulton approached the driver, he advised her that he was stopping her for safety and possible sobriety issues. He testified that he took her license and registration.
- [28] At the same time, Cst. Poulton made observations about the passenger. He said that at the time he believed the male to be Mr. Hardenstine. He based his suspicion on his observations about his hair, his large size and the presence of a hand tattoo.
- [29] Despite this suspicion, Cst. Poulton radioed and asked Cst. Ballarin to attend the scene as he wanted an experienced officer to come and positively identify Mr. Hardenstine.
- [30] Cst. Poulton gave evidence that the passenger was "shielding" his face. He described the passenger holding up his jacket to obscure his face and that he turned face away from the officer. When the Crown asked whether the officer had attempted to engage the passenger in any way or ask him any questions, Cst. Poulton stated that he did not.
- [31] In cross-examination, Cst. Poulton conceded that the passenger did not move to conceal his features and could have been asleep. Cst. Poulton agreed with the suggestion that his description of Mr. Hardenstine as "hiding" or evading" were based on assumptions that he was making. Cst. Poulton also testified that he did not have a "positive ID" on Mr. Hardenstine after observing the male in the passenger seat.

C. The Circumstances of the Arrest

- [32] Up until this point in the narrative, all four of the officer's were fairly consistent in their description of the events. Indeed, during closing submissions, the Crown and defence filed a document entitled, "Outline of Agreed Facts." That document deals with the events leading up to the arrest and events following the arrest. There was no agreement between the parties as to the facts of the arrest itself.
- [33] Csts. Ballarin, Poulton, Harrison and Turundzev were all engaged in the arrest and physical takedown of Mr. Hardenstine.
- [34] Two dashcam videos were filed as part of the Crown case: one from Cst. Ballarin's police cruiser and a second video taken from the perspective of Cst. Poulton's cruiser.

- [35] Cst. Ballarin testified first. He stated that upon walking up to the vehicle, he could identify Mr. Hardenstine as the passenger. Cst. Ballarin opened the passenger door of the vehicle. He and Cst. Poulton had their service pistols drawn. Cst. Ballarin testified that he advised Mr. Hardenstine he was under arrest. He did not say what for. He states that Mr. Hardenstine said something to the effect of "what, who me?".
- [36] Each of the officers described the manner in which Mr. Hardenstine exited the vehicle. Cst. Ballarin stated that the accused "popped" out of the vehicle in an angry and aggressive manner and attempted to punch him in the head with a closed fist. Cst. Ballarin testified that he was punched in the face while standing. Cst. Poulton testified that Mr. Hardenstine "sprung out of the vehicle, lunging to attack to Cst. Ballarin." Cst. Harrison testified that Mr. Hardenstine "sprung up" out of the car. When asked how he could spring up, he said "as fast as you can from a seated position." Cst. Turundzev testified the following day, and when asked about Mr. Hardenstine in the vehicle he said Mr. Hardenstine "sprung" up, "standing fast from a seated position."
- [37] Cst. Poulton also stated that Mr. Hardenstine attempted a "football tackle". He described Mr. Hardenstine's arms "going out and straight for Cst. Ballarin". During the ensuing struggle, Cst. Poulton, who is approximately 6'3" and 280 lbs, remarkably described being lifted up like a "baby grab" by Mr. Hardenstine upon Mr. Hardenstine's exit from the vehicle. He said his feet were off the ground and his "vantage point changed." Cst. Poulton described activating his "panic button" on his police issued radio. This call is designed to advise nearby officers of a "priority situation" and to call for additional police support.
- [38] All officers described Mr. Hardenstine as combative and resistant to arrest.
- [39] All officers testified to applying strikes, mainly punches, to Mr. Hardenstine while he was standing.
- [40] Cst. Ballarin and Cst. Poulton jointly brought Mr. Hardenstine to the ground by grabbing his clothing and body and pulling him down. Cst. Turundzev assisted with a "double leg takedown".
- [41] Mr. Hardenstine was then on the ground, on his stomach. Cst. Turundzev was on Mr. Hardenstine's leg area. Cst. Poulton was directly in front of him on the upper part of Mr. Hardenstine's body. Cst. Ballarin is on the left side of Mr. Hardenstine. Cst. Harrison is on the right side of Mr. Hardenstine.
- [42] At some point during the physical altercation, Cst. Harrison called out, "gun, gun". Cst. Turundzev was positioned at the legs and lower body. He saw a rifle hanging from Mr. Hardenstine's left shoulder. He also heard another officer say, "he's got a gun". Cst. Turundzev saw a thin barrel of a rifle pointing at his chest. He described feeling terrified. He grabbed the barrel of the rifle and moved it away from his chest. He tugged three times and saw the rifle and sling come loose from Mr. Hardenstine's body. He threw the rifle away into some grasses.

- [43] According to all the officers, Mr. Hardenstine was face down on the ground with his stomach down and his hands tucked under his chest during the duration of the struggle. The officers were unable to gain control of his arms and hands. All officers describe Mr. Hardenstine as making a "push up" motion with his body. Cst. Turunzev was trying to bend Mr. Hardenstine's knees to try to place his feet towards his buttocks. He described Mr. Hardenstine pushing his body up with what he believed to be his arms. This behaviour continued until the end of the fight.
- [44] When this "push up" was happening, Cst. Ballarin testified that one of Mr. Hardenstine's hands was reaching for Cst. Poulton's taser. Cst. Poulton also observed Mr. Hardenstine's hand grabbing in the area of his taser. Cst. Poulton reacted by pulling his left leg away from Mr. Hardenstine and pushing his hand off the handle. Cst. Ballarin punched Mr. Hardenstine four more times in the ribs. Cst. Turundzev punched Mr. Hardenstine five to eight times in the kidneys.

D. The Tasing of the Accused

- [45] Mr. Hardenstine continued to keep his hands under his body and was continuing to push up against the officers. At this point, Cst. Ballarin yelled "taze him". Cst. Turundzev testified that he made the decision to deploy his taser. He testified that he believed he deployed the taser six times. This was all while the three other officers were continuing to strike Mr. Hardenstine in the various places where they are positioned.
- [46] Cst. Turundzev testified that he deployed his taser because he felt nothing was working and he feared bodily harm and death. He stated that he feared another gun could be in play.
- [47] He deployed the taser on Mr. Hardenstine's lower back by allowing the prongs to go into the skin. He then continued to deploy the taser using a three-point contact method. He moved the body of the taser from one buttock to another deploying it each time.
- [48] Cst. Turundzev testified that he has had special training on tasers. He explained that with each depression of the trigger, the taser will deploy an electric current for a five second cycle. The cycle of a taser is five seconds long, unless the trigger it is held longer by the operator.
- [49] The Crown entered an activity log for the CEW into evidence as an exhibit in the proceedings. The log reveals that Cst. Turundzev, despite recording six taser deployments in his notes, actually deployed the taser 10 times to Mr. Hardenstine's body. The taser log also reveals that the first two deployments of the taser were manually extended to six second deployments. The taser log also reveals that there was a pause of only 1-2 seconds between most of the deployments, one or two with a three second pause, and the only significant exception being a pause of 11 seconds before the last deployment.

- [50] In cross-examination, Cst. Turundzev testified that he was aware of the findings of the Braidwood Commission on the death of Robert Dziekanski (the "Braidwood Commission"), who died in 2007 after being stunned with a taser multiple times. This did not stop Cst. Turundzev from repeatedly deploying the taser. He believed that the taser deployments were largely ineffective and that multiple deployments were necessary in the circumstances.
- [51] Cst. Turundzev testified there is no limit on the number of times that a taser can be deployed according to the training he received. The decision about whether to continue with multiple deployments is left to the discretion of the officer. Cst. Turundzev testified that he would have tasered Mr. Hardenstine an unlimited number of times until he complied with police directions.
- [52] The incident with Mr. Hardenstine was only the second time that Cst. Turundzev had deployed his taser in the field.
- [53] Ultimately, after the final taser deployment, Cst. Turundzev heard a loud exhale from Mr. Hardenstine and observed his arms finally release from under his body and come under the control of Cst. Harrison and Cst. Ballarin.
- [54] Mr. Hardenstine was secured in handcuffs. Cst. Turundzev testified that Mr. Hardenstine complained that it was hard to breathe. He cut off Mr. Hardenstine's jacket and rolled him into the recovery position.
- [55] Cst. Turundzev remained with Mr. Hardenstine until EHS arrived and travelled with him to the hospital. EHS was request as per protocol for anyone who has experienced two deployments of a taser. The ambulance arrived 23 minutes later.
- [56] According to the officers, Mr. Hardenstine's face was swollen and bloody. Throughout the waiting period for the ambulance, there were moans and other clear and obvious sounds of pain coming from Mr. Hardenstine.
- [57] Mr. Hardenstine was left in the ditch on his side while waiting for the ambulance.

E. Search of the Vehicle

- [58] After Mr. Hardenstine was put into handcuffs by Cst. Harrison and Cst. Turundzev, Cst. Ballarin then delegated jobs to everyone. Cst. Poulton was tasked with taking photos. Cst. Turundzev was tasked with standing over Mr. Hardenstine. Cst. Harrison was tasked with logging exhibits.
- [59] Mr. Hardenstine was personally searched incident to arrest. The search incidental to arrest located a magazine, however Cst. Turundzev testified he did not remember if he physically grabbed the magazine from Mr. Hardenstine or not.
- [60] Cst. Ballarin testified that they searched the vehicle incident to arrest for "firearms and ammunition". He had no intention of getting a warrant to search the vehicle.

[61] Cst. Harrison was tasked as exhibit clerk. He seized the following exhibits:

- a. A long gun in a grassy area with a magazine seated in the gun;
- b. A wallet from Mr. Hardenstine;
- c. An empty magazine;
- d. A loaded handgun with magazine on the ground next to a handbag beside the open passenger door of the vehicle; and
- e. A cellphone on the passenger seat of the vehicle.

F. Attendance of the Ambulance

[62] The Crown and defence agreed on the facts related to Mr. Hardenstine's treatment after he was placed in custody. I will set out some of those facts here.

[63] Approximately 23 minutes after Mr. Hardenstine was secured in custody, EHS arrived. Using the dashcam videos as a guide, it appears that 4 minutes later, Mr. Hardenstine was transported to the ambulance on a stretcher.

[64] Cst. Turundzev travelled in the back of the ambulance with Mr. Hardenstine. Mr. Hardenstine interacted with paramedics and answered their questions. Cst. Turundzev observed that Mr. Hardenstine was coherent and able to speak with paramedics.

[65] At 3:02 a.m., after a few minutes in the ambulance, Cst. Turundzev formally arrested Mr. Hardenstine. He did so by reading from a RCMP-issued card. Cst. Turundzev stated that he cited s. 10(a) and said that Mr. Hardenstine was under arrest for all outstanding warrants, resisting a police officer, obstructing a police officer, assaulting a police officer, possessing firearm while prohibited, possessing a restricted firearm, possessing a firearm in a vehicle, possessing a firearm for a dangerous purpose, and attempting to disarm a police officer.

[66] Cst. Turundzev asked Mr. Hardenstine if he understood. Mr. Hardenstine replied "no". Cst. Turundzev asked why and Mr. Hardenstine said, "cause you're a fucking goof".

[67] Cst. Turundzev read Mr. Hardenstine his s. 10(b) rights at 3:03 a.m. Mr. Hardenstine did not reply. Cst. Turundzev read this three times with no reply.

[68] Cst. Turundzev asked Mr. Hardenstine "do you want to call a lawyer" at 3:04 a.m. He has asked three times and there was no reply.

[69] Cst. Turundzev read the police caution at 3:05 a.m. He asked "do you understand" three times with no reply.

[70] The ambulance arrived at the Penticton Regional Hospital where Mr. Hardenstine was assessed by medical staff.

[71] Mr. Hardenstine was discharged from the hospital in the morning of April 5, 2024, and booked into cells at the Penticton RCMP detachment no later than 10:00 a.m.

G. The Dash Cam Videos

[72] The Crown filed two dashcam videos in evidence: one from Cst. Ballarin's police cruiser (the "First Video") and a second video taken from the perspective of Cst. Poulton's cruiser (the "Second Video").

The First Video

[73] The First Video is approximately 55 minutes in length. In the first two minutes, Cst. Ballarin is driving along the highway and he passes several cars. At approximately 2:04, Cst Barrett asks Cst. Ballarin "if they have confirmation its him". Cst. Ballarin's response is not audible on this video.

[74] At approximately 2:25 of the First Video, Cst. Ballarin stops his police cruiser near the intersection of ORR and Highway 17 in order to set up what he described as a "hard lock" in case the Chevy did not stop during the planned traffic stop.

[75] While the Chevy is stopped, several radio broadcasts are discernible on the First Video:

At 2:30, Cst. Ballarin says " Let us set up here and then try and light him up and see if he takes off I guess";

At 2:48 dispatch asks PC Poutlon if he has a visual and he confirm that he still has a visual

At 3:08, Cst. Poulton says, "ok, copy that, I'll light him up right now";

At 3:27, Cst. Poulton says, "yeah it seems like this guy is stopping and pulling over";

At 3:45 Cst. Poulton provides the licences plate;

At 3:49, Cst. Ballarin says, "Fuck";

At 3:55 Cst. Poulton says, "Do you want me to make contact or do you want me to stage?"

At 4:01 Cst. Ballarin says words to the effect of "Go chat "

At 4:05, Cst. Poulton says, "copy that";

At 4:11, the dispatch confirms the license plate number is connected to a "Grey Chevy metro, associated to somebody by the name of Steven Neary out of Oliver, born on 67"

At 4:30, Cst. Ballarin says, "Nope that's not him"

At 4:34, Cst. Ballarin says, "We don't know what he's driving. This car pulled in behind the gas station"

At 4:39, Cst. Ballarin asks "is he at the tickleberrys?"

Cst. Ballarin says, "We pulled over the car that pulled in behind the gas station and it wasn't him"

At 4:51, Cst. Poulton says, "You want to start making your way up here?"

At 5:01, Cst. Poulton says "if you want to try making your way up here there's a male, he's [sort of] hiding his face and he's supposedly passed out. Female doesn't have he DL on her, apparently it was stolen. There's two females, with one female in the back and an older female driver.

- [76] At approximately 5:51 of the First Video, we see Cst. Ballarin's police cruiser pull up directly in front of the stopped Chevy. We can see Cst. Poulton's police cruiser parked approximately two car lengths behind the parked Chevy. Cst. Poulton is standing at the rear of the Chevy on the driver's side. The three occupants of the vehicle are visible through the front windshield.
- [77] At approximately 6:06, Csts. Ballarin and Poulton approach the right passenger side door and Cst. Turundzev approaches the driver side door of the Chevy. The passenger appears to be wearing a hat and has his head down.
- [78] At approximately 6:07, Cst. Ballarin says something to Cst. Poulton and he begins to put on his police gloves. Cst. Turundzev begins doing the same. Cst. Ballarin then opens the door to the Chevy and pulls his firearm. Cst. Poulton also pulls out his firearm. The passenger is not moving.
- [79] At 6:17, something is said to the passenger and he looks up. Both Cst. Ballarin and Poulton are pointing their guns directly in the passenger's face. The passenger says something indiscernible and moves his arm. Cst. Ballarin immediately places his left arm on the passenger and there is some movement back and forth.
- [80] At 6:22, Cst. Poulton appears to also attempt to reach into the car to put hands on the passenger and the passenger's body turns to the right. There appears to be a struggle, and the passenger is partially pulled out of the vehicle and onto his feet. Cst. Turundzev is seen running around the front of the vehicle to assist.
- [81] At 6:25, all three officers attempt to grab onto the passenger. Cst. Harrison comes into view for the first time and reaches over the passenger side door to grapple with the passenger. We also see that either Cst. Ballarin or Cst. Turundzev strikes the passenger in the face. In the ensuing seconds much of the passenger's body is obscured by those of the officers and the melee moves off to the left of the camera's field of view. Before the parties completely disappear from view, we see Cst. Poulton deliver a few punches in the direction of the passenger's head.
- [82] By 6:30, the four officers and the passenger are out of frame. In total, the First Video depicts the first 24 seconds of the initial interaction between police and the passenger, later identified as Mr. Hardenstine. At 6:30 we can observe the two females looking towards the altercation and screaming. Cst. Barrett comes into view for the first time and moves to close the passenger side door of the Chevy, preventing the female in the back seat from exiting the vehicle. Cst. Barrett remains at the passenger side door for most of the altercation.

- [83] At 9:10 Cst. Ballarin comes back into view of the camera and as such, we know that Mr. Hardenstine has been secured in custody with handcuffs at some point shortly before this. The entire interaction between police and Mr. Hardenstine took less than 3 minutes.
- [84] At 10:33, dispatch asks if anyone needs EHS. At this point, Cst. Ballarin indicates that it is only the male in custody that needs medical attention.
- [85] At 12:07. Cst. Ballarin puts a wallet on the car. He confirms with dispatch that it is Mr. Hardenstine in custody.
- [86] The rest of the First Video depicts the search of the Chevy and the eventual arrival of EHS. Consistent moaning sounds and expressions of pain can be heard throughout the First Video.

The Second Video

- [87] The Second Video is 66 minutes in duration.
- [88] At 4:10 of the Second Video, Cst. Poulton's police cruiser drives past a small grey vehicle, which is driving in the opposite direction. It is dark and there appears to be rain drops on the windshield. Nothing about the interior of the vehicle is observable on the video. Cst. Poulton immediately executes a u-turn and begins to follow the vehicle.
- [89] As in the First Video, in the Second Video at 8:40, Cst. Barrett asks Cst. Ballarin if they have confirmation that Mr. Hardenstine in the vehicle. On the Second Video, Cst. Ballarin's reply is audible. He says, "No, just based on what this call said which is unhelpful". The rest of the reply is indiscernible.
- [90] At 9:52 of the Second Video, Cst. Poulton initiates the traffic stop. At 11:20 Cst. Poulton returns to his police vehicle with one document in hand.
- [91] At 12:19, two additional police vehicles pull up in front to the Chevy. By 12:38, Cst. Poulton is approaching the passenger side door from behind. It is dark and visibility from this camera is relatively poor due to rain on the windshield. Cst. Ballarin puts on his gloves as he stands beside the passenger side door.
- [92] At 12:48 Cst. Ballarin opens the passenger side door. By 12:53, jerky movements can be seen by the passenger side door. Over the next several seconds a physical struggle ensues. It is difficult to discern individual movements and actions. It appears by 13:07 that Mr. Hardenstine has been taken to the ground. It is possible that Cst. Poulton may have fallen and gone to the ground at the same time. All four officers appear to be engaged with Mr. Hardenstine and short, sharp movements by the officers are observable.
- [93] At 13:38, Cst. Poulton broadcasts "1033" twice over the radio, calling for additional assistance. Cst. Poulton appears to sound out of breath while calling out for assistance a second time. At 13:54, Cst. Barrett joins the altercation and remains there until it ends at approximately 15:43.

[94] For the duration of the altercation the officers and Mr. Hardenstine are in the camera's field of view, but due to the lack of light and precipitation, it is almost impossible to discern individual movements. It is not possible to observe the taser being deployed during the altercation due to the poor quality of the video.

H. Procedural Background

[95] The Charter application occurred over four days. Counsel for both parties asked to proceed by way of a blended voir dire in relation to the alleged breaches of ss. 7, 8, 9, 10(a) and 10(b) and 12 of the Charter. Closing submissions on the voir dire took place remotely via MS Teams, in the presence of the accused, over the course on one day on April 3, 2025.

III. Issues

[96] The issues to be determined are:

1. Was the stop of Mr. Hardenstine's vehicle arbitrary?
 - a. Was it a lawful traffic stop?
 - b. Was it a lawful investigative detention?
2. Did the police conduct an unlawful search of the vehicle before or after Mr. Hardenstine's arrest?
3. Did the police breach Mr. Hardenstine's s. 10(a) and 10(b) rights after his arrest?
4. Did the police use excessive force during Mr. Hardenstine's arrest?
5. Does the conduct of the police justify a stay of proceedings against Mr. Hardenstine?
6. Does the conduct of the police justify excluding the firearms from Mr. Hardenstine's trial?

IV. Analysis

Credibility and Reliability

[97] Before I turn to a consideration of the legal issues to be determined in this case, let me first deal with the credibility and reliability of the officers that testified on the voir dire.

[98] I am mindful of the principles set out by this Court in *Bradshaw v. Stenner*, 2010 BCSC 1398 relating to assessments of credibility and reliability. While a civil case, the principles in *Bradshaw* have been consistently relied upon in this province in the criminal context. Of note are the following comments by Justice Dillon:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to

resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[Emphasis added].

[99] The Crown's position is that the five officers who testified are all credible and that there are no concerns about collusion. The Crown concedes that each individual officer had "reliability issues" but that those issues were explained by the fact that the incident was a fast-moving and dynamic situation.

[100] The position of the defence is that based on the quantity and quality of the inconsistencies between the various officers, this Court should find some level of dishonesty in their evidence. The defence listed numerous inconsistencies in their written submissions that they say support their position that the officers were being less than truthful:

1. That Mr. Hardenstine "sprung" out of the vehicle;
2. That Mr. Hardenstine took a "swing" or attempted to punch Cst. Ballarin;
3. That Mr. Hardenstine attacked and attempted to "football tackle" Cst. Ballarin;
4. That Cst. Ballarin lifted up the brim of Mr. Hardenstine's hat to better identify him;
5. That Mr. Hardenstine grabbed Cst. Poulton by his vest and lifted him up like a "baby" and off the ground; and
6. That Mr. Hardenstine was crawling toward the handgun lying on the ground beside the Chevy.

Analysis

[101] In relation to the very first seconds of the interaction between police and Mr. Hardenstine, a consistent theme emerged from the testimony of all four officers. First, the officers described Mr. Hardenstine's emergence from the vehicle in strikingly similar terms. Cst. Ballarin stated that Mr. Hardenstine "popped" out of the vehicle and "took a swing at him when he came out of the car". Cst. Poulton testified that Mr. Hardenstine "sprung out of the vehicle" and immediately lunged to attack Cst. Ballarin. Cst. Poulton testified that Mr. Hardenstine attempted a "football tackle" when he "went straight for Ballarin".

- [102] Cst. Harrison was the third officer to testify. He stated that Mr. Hardenstine "sprung up" when he exited the vehicle. When asked to elaborate further, he stated that Mr. Hardenstine stood up "as fast as you can from a seated position".
- [103] Cst. Turundzev testified the following day. When asked about Mr. Hardenstine's emergence from the vehicle he testified that the suspect "sprung" up, "standing fast from a seated position".
- [104] After reviewing the dash cam footage from the First Video, I find that Mr. Hardenstine did not spring or jump out of the vehicle on his own accord. Viewed objectively, the First Video depicts Mr. Hardenstine reacting in apparent surprise or alarm to see two firearms pointed directly at his face. While Mr. Hardenstine does turn toward the officers, I find that it was Cst. Ballarin who first reached into the vehicle and put his hand on Mr. Hardenstine. In cross-examination, after the First Video had been played for them, several of the officers agreed with the suggestion that Mr. Hardenstine was effectively pulled from the vehicle. Having watched the First Video, I find this to be the most reasonable description of what took place.
- [105] Secondly, there was evidence from all four officers regarding a punch directed at Cst. Ballarin. Cst. Ballarin testified that he was "punched in the face while standing". Reviewing the dash cam footage, this did not happen. I do not accept Cst. Ballarin's evidence on this point.
- [106] Cst. Harrison testified that when Mr. Hardenstine initially came out of the vehicle, he took a swing at Cst. Ballarin. Cst. Harrison described seeing Mr. Hardenstine use a closed fist and swing at Cst. Ballarin's "head area". When shown the dash cam video in cross-examination, Cst. Harrison agreed that it did not depict Mr. Hardenstine attempting to punch Cst. Ballarin. I do not accept Cst. Harrison's evidence on this point.
- [107] Cst. Turundzev also testified that Mr. Hardenstine attempted to punch Cst. Ballarin immediately upon exiting the vehicle. In cross-examination, when asked about the punch, Cst. Turundzev physically demonstrated a large, over-the-shoulder-type windmill gesture with his right arm to represent the punch that he observed. He further testified in cross-examination that he also saw Cst. Ballarin duck the punch. When confronted with the First Video, Cst. Turundzev accepted that no punch or ducking gesture was visible. Having reviewed the First Video, I conclude that none of the detailed actions described by Cst. Turundzev took place. I reject his evidence in this regard.
- [108] In relation to Cst. Poulton, there were several problematic aspects of his testimony. As to the start of the fight, he testified that Mr. Hardenstine attempted to punch Cst. Ballarin and immediately lunged at him with what was described as a "football tackle". As mentioned above, based on my review of the First Video, neither one of the described actions took place. The evidence in relation to the "tackle" is perhaps understandable. Upon his emergence from the vehicle, Mr. Hardenstine is very quickly engaged in a struggle with several officers in which there is much pushing and pulling. Cst. Poulton might be forgiven

for misdescribing the nature of Mr. Hardenstine's movement.

- [109] Cst. Poulton's detailed evidence about being lifted up by Mr. Hardenstine in a "baby grab" is harder to justify. He testified that his feet were off the ground and his "vantage point changed". Upon looking at the dash cam footage, I find that this did not happen. Further, Cst. Poulton admitted in cross-examination that he did not write this fact down in his notes. However, I also note that from my review of the Second Video, it appears that Cst. Poulton went down to the ground himself when Mr. Hardenstine was taken to the ground by the other officers. The dash cam footage also shows Cst. Poulton making two separate and apparently urgent calls for assistance over the radio, while at the same time pressing his panic button. I find as a fact that Cst. Poulton was afraid for his life at the time that he made that call. As such, while this portion of his evidence affects my assessment of his reliability as a witness, I do not find that it affects his credibility as a witness.
- [110] The Crown argues that some of the inconsistencies pointed out by the defence are minor and do not give rise to credibility concerns. For example, Cst. Turundzev stated in his evidence that he and the other officers knew the make and model of the vehicle that was expected to be at the gas station. As the Crown points out, this was not the evidence of the other officers. Further, as Cst. Ballarin was the officer in contact with Aaron Brown, it is his evidence that should be preferred on this point. It is clear from the balance of the evidence, including the officers' conversations over the radio as depicted in the dash cam footage, that the officers had no information about the make and model of the suspect vehicle.
- [111] While I agree with the Crown that this error was one that seems to have been made by Cst. Turundzev alone, it nonetheless gives rise to reliability concerns. One of the key questions to be decided on this voir dire is the legality of the traffic stop. If the police were provided with a make and model of the suspect vehicle by Mr. Brown, and a vehicle of that same make and model later arrived at the gas station, this may have substantiated the officers' continued investigation of the vehicle.
- [112] Other errors highlighted by the defence are not as consequential. Cst. Harrison described seeing a woman standing outside of the vehicle during the altercation with Mr. Hardenstine. The dash cam video clearly shows that the only woman standing beside the Chevy was Cst. Barrett. Similarly, Cst. Turundzev described seeing Cst. Ballarin lift the brim of Mr. Hardenstine's hat after he opened the passenger side door. This assertion was contradicted by the video evidence, and in cross-examination, Cst. Turundzev admitted that he could be mistaken.
- [113] Cst. Harrison was asked if he had reviewed the notes or statements of his fellow officers before testifying. He stated that he had not done so. At the conclusion of Cst. Turundzev's testimony, he was asked the same question. He stated that he had not reviewed their notes, but had in fact reviewed their narrative statements. He indicated that the narrative statements were stored on the "ledger file" and that the statements were not locked. Cst. Turundzev explained that anyone with access to the ledger file could review the statements.

[114] There are cases such as *R. v. Jayawardena*, 79 W.C.B. (2d) 79 (Ont. S.C.) at para. 9, 2008 CanLII 43584, and *R. v. C.O.L.*, 2010 ONSC 2755 at paras. 123-140, that stand for the proposition that where statements of different declarants contain multiple, almost-matching, erroneous observations, a strong inference should arise that the statements were the product of collusion or collaboration. While discussing an unrelated standard of threshold admissibility, the Supreme Court of Canada in *R. v. U.(F.J.)*, [1995] 3 S.C.R. 764 at para. 40, 1995 CanLII 74 (SCC) described five explanations for a situation in which several witnesses give similar testimony:

When two statements contain similar assertions of fact, one of the following must be true:

1. The similarity is purely coincidental.
2. The similarity is the result of collusion between the two declarants, before one or both of their statements were made.
3. The second declarant knew of the contents of the first statement, and based his or her statement in whole or in part on this knowledge.
4. The similarity is due to the influence of third parties, such as an interrogator, who affected the contents of one or both of the statements.
5. The similarity occurred because the two declarants were both referring to an actual event - that is, they were both telling the truth.

[115] In this case, there are very similar accounts of Mr. Hardenstine being an immediately aggressive combatant who instantly sprung out of the car and attacked Cst. Ballarin. That did not happen. There are similar accounts, some described and even physically demonstrated in great detail of Mr. Hardenstine immediately attempting to punch Cst. Ballarin. That did not happen. There is also evidence from at least one of the officers, Cst. Turundzev, that he read the narratives of his fellow officers before testifying. Cst. Turundzev also indicated that the narratives were not locked in the police file system and were available to be reviewed. Those questions were not put to Cst. Ballarin or Cst. Poulton, although both were confronted with the video.

[116] In weighing the credibility of these officers, I have also found that they were all relatively junior officers, with the lead investigator Cst. Ballarin having been on the job for seven years. The situation was stressful, and the information known about Mr. Hardenstine was that he was a potentially violent individual who was possibly in possession of at least two firearms that night. All the officers testified that they were concerned for their safety that evening and I accept that they were.

- [117] Finally, to their credit, in terms of describing their individual uses of force, I find that the officers were exceedingly frank. Cst. Poulton testified that he punched Mr. Hardenstine so hard and so many times that he sprained and dislocated several knuckles. Cst. Harrison stated that he administered so many knee strikes to Mr. Hardenstine that he grew tired and needed to switch legs. This is not the testimony of officers seeking to minimize their actions.
- [118] At the end of the day, I accept the basic description of the incident in so far as Mr. Hardenstine was combative and non-compliant with police. I accept that he engaged in a struggle with all four and later all five officers on scene. I accept that these officers were scared for their safety and struggled to bring Mr. Hardenstine under control.
- [119] However, I do have serious concerns about the reliability and credibility of these officers when it comes to their descriptions of key events, such as how the fight started and the nature and extent of Mr. Hardenstine's resistance. The officers exaggerated some details about the manner in which Mr. Hardenstine got out of the car. They claimed he attacked Cst. Ballarin with a windmill punch that never took place. Can these errors be chalked up to a fast-moving and stressful event? I do not believe so. At best, some of these officers' memories were inadvertently tainted by reviewing each others' narratives. At worst, as the defence argues, the officers collaborated to tailor their evidence on certain key portions of the narrative. I do not find collusion in this case; I do not find that the evidence rises to that level. I am left however, with significant concerns about the reliability and credibility of all four of the primary officers involved in the physical takedown on Mr. Hardenstine.

Issue #1: Was the stop of Mr. Hardenstine's vehicle arbitrary?

What was the nature of the traffic stop?

Law

- [120] Section 9 of the Charter protects individuals against arbitrary detention. A random stop of a vehicle without a lawful basis for that stop is *prima facie* unreasonable and constitutes an arbitrary detention. It is the purpose of the traffic stop that is important for the inquiry into whether the stop breaches s. 9: *R. v. Woody*, 2018 BCSC 2275 at para. 33. An unlawful traffic stop is necessarily an arbitrary one which violates s. 9: *R. v. Anwyll*, 2025 BCSC 156 at para. 48; *R. v. Tim*, 2022 SCC 12 at para. 22.

Statutory Authority for Traffic Stops

- [121] A detention of a vehicle and its occupants for the purpose of enforcing traffic or vehicle safety laws may be authorized or justified by the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]. Section 73 of the MVA provides that:

73 (1) A peace officer may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as a peace officer, must immediately come to a safe stop.

- (2) When requested by a peace officer, the driver of a motor vehicle or the person in charge of a motor vehicle on a highway must state correctly the driver's or person's name and address and the name and address of the owner of the motor vehicle.
- (3) A person who contravenes subsection (1) or (2) commits an offence and is liable to a fine of not less than \$100 and not more than \$2 000 or to imprisonment for not less than 7 days and not more than 6 months, or to both.

[122] Although no grounds are required to conduct a random stop under s. 73(1), the stop must be related to traffic safety and regulation: *R. v. Strilec*, 2010 BCCA 198 at para. 29.

[123] In *Woody*, Justice Riley, then of this Court, explained that there are two different kinds of potentially valid traffic stops:

[34] If the officer's basis for stopping the vehicle relates to enforcement of traffic or vehicle safety laws, then the resulting detention may be authorized or justified by the Motor Vehicle Act, R.S.B.C. 1996 c. 319. To be more precise, there are two different bases on which a vehicle stop related to enforcement of traffic or vehicle safety laws will be authorized under the Motor Vehicle Act. On the one hand, where the vehicle stop is based on an observed traffic infraction or violation of the Motor Vehicle Act or its regulations, then the resulting "detention" is authorized under the Act and therefore does not infringe s. 9 of the Charter: *R. v. Kaddoura*, 2009 BCCA 113 at para. 12-13. On the other hand, where the vehicle stop is a random stop to enforce traffic or vehicle safety laws, the detention of the driver is arbitrary under s. 9 of the Charter, but justified as a reasonable limit under s. 1 of the Charter so long as the actions of the police fit within the pressing and substantial objective of promoting traffic safety: *R. v. Nolet*, 2010 SCC 24 at para. 22.

[emphasis added]

[124] The most straightforward example of a valid traffic stop is one where the police officer initiates the stop based on an observed traffic infraction or violation of the MVA. This type of stop is clearly authorized by the MVA and is not arbitrary.

[125] Traffic stops become less straight-forward when they are random. Sometimes referred to as "spot checks" or safety checks, these types of random stops are inherently arbitrary: *R. v. Nolet*, 2010 SCC 24 at para. 22. However, the infringement of the individual's Charter rights in these circumstances is justified as a reasonable limit under s. 1 of the Charter, "so long as the actions of the police fit within the pressing and substantial objective of promoting traffic safety": *Woody* at para. 34. Therefore, a traffic stop that is initiated to check matters such as sobriety or licensing is justified under s. 1: *R. v. Phengchanh*, 2011 BCSC 484 at para. 24. Further, sobriety or safety stop checks do not require "objective evidence that a person has already committed a traffic violation"; the power is based on the pressing and

substantial objective of ensuring safety on the roads and reducing dangers, including dangerous or impaired driving: *R. v. Makortoff*, 2023 BCSC 2524 at para. 67.

Common Law Authority for Traffic Stops

[126] A traffic stop may also be valid if it relates to a criminal investigation: *R. v. Abdullahi*, 2020 BCSC 1822 at para. 33. In *Woody*, Justice Riley outlined the circumstances in which a traffic stop initiated for the purpose of criminal investigation may be justified:

[35] If the officer's basis for stopping the vehicle does not relate to enforcement of traffic or vehicle safety laws, but rather relates to a criminal investigation, then the officer must have some independent authority for effecting a "detention" of the driver or other occupants of the vehicle. The officer may have reasonable suspicion to justify an investigative detention in respect of a crime as discussed in *R. v. Clayton*, 2007 SCC 32, or the officer may have reasonable grounds to justify an arrest for an offence as discussed in *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241. In either case, it makes little difference whether the police are dealing with a suspect on foot or in a vehicle. Where the police have reasonable suspicion to support an investigative detention, or reasonable grounds to support an arrest, the interference with the suspect's liberty is authorized and not arbitrary, whether the suspect is on foot or in a car: *R. v. Liang*, 2007 YKTC 18 at para. 58. However, where the police have no such reasonable suspicion or reasonable grounds, they cannot simply stop a vehicle and detain the driver or occupants for some general inquisition into possible criminal wrongdoing.

[Emphasis added.]

[127] Drawing the line between stops that are related to traffic violations or vehicle safety concerns on the one hand and stops based on criminal investigations on the other is crucial to determining the lawfulness of the detention. However, this analysis must address the reality that police officers may have multiple reasons for initiating a traffic stop, as well as the risk that some of these reasons may not be lawful exercises of police powers. Crucially, courts have been vigilant to protect against the misuse of traffic stops as a means of conducting general inquisitions into criminal activity: *Woody* at para. 42.

[128] Police officers may have dual purposes when initiating a traffic stop. Where a traffic stop is initiated after a police officer observes an infraction, the officer "has authority to stop the vehicle in connection with the traffic infraction, and the detention is not rendered arbitrary simply because the officer suspects that the driver or occupants may be involved in unrelated criminal activity": *Woody* at para. 43. The fact that an officer may have other reasons for a stop, for example to identify the driver, does not transform a lawful stop into an unlawful one: *R. v. Kaddoura*, 2009 BCCA 113 at para. 12.

[129] Where there is a dual-purpose stop, the Court need not be concerned with which purpose is the "predominant" purpose. As Riley J. noted, "the "predominant purpose" analysis is not helpful in the context of a traffic stop in which the police may have concurrent Motor

Vehicle Act concerns and concerns about criminal activity": Woody at para. 46. Indeed, the Court need not determine which purpose is predominant or subordinate, so long as it is satisfied there is a "continuing regulatory purpose on which to ground the exercise of the regulatory power": Nolet at para. 41.

[130] The presence of a mixed motive or dual-purpose for the stop becomes more problematic where the stop is not based on an observed traffic violation, but rather the stop is purported to be a traffic or vehicle safety stop, such as a sobriety check. In these circumstances, the Court must determine first whether the stop was pursuant to an authorized regulatory purpose. If the Court determines that the stop was a pretext or ruse, used only as a means of furthering some other criminal investigation, the stop constitutes an arbitrary detention: Phengchanh at para. 27; R. v. Johnson, 2009 ONCA 668 at para. 27.

[131] Justice Jackson succinctly summarized the appropriate approach in R. v. Speck, 2022 BCSC 486:

[51] Thus the focus of the inquiry under s. 9 of the Charter is on determining the basis for the stop: Woody at para. 33. In doing so, the reality that sometimes police officers have a mix of reasons, purposes, objectives, or motivations for stopping a motor vehicle, must be acknowledged. In the circumstances of a traffic stop (where an officer observes an infraction), they have an independent basis for stopping the motor vehicle, and the fact that they may have additional concerns or interests does not negate the authority for the stop: Woody at para. 43; Nolet at para. 37. In such a traffic stop for an infraction under the MVA, the lawfulness of their stop of a motor vehicle will only be negated where the traffic stop was a ruse or a mere pretext for a general investigation purpose: Woody at para. 43, R. v. Madill, 2005 BCSC 1564 at para. 26; Young at para. 35; R v. Huntley, 2021 BCSC 149 at para. 27.

[Emphasis added.]

[132] The situations where the safety and sobriety stops are used as a ruse for general suspicion, further another investigative aim, or any other purpose not grounded in law underscore the danger of this type of power and how it may readily be abused. The Quebec Court of Appeal recently commented on this issue in Luamba c. Quebec (AG), 2024 QCCA 1387. In disallowing random safety stops, the Court found that the stop power was utilized arbitrarily, without grounds, and based on racial profiling.

[133] A review of the jurisprudence provides some guidance to judges tasked with determining the bona fides of an officer's claim that the purpose of the stop was to randomly explore road safety issues:

- What was the officer's duties at the time of the stop? Did the duties include enforcing road safety legislation?: R. v. Peel, 2003 NSPC 66 at para 8; R. v. Mitchell, 2019 ONSC 2613 at para. 73.

- Was the officer tasked with investigating particular criminal activity at the time of the stop?: D.M. Garg and A. Kapoor, *Detention, Arrest, and the Right to Counsel*, (Toronto: Emond, 2025) at p. 74.
- Had the officer been stopping other vehicles for random checks during their shift?: *R. v. Hufsky*, [1988] 1 S.C.R. 621 at p. 627; 1988 CanLII 72 (SCC).
- Were the officer's actions after stopping the vehicle consistent with their stated purpose for the stop? Mitchell at para. 80. For example, if the stated purpose for the stop was a sobriety check did the officer then take steps consistent with that purpose?: *R. v. Sitladeen*, 2021 ONCA 303 at paras. 33, 37.

Position of the Parties

- [134] Mr. Hardenstine submits that the stop was a mere ruse and not based on any safety, sobriety, or traffic concerns. Mr. Hardenstine argues that the stop was made on the suspicion that it was him in the vehicle, making it a mere pretense for the police to further investigate the tip they received from Mr. Brown.
- [135] The Crown submits that Cst. Poulton had a dual-purpose in initiating the traffic stop. Cst. Poulton was concerned about road safety and sobriety, as well as if Mr. Hardenstine was in the vehicle. The Crown argues that no evidence of a traffic violation is required for a safety stop. While Cst. Poulton was aware of the informant information and suspected Mr. Hardenstine was in the vehicle, the Crown submits that does not negate his valid concern regarding the hour of day and its presence on a side road.
- [136] In the alternative, Crown also argues that even if the stop was not for a dual-purpose, but rather solely in furtherance of the investigation into Mr. Hardenstine, that Cst. Poulton had reasonable grounds to suspect Mr. Hardenstine was in the vehicle and therefore had lawful grounds for an investigative detention. This alternative argument places Cst. Poulton's conduct in line with that discussed in *Woody* at para. 35, noted above. I will address this alternative argument later in these reasons.

Analysis

- [137] The issue framing the analysis into the nature of the stop is one of fact: what was in Cst. Poulton's mind when he initiated the stop: *R. v. Huntley*, 2021 BCSC 149 at para. 6.
- [138] The traffic stop in the case at bar was not initiated on account of observing a traffic violation. Nor is this a case where there was a traffic roadblock set up to check sobriety of all vehicles passing through a particular stretch of highway. On the contrary, the impugned traffic stop is either a dual-purpose stop, or a stop in which safety and sobriety concerns were invoked as a mere ruse or pretext to investigate whether Mr. Hardenstine was in the vehicle. Regardless of the outcome, the Court is tasked with assessing the circumstances surrounding the traffic stop to determine the true purpose of the stop.

- [139] This is not a case where the police encountered the vehicle on the road without prior planning or pursuit. Cst. Ballarin sent Cst. Poulton and the other officers to OK Falls solely on the tip he received that night from Mr. Brown. The reason Cst. Poulton was in OK Falls at all was to investigate the tip relating to Mr. Hardenstine.
- [140] This is also not a case where the police were investigating a vehicle and only initiated a traffic stop after observing a traffic violation. The Court of Appeal was clear in Kaddoura that where a police officer has a lawful basis for a stop, which in that case was the observation of a defective taillight, the officer has a lawful and reasonable basis to stop the vehicle, regardless of the presence of additional investigatory reasons: at para. 23.
- [141] In Makortoff, before pulling the vehicle over, the officer observed what he described as erratic driving. The vehicle swerved towards the centre line, braked heavily, and slowed inexplicably: at para. 60. The officer testified that these movements were, in his experience, consistent with those of an impaired driver: at para. 68. In the case at bar, there were no such indications of intoxication or erratic driving. Cst. Poulton testified that nothing about the Chevy gave rise to sobriety concerns.
- [142] While I acknowledge that Cst. Poulton also testified that it was unusual to see a car on the road at that time of night and that the Chevy was "rough looking," I do not accept that these reasons formed any part of Cst. Poulton's decision to pull the Chevy over, considering the other surrounding circumstances. First, Cst. Poulton's testimony about the condition of the Chevy only emerged after he was asked about his grounds for the stop. He was testifying to what he observed of the Chevy after having an opportunity to see it more closely. He did not testify to making any observations about the Chevy before he initiated the traffic stop. Cst. Poulton further added under cross that the Chevy was "older looking," but admitted he would not stop every older vehicle. He also testified that he was "too far back" to notice anything unusual about the older car. I do not accept that Cst. Poulton was able to make any observations about the Chevy until after he had stopped it.
- [143] Further, other than the time of day and its location in OK Falls, nothing about the Chevy gave rise to safety or sobriety concerns. Cst. Poulton testified that it was not speeding, nor were there any concerns relating to dangerous driving. On cross-examination, Cst. Poulton agreed that the driver and passenger could have just be going to their homes and that there are residential homes in that area.
- [144] In *R. v. Lauriente*, 2008 BCSC 187, the patrol officer stopped Mr. Lauriente for speeding, on the instruction from another officer who was involved in an investigation into Mr. Lauriente. The stop resulted in the police obtaining information that assisted them in thereafter obtaining a search warrant. While the officers stated that they observed Mr. Lauriente speeding, there was no ticket issued. Justice Koenigsberg found the stated lawful purpose for the stop to be on "shaky ground" in light of the surrounding circumstances: at para. 39. First, the stop was made on the instruction of another officer, but "there was no evidence as to how it was that Constable Heisler [the investigating officer] could reliably

know" the accused was speeding. Second, the stop, though purportedly based on the officer observing a traffic violation, did not result in a traffic violation ticket being issued. Justice Koenigsberg found that, in the totality of the circumstances, the stop was not in the realm of a dual-purpose stop, but rather "was a ruse for obtaining evidence": at para. 40.

- [145] The facts in Lauriente are of assistance in the present case. Like in Lauriente, it was not Cst. Poulton's decision to initiate the traffic stop. Rather, Cst. Ballarin advised Cst. Poulton to conduct the traffic stop, despite not being present at the time to observe the vehicle. The fact that it was Cst. Ballarin that advised him to stop the vehicle in advance of the stop, further supports the finding that Cst. Poulton himself did not actually observe anything that substantiated a safety or sobriety check. I am further bolstered in this belief by Cst. Harrison's frank testimony that despite not being able to make any observations about the driver or any other occupants, "we were going to try and conduct a traffic stop [] to confirm and see if Mr. Hardenstine was in the vehicle".
- [146] Further, while the record does not reveal exactly what Cst. Poulton said when he asked for Ms. Olafson's license and registration, there is no evidence that he made inquiries as to her sobriety, or any inquiries that would help him assess the apparent safety concerns he had. Indeed, the sole focus of his radio broadcasts after stopping the vehicle was to communicate his brief observations about the passenger and his appearance.
- [147] In *R. v. Nguyen*, 2017 BCSC 105, Cst. Khalif received a radio dispatch from the RCMP Drug Section to stop a specific vehicle and identify the driver. Cst. Khalif followed the vehicle. At this point, the officer was pursuing the vehicle solely for investigative purposes, and the officer testified that "he knew he needed a reason to initiate a motor vehicle stop other than a request from drug section investigators", meaning "he was aware he needed to observe some driving or MVA infraction before stopping the vehicle": at para. 22. Cst. Khalif observed the driver of the vehicle veer into the adjacent lane several times and he was concerned about the driver's sobriety. In *Nguyen*, the driver acknowledged that he had been bleeding into the other lane and attempted to provide an explanation for his driving behaviour: at para. 24. In Justice Greyell's opinion, this supported the finding that, while Cst. Khalif had an investigative purpose, he also had a lawful basis for pulling the vehicle over and it was not "simply a ruse to detain Mr. Nguyen to obtain his identity": at para. 24.
- [148] Cst. Poulton similarly testified that he was aware that he could not pull the car over for the purposes of identifying the occupants inside the car. However, he did not observe any traffic violations, or any dangerous or erratic driving that, though perhaps falling short of an actual violation, would nonetheless justify a safety and sobriety check. Cst. Poulton was not on patrol or conducting random traffic stops. His sole purpose for being in OK Falls was to investigate the Aaron Brown tip. Considering all of this evidence in context, I find that Cst. Harrison's evidence that the purpose of the traffic stop was to confirm the identity and presence of Mr. Hardenstine was truthful and most accurately describes the pre-planned purpose of the stop. As such, I find the circumstances in the case at bar to be more in line with those in *Lauriente*: see also *R. v. Huete*, 2018 BCSC 637.

- [149] Having regard to all of the evidence, the traffic stop was not conducted to enforce a traffic or vehicle safety law. Not only was there no observance of a traffic infraction or violation, but I do not accept that the bases which Cst. Poulton cited for substantiating the stop were bona fide, when considered in light of the surrounding circumstances. To be clear, I do not accept Cst. Poulton's evidence that the purpose of the stop was related to road safety. I agree with Mr. Hardenstine's submission that the stop was a mere pretext to further investigate the tip and to determine whether Mr. Hardenstine was in the vehicle.
- [150] Even if I am wrong that the stop is properly characterized as a "pretext", at the very least, it is similar to the impugned stop in *R. v. Harrison*, 2009 SCC 34. In *Harrison*, the police officer arbitrarily stopped the appellant's rental vehicle even though he knew he had no legal basis to do so, and his in-court explanations for his actions were contrived and defied credibility. Moreover, once the vehicle was stopped the officer's actions were motivated by a desire to pursue a mere suspicion that it contained drugs. In these circumstances, the officer's conduct was held to be brazen, flagrant and extremely serious: *Harrison* at paras. 6, 11-12, 22-27.
- [151] Like in *Harrison*, I find that Cst. Poulton's determination to confirm the presence of their target in the vehicle "blinded him to the constitutional requirements of reasonable grounds": at para. 24. While the violations may not have been "deliberate" in the sense of Cst. Poulton setting out to breach the Charter, they were reckless and showed insufficient regard for Charter rights or a completely unacceptable understanding of the purpose of the random stopping powers under the MVA. A careful consideration of the evidence, including Cst. *Harrison*'s evidence about the purpose of the stop and the contemporaneous statements of Csts. Ballarin, Barrett and Poulton on the radio, confirm that the decision to conduct a traffic stop was a pre-approved plan to stop the car for the sole purpose of confirming the presence or absence of Mr. Hardenstine in the vehicle.
- [152] I conclude this was an arbitrary detention and the rights of Mr. Hardenstine pursuant to s. 9 of the Charter were infringed. The infringement cannot be saved by s. 1 of the Charter. As noted in a number of cases, the police cannot stop a person driving a motor vehicle for no reason. While each case depends on its own facts, the inquiry must begin with the determination of whether the detention was justified in the totality of the circumstances: *Huete* at para. 67, citing *R. v. MacGregor*, 2017 ONCJ 253 at para. 12.

Was Mr. Hardenstine a mere bystander during the traffic stop?

Law

- [153] It is clear from the jurisprudence relating to s. 9 breaches that police officers may engage in preliminary questioning of bystanders without engaging ss. 9 and 10 of the Charter: see *R. v. Mann*, 2004 SCC 52; *R. v. Grant*, 2009 SCC 32; *R. v. Suberu*, 2009 SCC 33.

- [154] In the context of a traffic vehicle stop, there is some authority for the proposition that only the driver of a vehicle is necessarily detained: *R. v. Mooiman and Zahar*, 2016 SKCA 43 at para. 21. The passenger is therefore a bystander, though this may change as the stop evolves and the interaction may shift to impose an element of either physical or psychological control on the passenger. This is a fact-specific inquiry.
- [155] Without some additional element of police control, whether psychological or physical, there is nothing stopping the bystander from "simply walking away": *Mooiman* at para. 22. There is no legal requirement that compels the bystander to comply with police: *Suberu* at para. 28.
- [156] In circumstances where the passenger of a vehicle subject to a stop argues that they were arbitrarily detained, the passenger must show that their liberty was deprived: *Suberu* at para. 28; *Mooiman* at para. 23.

Position of the Parties

- [157] The Crown has framed this issue as one of standing. The Crown argues that Mr. Hardenstine does not have standing to make an application under s. 9 of the Charter because he was not the individual detained in the traffic stop. Rather, the Crown submits that, as the passenger, Mr. Hardenstine was a mere bystander, and Ms. Olafson, as the driver, was the individual detained. It was Ms. Olafson's Charter rights which may have been engaged in the course of the initial traffic stop.
- [158] The Crown relies on *R. v. Robinson*, 2021 BCSC 899, wherein the accused was likewise a passenger in a vehicle that was subject to a roadside traffic stop. In *Robinson*, Justice Saunders outlined that the jurisprudence relating to s. 9 breaches shifted after the Supreme Court's decision in *Grant*. Specifically, Saunders J. noted that a close and contextual inspection of the interactions between police and passengers is required to determine whether there was in fact a detention such that s. 9 is engaged, or if the interaction was superficial such that the interaction between the police officer and the passenger did not amount to a detention: at para. 29.
- [159] Justice Saunders found that Mr. Robinson was not physically or psychologically restrained. There was only one officer present and the officer's stated reason for the traffic stop, being a faulty taillight, did not involve Mr. Robinson. Justice Saunders found that despite asking for his name, the officer did not single Mr. Robinson out as the focus of police interest or the subject of a police investigation. The inquiry into Mr. Robinson's name did not amount to a detention: at para. 32.

- [160] The Crown also relies on *Mooiman*, on which Saunders J. also relied in *Robinson*. The Court in *Mooiman* found that Mr. Mooiman, the passenger of the vehicle, was a bystander and was not detained simply because the vehicle was subject to a traffic stop and the officer asked for his name. Rather, the Court held that it is only the driver in these circumstances that is necessarily detained, and the detention extends to the passenger only if there is "some other suggestion of significant physical or psychological restraint": at para. 21.
- [161] The Court differentiated between the officer's suspicion before running checks on Mr. Mooiman and the driver of the vehicle, and the officer's suspicion after learning that Mr. Mooiman had a criminal record and that both individuals were associated with criminal drug activity. The former was mere suspicion, whereas the latter was a reasonable suspicion that the individuals might be in possession of controlled substances. The detention commenced only after the officer conducted the checks.
- [162] The Crown argues that Mr. Hardenstine's interaction with police did not amount to a detention, nor did it even amount to the level of interaction described in *Robinson*, since Cst. Poulton never asked Mr. Hardenstine for his name. The Crown submits that the circumstances of the traffic stop put this case in line with *Robinson* and *Mooiman*. Because Mr. Hardenstine was a mere passenger in the vehicle, the police did not suggest that he was the subject of investigation, or subject him to any search or questioning at the time, his Charter rights were not engaged at the time.
- [163] Mr. Hardenstine submits that he was detained immediately upon the vehicle being pulled over. Mr. Hardenstine argues that the stop was made on the suspicion that it was him in the vehicle, making it a mere pretense for the police to further investigate the tip they received from Mr. Brown. On this basis, Mr. Hardenstine was the subject of particularized police interest and investigation throughout the stop and his s. 9 Charter rights were engaged.

Analysis

- [164] My findings regarding the nature of the police stop are highly relevant to this second issue. In essence, the Crown is making a further alternative argument that, even if the traffic stop was a ruse and therefore arbitrary, the stop was still not a breach of Mr. Hardenstine's rights because, as a passenger, he was not actually detained. However, as I have found that the traffic stop was a pretense to further investigating the tip they received from Mr. Brown, the cases relied upon by the Crown are distinguishable.
- [165] In *Mooiman*, the Court was focused on drawing the line between general questioning and detention, and how a reasonable person in the shoes of Mr. Mooiman would interpret the initial interaction in which the police officer asked for his name. The Court was clear that there was an investigative detention that began after the officer ran the checks and discovered Mr. Mooiman's record. The officer's reason for keeping the individuals shifted from the traffic stop to reasonable suspicion of criminality. However, the traffic stop was initiated in the context of a routine traffic patrol on the highway and after the officer

observed the vehicle approaching at a high rate of speed and then brake suddenly. The traffic stop in Robinson was in the same vein: the officer was on patrol and initiated the traffic stop after observing the vehicle had a defective taillight and a defective license plate light.

- [166] The same cannot be said for Mr. Hardenstine's traffic stop. The officers here were not conducting a routine traffic patrol or stopping Mr. Hardenstine for a traffic violation. Rather, Mr. Hardenstine was always the subject and object of the stop; the stop was initiated as a means of confirming whether or not he was the passenger in the vehicle. Without Mr. Hardenstine, the vehicle would not have been stopped. He was always much more than a bystander.
- [167] In *R. v. Karaim*, 2022 BCSC 1849, the Court determined that the passenger of a vehicle which had been stopped by police was not detained for the purposes of s. 9. The Court found the detention only began when the police told her she could not leave until they searched her purse. Justice Verhoeven's analysis focused on determining the point in time in which the passenger became the subject of police investigation. Prior to this point, it was the driver, not the passenger, that was the focus of police attention. In the present case, the objective of the stop was always to investigate the identity of the passenger. The attempt by the detaining officer to use the thin veneer of a random traffic stop to cloak the true reason for the stop, does not diminish the infringement on Mr. Hardenstine's s. 9 rights, despite him being the passenger and not the driver.
- [168] Rather, like Justice Shergill found in *Abdullahi* at para. 66, I find the stop was tainted from the outset. In *Abdullahi*, both the accuseds' rights - the driver and the passenger - were found to be engaged immediately when the vehicle was stopped. In that case, the accused were in a vehicle together and were pulled over for a traffic stop. The officer testified that he was suspicious of the manner in which the vehicle was driving and wanted to ascertain the owner and confirm that the driver was licensed. Before stopping the vehicle, the officer became aware that this was a "robbery suspect vehicle": at para. 20.
- [169] Justice Shergill held that "there was nothing random" about the officer stopping the vehicle: *Abdullahi* at para. 49. Rather, the officer had a suspicion of criminality that did not rise to a level which would ground an investigative detention: at para. 53. The stop was a ruse to further the robbery investigation, and their rights were engaged "immediately when the vehicle was stopped": *Abdullahi* at paras. 65, 66.
- [170] I have no trouble finding that the facts in the case at bar are in line with the findings in *Abdullahi*.

[171] Further, I have no trouble finding as a fact, from all the surrounding circumstances, that Mr. Hardenstine would not have been free to exit the vehicle and leave the scene. I find that Cst. Poulton, whose sole focus after the stop was to report back observations made about the male passenger, would have prevented Mr. Hardenstine from leaving the scene of the traffic stop. I find that Mr. Hardenstine was detained and thus has standing to argue a s. 9 violation in this voir dire.

Was the stop a valid investigative detention for trafficking firearms?

[172] In relation to the Crown's alternative argument that the police had reasonable grounds to detain Mr. Hardenstine in relation to the tip and their investigation into a possible sale of firearms, I find that it fails on both the subjective and objective prongs of the inquiry.

[173] In Mann, the Supreme Court at para. 34 outlined the requirements for a lawful investigative detention:

The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.

[174] The officer must therefore subjectively believe that they have reasonable suspicion when they effect the detention, and the overall reasonableness of the grounds and the decision to detain must be objectively reasonable.

[175] The primary problem for the Crown in relation to this argument is that Cst. Poulton, subjectively, did not believe that he had sufficient grounds to stop the vehicle based on the information that they had at the time. In his direct evidence, Cst. Poulton testified that he knew he could not pull the vehicle over simply for the purpose of identifying whether Mr. Hardenstine was in the vehicle. Further, we know that the stated reason for his decision to stop the vehicle was a traffic stop for road safety. So, again, subjectively, we know that in Cst. Poulton's mind he is not exercising his common law power to detain to further investigate a particular crime: Mann at paras. 34, 45; R. v. Le, 2019 SCC 34 at para. 131. Without subjective grounds, the stop cannot be lawful even if I were to find that objectively there were sufficient grounds to stop the vehicle.

[176] Even if Cst. Poulton had the subjective grounds to detain, however, I do not find that the objective grounds were sufficient either. The first area of the concern is what weight could be given to the "tip" that was provided to police. At the time the officers deployed to OK Falls, Cst. Ballarin had the following information:

- The tip came from an unknown individual, who initially used a false name to identify himself to police;
- The tipster changed the location of the alleged sale approximately ten times. Further, it is unclear from the evidentiary record whether the police had attended at another location when the so-called buyer failed to show up (there is some reference to this in Cst. Barrett's evidence);
- Cst. Ballarin formed the belief that the tipster "was lying" initially;
- Cst. Ballarin had to have multiple conversations with the tipster to get "correct info";
- Cst. Ballarin was unable to verify any of the information provided to him by the tipster;
- The tipster displayed a strong animus toward Mr. Hardenstine, telling the police on several occasions to "go get him" and "I'm giving him to you";
- No precise time was given in terms of the proposed sale;
- No make or model of the vehicle was given; and
- No information about how many people would be in the car was provided.

[177] Cst. Harrison was the officer tasked with observing one of the two gas stations in town where the vehicle might appear. There was some confusion in the evidence as to whether the police knew it would be the Centex or whether they believed that it may be another gas station. Cst. Harrison testified that the Chevy pulled into the Centex and drove around the back of the station and slowed for several seconds before coming briefly to a stop. It then pulled out and kept driving along the same path it had been travelling. Cst. Harrison was unable to make any observations about the driver or about how many occupants were in the vehicle.

[178] The Crown points out that all the officers noted that the Chevy was the only car that they observed in the area. While this is true, the primary problem is that their stated window of observation was only five minutes in duration. Additionally, we can see that there are several cars out and driving in the general area that night from the dashcam video. Further, Cst. Poulton acknowledged that the Chevy could just as easily have been a family returning home from an evening out. If the Chevy had been the only vehicle to enter the Centex for a longer period of time, even 30 minutes, the probative value of this observation would have some weight on my assessment of reasonableness. However, on the evidence, they had only been present in OK Falls for five minutes before they saw a car and made a decision to pull it over.

[179] I note the statements made over the police radio, in real time, as the stop was in progress:

- At 434, Cst. Ballarin says, "We don't know what he's driving. This car pulled in behind the gas station"
- At 439, Cst. Ballarin asks "is he at the tickleberrys?"

· Cst. Ballarin says, "We pulled over the car that pulled in behind the gas station and it wasn't him"

[180] I take from these comments that Cst. Ballarin here is (1) confirming that the real reason they pulled the vehicle over was because it had momentarily pulled in behind the gas station; and (2) at that time they actually thought they had the wrong vehicle.

[181] In the final analysis, while it may be close, I do not find that there were sufficient objective grounds to stop the Chevy given the limited information that they had, being namely an ambiguous location, an ambiguous time and a tipster whose reliability was unknown.

Issue #2: Did the police conduct an unlawful search of the vehicle before or after Mr. Hardenstine's arrest?

[182] Following Mr. Hardenstine's unlawful detention and arrest, Csts. Harrison and Poulton conducted a warrantless search of the Chevy. Cst. Turundzev also conducted a warrantless search of Mr. Hardenstine's incident to arrest. No issue was made by the Crown as to Mr. Hardenstine's reasonable expectation of privacy, so the question becomes whether these searches breached his s. 8 Charter rights.

[183] The police officers relied upon their common law powers to search incident to arrest. To be valid, a search incident to arrest must meet three preconditions: (1) the person searched is lawfully arrested; (2) the search is truly incidental to the arrest; and (3) the search is conducted reasonably: *R. v. Stairs*, 2022 SCC 11 at para. 35.

[184] As explained above, Mr. Hardenstine was not lawfully detained. As it was the arbitrary detention that allowed the police to collect further information about the occupants of the vehicle and to visually confirm the identity of Mr. Hardenstine, his subsequent arrest on the outstanding warrants was also tainted as a consequential breach flowing from the initial s. 9 violation. As Justice Layton noted in *Anwyll* at para 80, citing *R. v. Zacharias*, 2023 SCC 30 at paras. 26-44, Mr. Hardenstine's arrest on the outstanding warrants "necessarily constitutes a breach of his s. 9 Charter rights because the police are not permitted to rely on unconstitutionally obtained evidence to ground and arrest." The police were able to identify Mr. Hardenstine, but only through unconstitutional means, and therefore cannot rely on the identification to ground a lawful arrest. Police "cannot rely on conduct that violated the Charter": *Zacharias* at para. 32.

[185] Given that Mr. Hardenstine was not lawfully detained or arrested, the first precondition for a search incident to arrest is not met. As such, the police search of the Chevy breached Mr. Hardenstine s. 8 Charter rights.

[186] Mr. Hardenstine argues that additional or independent police misconduct occurred in relation to this search because it would not have fallen within the power to conduct a search incident to arrest even had Mr. Hardenstine's preceding arrest been lawful. He argues that as he was secure and in custody, the police could have and should have sought a warrant to search the vehicle.

- [187] I disagree. Cst. Ballarin tasked Csts. Harrison and Poulton to search the Chevy in order to search for "firearms and ammunition". Whatever the nature of the outstanding warrants, at this stage Mr. Hardenstine was otherwise arrestable (leaving aside the initial illegality of the arbitrary detention) on charges related to trafficking and possession of firearms. It was reasonable and truly incidental, as per *R. v. Caslake*, [1998] 1 S.C.R. 51, 1998 CanLII 838 (SCC), for the police to search the vehicle for any further evidence related to the prospective firearms charges. The standard of "some reasonable basis" was clearly met on the facts of this case.
- [188] Accordingly, I do not find that these searches involved any additional or independent police misconduct.
- [189] I would also note, similar to the clarifying note of Layton J. in *Anwyll* at para. 107, that Mr. Hardenstine was a passenger in the vehicle, and depending on the circumstances, a passenger may have a lesser expectation of privacy in a vehicle than does the driver, or no expectation of privacy at all: *R. v. Belnavis*, [1997] 3 S.C.R. 320 at paras. 22-23, 1997 CanLII 320. However, the Crown is not arguing that Mr. Hardenstine had no expectation of privacy in the Chevy or its contents: *R. v. Jones*, 2017 SCC 60 at paras. 32-33; *Belnavis* at para. 24.
- [190] The Crown, in the alternative, argues that the handgun and the long gun were found in plain view. Our Court of Appeal addressed the plain view doctrine in *R. v. Gill*, 2019 BCCA 260 which outlines the requirements:
- [33] The judge relied on *R. v. Asp*, 2008 BCSC 794, aff'd on other grounds 2011 BCCA 433, for its summary of the plain view doctrine, permitting police seizure of evidence without a warrant if four requirements are met (at para. 25 of the *Voir Dire* Ruling):
- a. the police had lawful prior justification to be at the place where the evidence was found;
 - b. the police discovered the evidence inadvertently while exercising a lawful police power or performing a lawful police duty;
 - c. the evidence was in plain view in the sense that it was detected through the unaided use of the officer's senses; and
 - d. it was immediately apparent to the officer that the evidence was probably connected to criminal activity.
- [191] In *Gill*, officers were executing a valid fingerprint impression warrant when an unsealed envelope fell from the accused during a struggle with the police. Inside the envelope was visible vacuum sealed brick consistent with cocaine.
- [192] The Crown says that the facts of *Gill* are akin to those in the case at bar. I disagree.

[193] The primary and most obvious difference is that in Gill, the officers were acting lawfully when they went to execute the fingerprint impression warrant. In this case, as I have already found they were not exercising a lawful police power due to the fact that the initial stop was arbitrary. The police would not have been in a position to make these observations of the firearms in this case but for their illegal detention of Mr. Hardenstine. As such, I cannot accede to the Crown's arguments in this regard.

Issue #3: Did the police violate Mr. Hardenstine's s. 10(a) and 10(b) rights after his arrest?

[194] In closing submissions, and in their written submissions, the Crown conceded a breach of Mr. Hardenstine's s. 10(a) and s. 10(b) Charter rights. As noted by the Crown, Mr. Hardenstine was not formally arrested on any specific charges or given a full Charter warning until after he was loaded into the ambulance. This is at least 27 minutes after he was handcuffed, relying on the dash cam video time stamps.

[195] Crown also acknowledged a breach of s. 10(b). Although Mr. Hardenstine made no request for access to counsel, given that he was being treated by EHS, it was the Crown's position that it would have been prudent to follow up with him. No follow-up occurred.

[196] I find that the Crown's concession here was a reasonable one on the facts. There was a significant delay in providing Mr. Hardenstine with his Charter rights. I find that the police could easily have complied with both of their informational obligations under s. 10(a) and (b): namely to inform him of the reason for his arrest and to inform him of his right to consult with counsel. Given the Crown concession, it is not strictly necessary to consider whether the police could have or should have complied with their implementational obligation under s. 10(b) while at the roadside. Police are not required to allow those in their custody to contact counsel using the officers' mobile devices: *R. v. Taylor*, 2014 SCC 50 at para. 27. However, it was an option that should have, at the very least, been considered and discussed given the lapse of time. The general tenor of the evidence of the various officers is that no one except Cst. Turundzev ever turned their mind to Mr. Hardenstine's s. 10 rights.

[197] I agree with the Crown and the Defence that a breach of s. 10(a) and s.10(b) is made out in the case at bar.

Issue #4: Did the police use excessive force during Mr. Hardenstine's arrest?

[198] Mr. Hardenstine argues that the police used excessive force in effecting his arrest, in contravention of his s. 7 and s. 12 Charter rights. The Crown says that the police use of force here, while significant, is justified under s. 25 of the Criminal Code, in all the circumstances.

[199] The defence is entitled to bring an application under both s. 7 and s. 12. I note that there is some commentary in the jurisprudence regarding whether s. 12 is the appropriate Charter right to invoke in these circumstances: *R. v. Douglas*, 2020 SKQB 57 at paras. 16-17; *R. v. Thomas*, 2024 SKKB 189 at para. 14. In my review of the authorities, s. 7 is clearly engaged

where police utilize force in an arrest and is most often the Charter right through which the reasonableness of the police conduct is assessed. While I do not foreclose the possibility, and in fact the reality, that s. 12 may be engaged in cases involving excessive force, in the case before me, I am of the view that s. 7 is the more appropriate inquiry into the lawfulness of the police conduct.

Law

- [200] The degree of force that an officer uses to complete an arrest, or to prevent a person from escaping their custody, is constrained by the principles of "proportionality, necessity and reasonableness": *R. v. Nasogaluak*, 2010 SCC 6 at para. 32. The mere fact that an officer might be duty-bound to make an arrest is not determinative of their ability to use a particular level of force.
- [201] The defence can bring a Charter application under s. 7 to establish that the police used excessive force when arresting the accused. Use of excessive force *prima facie* breaches s. 7 because it substantially interferes with an accused's physical or psychological integrity: *Nasogaluak* at para. 38; *R. v. Jarrett*, 2021 ONCA 758 at para. 61. The defence bears the burden of establishing a breach by demonstrating there was force used in effecting the arrest. The burden then flips to the Crown if it seeks to justify the level of force under s. 25 of the Code. Remedies for excessive force can include a stay of proceedings or a sentence reduction under s. 24(1), or the exclusion of evidence under s. 24(2).
- [202] Section 25 of the Code codifies the use of force principles from the common law. Under s. 25(1), a peace officer is justified in "using as much force as is necessary" if they act on "reasonable grounds". The principles that apply to the regular use of force under s. 25(1) also apply to the use of elevated force, with some additional considerations. "Elevated force" is force that is intended or likely to cause death or grievous bodily harm. "Grievous bodily harm" means serious hurt, pain, or injury: *Degen v. British Columbia (Public Safety)*, 2023 BCSC 508 at para. 439. While it is not limited to harm that is permanent or life-threatening, it must surpass simple "bodily harm" which is defined in s. 2 as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".
- [203] Section 25(3) of the Code sets out that the use of elevated force is prohibited unless, subject to s. 25(4), the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous harm.
- [204] Section 25(4) sets out further conditions for the use of elevated force by a police officer in conducting an arrest. They are as follows:

- (4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if
- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
 - (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
 - (c) the person to be arrested takes flight to avoid arrest;
 - (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
 - (e) the flight cannot be prevented by reasonable means in a less violent manner.

[205] This case involves not only physical force in the form of punches and knee strikes, but also the use of a taser. The use of a taser, which can be deadly, qualifies as elevated force. The use of this type of force clearly engages an individual's security of person, and if unlawfully used, is contrary to principles of fundamental justice. The use of force of this nature must be justified by law; s. 25(3) and the further requirements of s. 25(4) of the Code are engaged, and Crown must establish that these conditions are met.

[206] Reviewing a police officer's use of force and assessing whether that force was excessive requires the Court to consider all the circumstances. This includes considering the officers' conduct in light of what a reasonable officer would have done and taking into account the information the officer had, any urgency or risk involved in the arrest, and the knowledge, training, and experience of the officer: *R. v. McAlpine*, 2023 ONSC 2462 at para. 52. This is a subjective-objective test. The officer's subjective belief must be objectively reasonable: *Nasogaluak* at para. 34; *R. v. Dube*, 2024 ONCJ 105 at para. 51.

[207] Due to the highly dynamic, stressful and often dangerous nature of police efforts to arrest those suspected of committing a crime, the courts have been careful not to hold police to an exacting, after-the-fact, standard. In *Nasogaluak*, the Supreme Court re-emphasized this principle:

[35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 1981 CanLII 339 (BC CA), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

[208] In their recent and useful text, *Detention, Arrest and the Right to Counsel*, the authors have compiled a useful list of factors that courts may use to determine the reasonableness of an officer's use of force, including:

- whether the arrestee was acting in a hostile manner resisting arrest, or failing to comply with the officer's arrest procedure;
- the relative height, weight, and size of the officer and the arrestee;
- the urgency of the situation, which could also inform the extent to which the officer needed to act despite having uncertain or insufficient information;
- the time available for the officer to react;
- any information that informed the officer's belief that the arrestee might represent a threat;
- whether the officer believed that the arrestee was armed or that there might be weapons nearby;
- the relative number of officers involved; and
- the alternatives to force that were available to the officer.

[209] I note that many of these considerations mirror those stipulated by the Court in *Walcott*.

Analysis

[210] I have no issue finding that elevated force was used by the officers in arresting Mr. Hardenstine. I accept that Mr. Hardenstine was punched in the head, face and body numerous times. The officers kneed him in the ribs and in the kidney area numerous times. He was tasered in the lower back and buttocks 10 times.

[211] After he was handcuffed, several officers described Mr. Hardenstine's condition and appearance. I accept that his face was bloodied and swollen. I accept that he was in pain through the course of the struggle and after being secured in handcuffs. There is no doubt that he can be heard calling out in pain and moaning, both during the course of his arrest and afterwards.

[212] In short, Mr. Hardenstine's arrest involved significant use of force by all four of the male officer's involved in his arrest. Mr. Hardenstine has therefore met the burden of demonstrating that his s. 7 rights are engaged. The burden shifts to the Crown to establish that the use of force was justified.

- [213] The first condition under s. 25(4) is that there be a lawful arrest. I have previously found that the arrest was unlawful as it is a consequential breach stemming from the arbitrary detention. I will now expand on the impact this finding has on the use of force analysis.
- [214] Zacharias sets out a clear statement on the use of unconstitutionally obtained evidence at para. 26: where the arrest is based "on evidence that is subsequently found to have been unlawfully obtained, the court must excise this evidence from the factual matrix in order to determine whether the police had reasonable and probable grounds to arrest". In this case, but for the unlawful detention, the officers would never have been able to identify Mr. Hardenstine as the passenger of the Chevy. Ultimately, the unlawful detention taints the entirety of the encounter. Without the identification, the officers could not arrest on the outstanding warrants. The Supreme Court of Canada has clearly stated that "the state is prevented from benefiting from the illegal acts of police officers": *R. v. Grant*, [1993] 3 S.C.R. 223 at p. 251, 1993 CanLII 68 (SCC). Here, the police used illegal means to identify Mr. Hardenstine. This identification cannot be used to ground the arrest.
- [215] I note that the officers in this case no doubt believed that once they had identified Mr. Hardenstine, the warrants provided the authorization necessary to arrest. This is a mistake of law, not one of fact, and therefore provides no excuse or rationale to salvage the arrest: Zacharias at paras. 32-34. Citizens have "a legitimate expectation that the police will know and comply with the law, especially the Charter" and this principle "applies no less in dynamic situations": Zacharias at para. 43; *Tim* at para. 30. Section 9 protects individuals from unjustified state intrusion. Mr. Hardenstine's liberty was undoubtedly intruded upon, and the state cannot utilize the fruits of this intrusion, regardless of Mr. Hardenstine's alleged criminality.
- [216] I recognize that Zacharias dealt with warrantless arrests, and in the case at bar, there were warrants authorizing Mr. Hardenstine's arrest. However, I do not read the Supreme Court's decision in Zacharias to have a narrow application. Rather, the Court is clear that the decision reflects a principled approach to the Charter and an answer to divergent lower court decisions regarding arrests grounded on unconstitutionally obtained evidence: at para. 26. Here, despite there being legal authorization to arrest in the form of the warrants, the unconstitutionality of the detention renders the arrest unlawful, and therefore any use of force unlawful. But for the arbitrary detention, the arrest would not have been executed.
- [217] The arbitrary detention is determinative of the lawfulness of the subsequent police action in this case. Because the police officers proceeded in the manner they did, there was no way to lawfully arrest Mr. Hardenstine that night. However, I will nonetheless conduct the remainder of the analysis on excessive force.

- [218] In short, even if the arrest itself had been lawful, I would have found on the balance that the use of force was excessive in all the circumstances. While the force in the case at bar comes close to the line, ultimately the circumstances lead me to conclude that while the officers subjectively believed that the force was necessary, this belief was not objectively reasonable in the circumstances.
- [219] First, did the officers subjectively believe that the force used was necessary to preserve their fellow officers from death or grievous bodily harm?
- [220] Each of the officers testified that they had a fear for their personal safety and for the safety of their fellow officers. I accept that the officers were afraid, and that the fear was reasonable. Cst. Poulton, for example, hit the "panic button" on his radio and called for back-up at least twice during the struggle. While I do not accept that Mr. Hardenstine was doing "push-ups" with all four officers holding him down, I do accept that he continued to struggle mightily despite the pain compliance techniques being deployed by each officer. I accept that the officers subjectively believed that Mr. Hardenstine posed a serious threat, both physically and on account of the firearm.
- [221] In relation to the tasering itself, I accept Cst. Turundzev's evidence that he was afraid for his life and that he felt that it was necessary to deploy his taser. For the most part, I also accept that Cst. Turundzev did not feel that he could properly deploy his pepper spray or use his baton during the struggle, although it was not clear on his evidence that these were clear options that he actually considered in the moment.
- [222] Second, was the officers' belief objectively reasonable? That is, was their belief supported by facts known to the officers at the time that they formed their belief?
- [223] With regard to the officers' knowledge prior to the arrest and about the arrestee, all the officers testified that:
- They knew that Mr. Hardenstine was a person that could be considered "armed and dangerous";
 - They knew that Mr. Hardenstine had a history of fleeing from police;
 - They were operating on a tip that Mr. Hardenstine may have firearms;
 - One or more officers noticed a gun during the physical struggle and one of them yelled, "gun, gun";
 - One or more officers perceived Mr. Hardenstine to be reaching for Cst. Poulton's taser during the struggle;
 - They were unable to secure Mr. Hardenstine's hands despite the use of knee and hand strikes to his body and face; and
 - They were initially unable to secure Mr. Hardenstine's hands despite several deployments of the taser.

- [224] In terms of the number and relative size of the participants in the arrest, I note that Mr. Hardenstine was significantly outnumbered and outweighed by the four and later five officers that he was struggling against. That said, Mr. Hardenstine presented as a physically imposing figure. He was described as being "fit" and "muscular", weighing approximately 250 lbs and being 6'1" in height.
- [225] Mr. Hardenstine was a large individual who was combative and highly resistive to arrest. Importantly, Mr. Hardenstine was not only generally believed to be armed and dangerous but also was on the evening in question believed to be in possession of at least two firearms which he planned to sell. During the initial takedown, police discovered that he was in possession of a long gun and that firearm had to be removed and discarded during the arrest. The officers had confirmed their belief that he would be armed and were therefore reasonable in their fear that there may be another gun on his person that posed a risk to their lives.
- [226] I have also considered that most of the officers involved in this dynamic and dangerous encounter were relatively junior in experience. This incident marked only the second time that Cst. Turundzev had deployed his taser. Cst. Poulton, despite being a physically imposing man, was clearly unnerved and afraid that he and his fellow officers would not be able to control Mr. Hardenstine before something potentially tragic could occur. Perhaps more experienced officers would be more confident that with an advantage of five-to-one odds, with more officers only minutes away, that Mr. Hardenstine would inevitably be controlled and handcuffed. The focus of the analysis remains on the reasonableness of the officers' actions, taking into account the officer's training and experience. While this factor does not overtake the analysis, it is nonetheless one that I find relevant to my overall consideration of whether the officers believed the level of force was necessary in the circumstances, and whether that was objectively reasonable.
- [227] The question that arises in this case is whether the initial decision to deploy the taser was both reasonable and necessary in the circumstances but may have at some point become excessive. The decision in *R. v. Thomas*, 2023 ONCJ 531 [Thomas 2023] provides an example of just such a situation. In Thomas 2023, police stopped a motor vehicle on the side of the highway for speeding. During the traffic stop the driver was removed from the vehicle for further questioning. The passenger then attempted to climb into the driver seat and flee the scene. He was initially pulled from the car and a struggle ensued on the edge of a traffic lane of the highway. Several other officers then intervened, and the passenger was physically moved to the gravel shoulder of the highway. There, he was physically wrestled under control by five officers. In the course of his arrest, however, he was tasered by three separate officers. He was also punched several times by at least one of the officers.
- [228] In finding the force used was excessive, the Court in Thomas 2023 stated the following:

- [40] I find that the defendant was not so much hostile and aggressive as he was desperate to flee and resistant to attempts to prevent that happening. While there was initially a risk of harm to the officers, it was minimized if not eliminated when he was moved to the shoulder. The force became excessive after that point. No weapon was seen and the possibility of one materializing was no greater than in any other arrest. The defendant was greatly outnumbered and outweighed; the 140 pound defendant was subjected to the force applied by almost 800 pounds of police officer. It was five on one; there was almost no chance of escape. Of those five, three used taser or stun guns on him almost simultaneously and without warning; the fourth kned the defendant in his side while the fifth pummeled the defendant's face with his fists. At the time this was occurring, the defendant was substantially restrained. It was inevitable that he would soon be brought under control by use of reasonable force.
- [41] I find that the totality of the force used was unnecessary and greatly excessive. While not every case of excessive force constitutes a Charter violation it is my view that the facts in this case were serious enough that the defendant's section 7 right to security of his person was infringed: see *R v Donnelly* 2016 ONCA 988 (CanLII), [2016] OJ No 6681 (C.A.) at para 106. I am particularly troubled by the punches to the face while the defendant was lying on his back, substantially restrained.

[Emphasis added]

- [229] Like in *Thomas* 2023, Mr. Hardenstine was outnumbered and outweighed by the four, and later five, officers. As in *Thomas*, it was five to one. Once the officers were on top of Mr. Hardenstine, it was inevitable that he would eventually be brought under control. What distinguishes the case at bar from *Thomas* 2023 is the presence of a weapon, and the possibility of another being on Mr. Hardenstine's person. This fact, known to all the officers, is what makes this case close to the line.
- [230] What tips the scales, however, is the use of the taser. Even if the initial taser deployment was objectively necessary in the face of Mr. Hardenstine continuing to resist and based on the threat of a further weapon being on his person, I find the successive deployments unreasonable. Despite Cst. Turundzev's testimony that the taser was having little to no effect on Mr. Hardenstine, the taser log filed by the Crown indicates that most of the deployments were separated by a mere one or two seconds, until the 11 second delay before the final deployment. This calls into question whether there was an objectively reasonable possibility that Cst. Turundzev could have been actively assessing the need to continue deploying the taser. The lack of any clear efforts on the part of Cst. Turundzev to pause and re-assess the necessity of a further deployment in this case borders on reckless. This is especially so given his stated evidence that he was aware that multiple deployments of the taser can be life threatening to the subject. While I accept that Mr. Hardenstine was combative and resistive to arrest, I am not satisfied that the decision to deploy the taser on 10 separate occasions was objectively necessary. Nor do I accept Cst. Turundzev's evidence on this point, as I find it would have been impossible for him to ascertain the effectiveness

of the taser given the speed at which he was deploying it.

- [231] I recognize that police actions should not be judged against a standard of perfection: Nasogaluak at para. 35. I must assess what was reasonably known to and perceived by the officers at the time of the arrest, accounting for the fact that police action involves a degree of discretion in difficult, dangerous, and fluid situations: *R. v. Cornell*, 2010 SCC 31 at paras. 23-24. However, viewing the situation objectively, the necessity of the multiple and almost continuous taser deployments is not made out. Further, I find the use of the taser after the initial deployment, and particularly the extent of its use, was no longer proportional to the threat Mr. Hardenstine posed, given four officers were physically on top of him and striking him. I also note that Cst. Barrett had joined the fray by this point.

Issue #5: Does the conduct of the police justify a stay of proceedings against Mr. Hardenstine?

- [232] Mr. Hardenstine argues the number and seriousness of the Charter breaches renders a judicial stay of proceedings the most appropriate remedy.
- [233] A stay of proceedings is granted in the clearest of cases. The leading case on s. 24(1) of the Charter is *R. v. Babos*, 2014 SCC 16, wherein the Supreme Court set out the applicable test for the main category and residual category of abuse of process:
- [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
 - (2) There must be no alternative remedy capable of redressing the prejudice; and
 - (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits (*ibid.*, at para. 57).
- [234] A stay of proceedings is the most drastic remedy a criminal court can impose. It frustrates the truth-seeking function and mortally wounds the prosecution, thereby depriving the public and victims of an adjudication of the case on its merits. It should be imposed only in the clearest of cases, when no other remedy is available or will suffice to address the severity of the breach. In choosing between a stay and another remedy, the Court must take into account the interest of society in having a final decision on the merits: *Babos* at para. 30.

[235] That said, the "clearest of cases" standard is not reserved for only the worst and most egregious examples of Charter violative conduct. As recently explained in M. Asma and M. Gourlay, *Charter Remedies in Criminal Cases*, 2nd ed. (Toronto: Emond, 2023) at p. 83, the standard can be misinterpreted:

This is admittedly an amorphous standard. It is also a misnomer: a case of abuse does not literally have to be the clearest to qualify for a stay, just as an offender doesn't have to be the "worst of the worst" to qualify for a maximum sentence. But the abuse does need to be so clear so as to more or less foreclose reasonable disagreement about whether or not the conduct in question was proper. Borderline cases are not realistic candidates for this ultimate remedy.

[236] I have found a violation of s. 9 in relation to the vehicle stop. That violation also led to the consequential breaches in relation to Mr. Hardenstine's arrest and later searches incidental to arrest. I have likewise found a s. 7 breach. Lastly, the Crown conceded, and I have found, breaches of Charter ss. 10(a) and 10(b) based on delay in both the informational and implementational components. These breaches are serious, however, I do not find that they rise to the level necessary to dictate that a stay of proceedings is the only appropriate remedy.

[237] In extreme cases involving excessive force and s. 7 breaches, courts have imposed stays of proceedings. A list of such cases was canvassed in *R. v. Walcott*, 57 CR (6th) 223, 2008 CanLII 11374 (O.N.S.C.) at para. 124:

[124] Counsel brought to my attention a number of decisions by criminal trial courts granting stays of proceedings where they found that the police had employed unreasonable or excessive use of force in the course of arresting or detaining an accused:

- (i) *R. v. Merrick*, 2007 CarswellOnt 3855 (O.C.J.): unreasonable use of taser during arrest (breach of section 7);
- (ii) *R. v. Cheddie*, [2006] O.J. No. 1585 (S.C.J.): police struck and kicked the accused at time of arrest and search (breach of section 7);
- (iii) *R. v. Fryingpan*, 2005 ABPC 28 (CanLII), [2005] A.J. No. 102 (Prov. Ct., Crim. Div.): unreasonable use of taser during arrest (breach of section 7);
- (iv) *R. v. Spannier*, [1996] B.C.J. No. 2525 (B.C.S.C.): unreasonable use of pepper spray while taking the arrested person to detention cells; and,
- (v) *R. v. Gladue*, [1993] A.J. No. 1045 (Prov. Ct., Crim. Div.): police pushed the arrested person face up against a wall when her handcuffs slipped (breach of section 7).

[238] These cases generally involved assaults on a detainee who had already been handcuffed or otherwise rendered harmless, or there was other gratuitous or mean-spirited police conduct: *R. v. Tran*, 2010 ONCA 471 at paras. 94-102; *R. v. Bellusci*, 2012 SCC 44 at para. 31. The case at bar does not possess any of these hallmarks. To the contrary, Mr. Hardenstine was resisting his arrest throughout the interaction. He was warned that a taser was going to

be deployed in advance of the first deployment. The police had a reasonable fear that he might have access to a firearm, even after they relieved him of the long gun in his possession at the start of the struggle. No violence was inflicted by the police after the defendant was finally restrained.

[239] As such, I do not believe the "last resort" and "clearest of cases" standards, or the preconditions specified in *Babos* - including that there be no alternative remedy - are met in this case.

Issue #6: Does the conduct of the police justify excluding the firearms from Mr. Hardenstine's trial?

Law

[240] Section 24(2) of the Charter provides that evidence obtained in a manner that infringes any Charter rights shall be excluded if it is established that, having regard to all the circumstances, its admission in the proceedings would bring the administration of justice into disrepute. The determination of whether the evidence ought to be excluded is done by considering and balancing three lines of inquiry: (1) the seriousness of the state's Charter-infringing conduct; (2) the impact of the breach on the accused's Charter-protected interests; and (3) society's interest in an adjudication of the case on its merits: *Tim* at para. 74; *R. v. Beaver*, 2022 SCC 54 at paras. 116-117.

[241] The first line of inquiry asks whether the police engaged in conduct of such a serious nature that the Court ought to disassociate itself from it. The Court is tasked with placing the police conduct on a scale, or spectrum, of culpability. This scale ranges from inadvertent, technical breaches made in good faith, to highly egregious and intentional disregard for Charter rights and patterns of systemic Charter-infringing state misconduct. The aim of this inquiry is not to punish police misconduct, but rather to preserve public confidence in the rule of law and the justice system: *Tim* at para. 82; *Beaver* at para. 120.

[242] The second line of inquiry assesses the impact the Charter breaches had on the interests each Charter right protects. This second branch evaluates the extent to which the Charter breach actually undermined the interests protected by the right: *Beaver* at para. 123; *Grant* at para. 76. As in the first stage, the Court should place the impact on the right on a scale of seriousness, one end encompassing impacts which are of a fleeting, technical, transient, or trivial nature, and the other end relating to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed. The greater the impact on Charter-protected interests, the greater the risk to the administration of justice and to the public's confidence in the validity and protection of Charter rights: *Tim* at para. 90; *Beaver* at para. 123.

- [243] The third line of inquiry assesses societal concerns by considering factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the offence at issue: *Beaver* at para. 129. The question at this stage is whether the truth-seeking function of the criminal justice system would be better served by admitting the evidence or by its exclusion.
- [244] Finally, the balancing step in the s. 24(2) analysis involves weighing each line of inquiry to determine whether admitting the evidence would bring the administration of justice into disrepute. This balancing aims to ensure that evidence obtained through a Charter breach does not cause further damage to the justice system. It considers the broader impact of admitting the evidence on the long-term reputé of the justice system. The balancing is contextual and qualitative, is not capable of mathematical precision, and there is no overarching rule governing how the balance is to be struck: *Tim* at para. 98; *Beaver* at para. 133; *R. v. McColman*, 2023 SCC 8 at para. 59.

Analysis

Seriousness of the Breach

- [245] Some of the Charter breaches in this case arise only as a consequence of preceding Charter breaches, including Mr. Hardenstine's arrest on the outstanding warrants, the subsequent and incidental searches of his person and the search of the Chevy.
- [246] Purely consequential breaches - meaning ones that arise only as a result of an initial breach and involve no additional or independent police misconduct - must be factored into the first stage of the s. 24(2) analysis, but will usually not meaningfully increase the seriousness of the Charter-infringing conduct, at least where the police honestly believed they did not commit the initial breach. The focal point for evaluating seriousness will thus likely remain the initial breach: *Zacharias* at paras. 47-49, 52-57.
- [247] The s. 8 breaches and the s. 9 breach relating to the arrest arise from Mr. Hardenstine's unlawful detention and are therefore consequential breaches. The unlawful detention taints the arrest and the searches incident to the arrest.
- [248] The s. 7 breach is not purely consequential. While the s. 7 breach was initially triggered by the arbitrary vehicle stop, just as the subsequent arrest was tainted by the unlawful detention, the excessive force does not stem from the impugned detention. That is, the s. 7 breach was not simply a breach on account of the initial stop.
- [249] The breaches of Mr. Hardenstine's Charter rights under s. 10(a) and 10(b) are not purely consequential. Whether the police had a valid purpose to stop the vehicle or not, they could have chosen to promptly, and properly, comply with their informational obligations under ss. 10(a) and (b) of the Charter. Further, they could have explored the facilitation of access to counsel at the roadside or, barring an expression of such interest by Mr. Hardenstine immediately following a painful and violent arrest, they could have followed up regarding

s. 10(b) at the hospital or at the police station. The failure of the police to take any prompt action in relation to s.10(a) and (b) was unconnected to, and independent of, their earlier breaches under ss. 8 and 9 of the Charter.

[250] I find that the focus of this line of inquiry is the unlawful detention contrary to s. 9, which was the breach which initiated the cascade, the s. 7 breach, and the s. 10 breaches.

[251] The unlawful detention itself demonstrated a knowing, or at the very least a reckless, disregard for Mr. Hardenstine's Charter rights. I have found that the officers knew they did not have grounds to pull over the vehicle for the purpose of an investigative detention, nor were they pulling the vehicle over for any other lawful traffic or driving-related purpose. This places the breaches on the more serious end of the scale.

[252] I also note that the officer's testimony, particularly with regard to the internal inconsistencies relating to the basis for the traffic stop, aggravates the seriousness of the breaches. Further, the officers' testimony was contradicted on numerous points by the dash cam footage. I find the inconsistencies in the officer's evidence, some of which are strikingly similar and inexplicable, to aggravate the overall seriousness of the breaches: Harrison at paras. 26-27.

[253] I found the s. 7 breach was close to the line of excessive force. The police were no doubt facing a dynamic situation, and active threat, and the potential of a further firearm. The conduct that tipped the scales in this case was Cst. Turundzev's repeated deployments of his taser without assessing whether further deployments were necessary. It borders on miraculous that Mr. Hardenstine was not significantly injured as a result of the combined strikes by the officers and successive deployments of the taser. While there was some reasonable basis for the officer's actions, the largely unrestrained use of elevated force in this case is a serious breach. Tasers can cause serious bodily injury and death, and deploying this type of weapon is dangerous and should not be done unyieldingly. The repeated and largely unchecked taser deployments constitute a serious breach.

[254] The breaches to s. 10 were likewise serious. The delay in effecting Mr. Hardenstine's s. 10 rights was unnecessary and inexplicable. There could be no question after the takedown and arrest that the informational and implementational requirements under the Charter were immediately required. This needless breach constitutes a serious infringement of Mr. Hardenstine's right to counsel.

[255] While consequential breaches do not necessarily increase the overall seriousness of the state misconduct, I cannot ignore the fact that the police infringed Mr. Hardenstine's Charter rights in four different ways in a matter of only a few minutes. The encounter between the police and Mr. Hardenstine demonstrates layers of Charter non-compliance and an overall reckless disregard for Charter rights. I have found that the initial stop was a pretext to identify Mr. Hardenstine and that the police knew they had no grounds for an investigative detention after that point. It cannot be said that they honestly believed they had not committed this initial breach. I find this concerning, and is another factor which,

along with the foregoing analysis, that pushes the state misconduct further towards the more serious end of the spectrum of culpability. This line of inquiry therefore strongly favours exclusion.

Impact of the Breach

- [256] The s. 9 breach in this case had a cascading effect on Mr. Hardenstine's Charter protected interests. Section 9 protects an individual's liberty from unjustified state interference and their right to be left alone: *Le* at paras. 152, 155. The s. 9 breach not only interfered with his liberty in the course of the initial detention and traffic stop, but also was the triggering event leading to Mr. Hardenstine's further physical and injurious detention and arrest. Clearly, his liberty was profoundly and seriously impacted.
- [257] Section 7 of the Charter protects an individual's interest in being free from the exercise of force by the state: *Fleming v. Ontario*, 2019 SCC 45 at para. 65. Like s. 9, it also engages liberty interests in being physically protected from state-imposed restraint, as well as security of person interests in bodily integrity and the right to be free from physical punishment or suffering. Mr. Hardenstine's s. 7 rights were engaged where the police utilized elevated force to execute an arrest that was tainted by the prior s. 9 breach. It cannot be said that Mr. Hardenstine's s. 7 interests were minimally or trivially impacted. The arrest was physical, deadly force was used, and Mr. Hardenstine sustained injuries. The use of force was significant and greatly impacted his liberty and security of person.
- [258] Section 8 of the Charter protects the right to privacy and human dignity: *Tim* at para. 91. The searches in this case were unlawful as they stemmed from the unlawful detention. They are necessarily tainted. Therefore, the searches did infringe and impact Mr. Hardenstine's right to privacy, however, the searches themselves were minimally intrusive.
- [259] The rights guaranteed and interests protected under s. 10, and particularly s. 10(b) of the Charter, has been described as the "single most important organizing principle in criminal law": *R. v. Lafrance*, 2022 SCC 32 at para. 97. Interests protected under this section of the Charter include the right to make a meaningful and informed choice to speak to and retain counsel, protection against self-incrimination, and the right to know one's jeopardy: *Lafrance* at para. 97. While Mr. Hardenstine did not confess or speak to police in the interim period between his arrest and Cst. Turundzev providing him with his ss. 10(a) and (b) rights, he was still left in a state of unknown as to the exact reason and nature of his arrest. This impacted his ability to know and understand his jeopardy and whether to speak to police or remain silent.
- [260] Finally, I note that the presence, or lack thereof, of a causal connection is a key consideration under this line of the s. 24(2) inquiry. Here, of course, the causal connection is clear. But for the s. 9 breach and the consequential ss. 7 and 8 breaches, no evidence would have been obtained. Overall, I find this line of inquiry strongly favours exclusion.

Society's Interest in Adjudication on the Merits

- [261] At this stage, the Court is focused on the impact the state misconduct has on the reputation of the administration of justice: *Le* at para. 158.
- [262] The evidence here is clearly fundamental to the Crown's case. In closing submissions, the Crown indicated that exclusion of the evidence would be fatal to the firearms counts on the indictment. They also clarified, however, that there were other counts on the indictment which may be able to proceed. That said, the offence is a serious one, as firearms are extremely dangerous weapons that pose a significant risk to the public and increase the risk of violent crime. The evidence is likewise reliable. It is physical evidence the reliability of which is not compromised by the breaches.
- [263] This line of inquiry cuts both ways. While society has an interest in the adjudication of a case on its merits, as the Court stated in *Le* at para. 158, an adjudication on the merits "in a rule of law state, presupposes an adjudication grounded in legality and respect for longstanding constitutional norms". That is, society also has an interest in the administration of justice being one that is above reproach and protects Charter rights. Overall, I find this line of inquiry favours inclusion, though minimally.

Balancing the Three Grant Factors

- [264] In this case, I have concluded that the state misconduct was serious and had a substantial negative impact on Mr. Hardenstine's Charter-protected rights. While I accept that the detection of firearms and those who might traffic in them is a serious societal concern, the principles which govern police officers' legal authority to stop and detain members of the public is well-defined. At its most basic, the police got a tip of unknown reliability and pulled over the Chevy on a hunch that this might be the car that they were looking for. The fortunate fact that their hunch proved correct does not render it lawful by virtue of an ex post facto review. The other Charter breaches are also concerning, particularly the repeated tasing of Mr. Hardenstine while substantially controlled. Officers who choose to deploy their tasers in repeated succession are obliged to continue to re-assess the necessity of such force, even in dynamic situations, unless it is practically impossible to do so. On the balance, I find the importance of ensuring that such conduct is not condoned by the courts therefore requires exclusion of the impugned evidence.

V. Conclusion

- [265] Based on my findings above, all the items seized by police from Mr. Hardenstine, the Chevy and the scene of the arrest are excluded from evidence under s. 24(2) of the Charter.

"Gottardi J."

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