

CANADA / JUDGMENT

R. v. Khouchaba

2025 BCSC 1488

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2025 BCSC 1488 R. v. Khouchaba

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Khouchaba,

2025 BCSC 1488

Date: 20250729

Docket: 41838-2

Registry: Port Alberni

Regina

v.

Victor Khouchaba

Before: The Honourable Justice K. Wolfe

Oral Reasons for Judgment on Voir Dire:

Exclusion of Evidence under s. 24(2) of the Charter

Counsel for the Crown:

C. Gibson (June 23 and 25, 2025)

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Counsel for the Accused:

J. Watt

Place and Date of Hearing:

Nanaimo, B.C.

June 23 and 25, 2025

Place and Date of Judgment:

Nanaimo, B.C.

July 29, 2025

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- [1] These are my oral reasons for judgment on the accused's application to exclude certain evidence seized from his vehicle following various breaches of his Charter rights. Should either side order a transcript, or should I decide to publish these reasons, I reserve the right to edit for grammar, clarity, style and case citations or references, but the substance of my judgment will not change.

Introduction

- [2] As a result of a traffic stop by police in Port Alberni on May 26, 2022, the accused, Mr. Khouchaba, stands charged on a nine-count indictment for firearms and related offences, as well as possession of various controlled substances for purposes of trafficking, including fentanyl. Mr. Khouchaba's criminal trial began with a voir dire to address his allegation that the police breached his Charter rights and his request that the Court exclude the evidence alleged to have been obtained in violation of the Charter.
- [3] On June 20, 2025, I delivered oral reasons for judgment on the first aspect of the voir dire. I found Mr. Khouchaba's initial detention was a valid traffic stop under the Motor Vehicle Act, R.S.B.C. 1996, c. 319 [MVA] and did not violate s. 9 of the Charter. However, I determined the police subsequently breached Mr. Khouchaba's rights under ss. 8, 10(a) and 10(b) of the Charter during their ensuing interaction. I found four breaches in total.

- [4] First, I found that when the focus of the police investigation shifted from a traffic stop to a criminal investigation, the police breached Mr. Khouchaba's rights under ss. 10(a) and (b) because the police did not inform Mr. Khouchaba of the reason for his continued detention or his rights to counsel. Next, the Crown conceded and I found a further breach of s. 10(b), because upon his initial lawful arrest for possession of a weapon for a dangerous purpose, the police failed both to inform Mr. Khouchaba of his right to counsel and to implement that right. Finally, I accepted the Crown's concession that the police breached s. 8 when they searched the trunk of Mr. Khouchaba's vehicle as that search was not a valid consent search or a lawful search incident to his arrest.
- [5] Having found those Charter violations, the voir dire continued with Mr. Khouchaba's application to exclude evidence under s. 24(2) of the Charter. In his notice of application, Mr. Khouchaba originally sought exclusion of all evidence arising from his interaction with police on May 26, 2022. However, because I ruled the police lawfully arrested Mr. Khouchaba for possession of a weapon for a dangerous purpose, Mr. Khouchaba now accepts that the search of the interior of his vehicle and its contents were lawful searches incident to arrest. As a result, he no longer seeks to exclude the evidence located in the vehicle's interior. That evidence includes a bag of marijuana and various substances that, for purposes of this voir dire, the defence admits were later confirmed to be fentanyl and three different benzodiazepines (a combination of fentanyl and other drugs). The police also located digital weigh scales, cell phones, two knives and various drug-related paraphernalia within the interior of the vehicle.
- [6] Mr. Khouchaba now only seeks to exclude the evidence obtained from the search of the trunk of his vehicle. This evidence consists only of physical items, and includes a loaded prohibited firearm and a curved "banana-style" ammunition clip or magazine, as well as loose ammunition, all of which relate to the five firearms charges that Mr. Khouchaba faces. The other physical evidence located in the trunk relates to his four drug trafficking charges, and includes, but is not limited to, a cell phone with a cracked screen, drug packaging materials and pre-paid credit cards. The Crown maintains that on the facts of this case, the overall balancing required by s. 24(2) of the Charter militates against exclusion of the evidence from the trunk.
- [7] These reasons address Mr. Khouchaba's application to exclude the evidence seized from the trunk of his vehicle. Since I refer to but do not repeat my earlier findings or the background to them, this decision should be read in conjunction with my earlier judgment.

Analysis

The legal framework

- [8] Section 24(2) of the Charter does not create an automatic exclusionary rule where there has been a breach of a Charter right. For evidence to be excluded under s. 24(2), the accused must establish on a balance of probabilities that: first, there is a sufficient nexus between

the Charter breaches and the evidence in issue (in other words, that the evidence was obtained in a manner that infringed a Charter right); and, second, the admission of the evidence would bring the administration of justice into disrepute: *R. v. Lauriente*, 2010 BCCA 72 at para. 35; *R. v. Jeeves*, 2025 BCSC 133 at para. 17.

- [9] The parties focused exclusively on the second question. As noted, the Crown conceded that the search of the trunk violated s. 8 of the Charter. Since Mr. Khouchaba now only seeks to exclude the evidence found in the trunk pursuant to that Charter-infringing search, the Crown concedes at least a temporal connection between the s. 8 breach and the impugned evidence. However, the search of the trunk was also part of a larger course of police conduct that involved additional breaches of Mr. Khouchaba's Charter rights, which taints the discovery of the impugned evidence: *R. v. Tim*, 2022 SCC 12 at para. 78, citing *R. v. Mack*, 2014 SCC 58 at para. 38 and *R. v. Wittwer*, 2008 SCC 33 at para. 21. On the whole, I am satisfied there is a sufficient nexus between the Charter breaches and the evidence in issue. The first requirement has been met, triggering the second part of the analysis.
- [10] The question of whether the admission of evidence would bring the administration of justice into disrepute turns on the three lines of inquiry set out in *R. v. Grant*, 2009 SCC 32. In particular, the Court must consider and balance: (1) the seriousness of the Charter-infringing state conduct; (2) the impact of the breach on the accused's Charter-protected interests; and (3) society's interest in the adjudication of the case on its merits: *Grant* at para. 71.
- [11] The case law is clear that the *Grant* factors are not a disjunctive three-part test. Rather, the Court must undertake a qualitative balancing of all three factors to determine if, considering all the circumstances, the admission of the evidence would bring the administration of justice into disrepute: *Grant* at paras. 71, 85; *Tim* at para. 74. There is no overarching rule that governs how the balance should be struck; it is not capable of mathematical precision: *Grant* at para. 86; *Tim* at para. 98.
- [12] In *Grant*, the Supreme Court of Canada confirmed that the concept of bringing "the administration of justice into disrepute" must be understood in terms of the long-term, overall repute of the justice system, rather than any immediate reaction to the individual case. The s. 24(2) inquiry is objective, asking if a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that admission of the evidence would bring the administration of justice into disrepute: *Grant* at para. 68.
- [13] The focus of the s. 24(2) balancing is prospective. Section 24(2) presumes that some damage has already been done because the evidence was obtained in breach of Charter rights, and seeks to ensure that the repute of the justice system does not suffer further damage from the admission of that evidence: *Grant* at para. 69. The s. 24(2) balancing is also societal; it seeks to address systemic concerns about the justice system, rather than to punish the police or compensate the accused: *Grant* at para. 70; *Tim* at para. 98.

The parties' positions

- [14] Mr. Khouchaba says, on the application of the Grant factors, the evidence located during the search of the trunk should be excluded. He says the state conduct in issue falls at the more serious end of the spectrum. He emphasizes the multiple breaches within a relatively short period of time, arguing this demonstrates a pattern of at least reckless disregard of Charter rights, increasing the level of culpability. He also notes the lead investigating officer, Cpl. Gudjonson (who was then a constable), was an experienced officer. Cpl. Gudjonson testified he was aware of his Charter obligations when detaining someone and he was carrying a standard issue Charter card (and in fact, read from the card later in the interaction with Mr. Khouchaba). Further, Cpl. Gudjonson knew he had embarked on a "new investigation" at some point after being alerted to the presence of the unsheathed machete in the front seat area of the vehicle. Mr. Khouchaba says, in this context, the breaches are not minor or technical in nature.
- [15] Mr. Khouchaba also says the impact on his Charter-protected interests was significant. The breaches of s. 10 in particular deprived him of the ability to seek legal advice and therefore to understand the jeopardy he was in and make informed choices about his actions. He says those choices ought to have included whether to continue speaking with police and what, if anything, to say. While Mr. Khouchaba acknowledges that the third Grant factor militates against exclusion, he says exclusion of the evidence from the trunk would only gut the Crown's case respecting the firearms offences; the Crown could technically still proceed with the drug-related offences. As a result, he says society's interest in adjudicating this case on its merits does not outweigh the seriousness of the state conduct or its impacts on his Charter-protected interests.
- [16] The Crown maintains that despite the Charter violations, the evidence should not be excluded. The Crown says the Charter-infringing conduct falls at the lower to mid-end of the range, especially because the breaches occurred in the context of a dynamic and evolving legitimate traffic stop. The Crown says as the on-the-ground situation shifted, the obligations of the police were not entirely clear. As a result, the police conduct, while not Charter-compliant, cannot be characterized as deliberate or abusive, and therefore does not fall at the more serious end of the spectrum.
- [17] The Crown says the impacts on Mr. Khouchaba's Charter-protected interests were likewise not significant. The ongoing interaction between police and Mr. Khouchaba, both before and after his initial arrest, did not generate any evidence that will be led at trial (in the form of inculpatory statements) and there is no causal connection between the s. 10 breaches and the evidence. Instead, the physical evidence sought to be excluded all existed independently of those breaches. In relation to the s. 8 breach, the Crown says Mr. Khouchaba had a significantly reduced expectation of privacy in relation to his vehicle. The Crown says society's strong interest in the adjudication of this case on its merits weighs heavily against exclusion and the overall s. 24(2) balancing militates in favour of admission.

The seriousness of the Charter-infringing state conduct

- [18] The first Grant factor requires the Court to evaluate the seriousness of the state conduct that led to the breach by situating the conduct in question along a spectrum or "scale of culpability". The scale ranges from inadvertent, technical or minor violations at one end, to wilful and reckless disregard of Charter rights, a systemic pattern of Charter-infringing conduct or a major departure from Charter standards at the other: *Tim*, at para. 82; *Grant* at para. 74.
- [19] While minor violations may only minimally undermine public confidence, the more the state conduct deviates from the rule of law, the greater the need for the Court to dissociate itself from that conduct by excluding evidence linked to it: *Grant* at paras. 72 and 74. Extenuating circumstances (such as a risk that evidence will disappear) may attenuate the seriousness of the Charter-infringing conduct, and "good faith" on the part of the police may reduce the need for the Court to dissociate itself from the police conduct: *Grant* at para. 75.
- [20] I must consider the seriousness of each breach I found, namely, a breach of ss. 10(a) and (b) when the focus of the investigation shifted, a further breach of s. 10(b) upon the initial arrest, and a breach of s. 8 in relation to the search of the vehicle's trunk. I will deal with each violation in turn.
- [21] To begin, I agree with Mr. Khouchaba that when the focus of the police investigation shifted, Cpl. Gudjonson's failures to advise him of the reasons for detention and his right to counsel are not merely technical breaches of ss. 10(a) and (b), especially given Cpl. Gudjonson's experience and his candid admission that he considered himself to have begun a "new investigation". However, I disagree that this Charter-infringing conduct falls at the more serious end of the spectrum.
- [22] I found that Cpl. Gudjonson and his partner, Cst. Kenny, conducted a lawful traffic stop of Mr. Khouchaba's vehicle because of his failure to prominently display a valid "N" sign as required by the conditions of his licence. When Cpl. Gudjonson asked Mr. Khouchaba for his licence, which was within the scope of his MVA authority, subsequent events unfolded rapidly and unpredictably. First, Cst. Kenny observed what he thought might have been drugs fall out of the "man bag" in which Mr. Khouchaba was attempting to locate his licence. Within a minute of Mr. Khouchaba denying any drugs and providing an alternate explanation, Cst. Kenny observed the unsheathed blade of the machete wedged between the passenger seat and the centre console. As it was within arms' reach of Mr. Khouchaba, Cst. Kenny alerted Cpl. Gudjonson to the weapon. Cpl. Gudjonson's subsequent dialogue with Mr. Khouchaba followed the rapidly changing flow of events.
- [23] The case law, including *R. v. Nolet*, 2010 SCC 24 and *R. v. Woody*, 2018 BCSC 2275, which I cited in my previous decision, recognizes that it can be difficult to draw clear lines in such dynamic and evolving circumstances. In *R. v. Omar*, 2019 SCC 32, adopting the dissent of Brown J.A. in *R. v. Omar*, 2018 ONCA 975, the Court accepted that when a situation shifts quickly, the parameters of police authority and obligations may not be entirely clear. I am

satisfied the officers in this case were reacting in the moment to events as they unfolded quickly in front of them. The breaches of ss. 10(a) and (b) at this point in time were not deliberate or planned. As in Jeeves, the officers here were not "intent on riding rough-shod" over Mr. Khouchaba's rights (Jeeves at para. 40). Rather, in the context of a dynamic situation, the officers were more focused on dealing with the potential threat posed by an accessible weapon than on needing to advise Mr. Khouchaba of his ss. 10(a) and (b) rights as the investigation shifted. I find the first two s. 10 breaches fall towards the lower end of the scale of culpability.

- [24] In my view, the further breach of Mr. Khouchaba's s. 10(b) rights after his initial arrest for possession of a weapon for a dangerous purpose is much more concerning. As indicated, Cpl. Gudjonson was an experienced officer at the time. He testified he was aware of his obligations to facilitate Mr. Khouchaba's Charter rights upon arrest. While he did provide Mr. Khouchaba with the standard police caution about his right to silence, Cpl. Gudjonson candidly admitted he did not inform Mr. Khouchaba of his right to counsel upon his initial arrest. Having not informed Mr. Khouchaba of his s. 10(b) right, Cpl. Gudjonson also did not take any steps to implement that right by facilitating access to counsel.
- [25] Cpl. Gudjonson did not explain why he failed to inform Mr. Khouchaba of his right to counsel upon his initial arrest. There was no evidence of extenuating circumstances, or any other obstacle to providing s. 10(b) rights at that time. When pressed in cross-examination about why he failed to inform Mr. Khouchaba of his right to counsel, Cpl. Gudjonson simply stated "I don't know". This response is wholly unsatisfactory in the face of Cpl. Gudjonson's obligations as an experienced arresting officer. I agree with Mr. Khouchaba that this was not a technical lack of compliance, but rather the complete absence of s. 10(b) rights upon initial arrest.
- [26] When Cpl. Gudjonson subsequently arrested Mr. Khouchaba for further offences following the search of his person and vehicle (about 45 minutes later), Cpl. Gudjonson read Mr. Khouchaba his s. 10(b) rights from the police-issued Charter card he carried. And after being transported to the detachment, Mr. Khouchaba was eventually offered the opportunity to contact counsel. He ultimately declined to contact counsel before his release, but neither that fact nor the provision of s. 10(b) rights after the second arrest, diminish the seriousness of the initial failure.
- [27] I accept the Crown's submission that there was no evidence of further Charter breaches between the initial and subsequent arrests, as the officers did not question or attempt to elicit further evidence from Mr. Khouchaba while waiting for a transport vehicle to arrive or conducting their searches of his vehicle. However, in my view, this also does not diminish the seriousness of the s. 10(b) breach upon arrest. While I am not satisfied on the evidence before me that Cpl. Gudjonson acted wilfully or intentionally when he failed to provide Mr. Khouchaba his rights to counsel, I find this conduct displays a concerning lack of diligence in meeting well-established constitutional obligations. This specific conduct is serious.

- [28] Turning finally to the s. 8 breach, the Crown conceded the breach but says, on the facts of this case, the search of the trunk does not fall at the serious end of the spectrum. I agree.
- [29] The evidence on the voir dire confirms the police searched the trunk in an attempt to verify Mr. Khouchaba's explanation that he had the machete because he had been camping and that his camping gear could be found in the trunk. The Crown appears to have conceded the search of the trunk was not a lawful search incident to arrest, and therefore breached s. 8, because neither officer expressly testified they conducted the search to look for weapons or further evidence of the offence for which Mr. Khouchaba had been arrested. In the absence of an alternative argument, I accepted the concession and found a Charter violation.
- [30] However, assessing the seriousness of that conceded violation involves different considerations. In that regard, I accept the Crown's submission that the search was not wholly disconnected from the officers' investigation, which attenuates its seriousness. Mr. Khouchaba was arrested for possession of a weapon for a dangerous purpose. As a machete is not inherently a prohibited weapon, the "purpose" for which he possessed the machete was an element of the offence that would need to be proven. Accordingly, the officers' search of the trunk was not a "fishing expedition"; in the context of their investigation, they had a reason to conduct the search. While their execution may have been flawed, I would not characterize the breach as wilful or flagrant. There is no evidence that the search of the trunk was conducted in an unreasonable manner or that the search conduct was part of a broader, systemic policy of non-compliance. In the circumstances, I find the breach of s. 8 falls towards the lower end of the spectrum of seriousness.
- [31] To this point, I have assessed the seriousness of each of the violations separately. However, as Mr. Khouchaba submits, in *Lauriente*, the Court of Appeal clarified that when assessing the seriousness of the breaches, and determining if there is a "pattern of disregard" of the Charter by the authorities that overall would bring the administration of justice into disrepute, the Court is entitled to consider the cumulative effect of multiple breaches during the same investigation: *Lauriente* at paras. 7, 27-30. Mr. Khouchaba says the cumulative effect of the breaches in this case demonstrates a serious pattern of disregard for Charter rights.
- [32] In this case, I found four breaches of Mr. Khouchaba's Charter rights. While the number of breaches is not insignificant, in my view, the number alone does not evidence a broader or systemic pattern of Charter-infringing conduct that elevates the collective seriousness of the breaches to the higher end of the scale. As set out above, I have found three of the breaches fall at the lower end of the seriousness spectrum, while only one breach is serious in nature. These findings are in contrast to those made in *Lauriente*, where the trial judge found each of the individual breaches to be serious. The trial judge in *Lauriente* also found the police engaged in a series of violative actions over the course of a week-long investigation, including a trespass onto property, a "ruse" of a highway stop used to gather information and continued questioning of one accused after he had asserted the right to counsel. Each of those breaches built on the previous one in a deliberate effort to advance the investigation:

Lauriente at paras. 12-16. While the breaches in this case are all part of the same transaction, unlike in Lauriente, the breaches did not deliberately build on each other to further the investigation.

- [33] Further, the Grant analysis requires the Court to consider the breaches both cumulatively and contextually. The context here is key. I found Mr. Khouchaba was stopped for a legitimate MVA purpose, but the traffic stop evolved rapidly and unpredictably into a criminal investigation. This is not a case where there was a complete absence of any reason to investigate further. Once the officers observed the unsheathed machete within Mr. Khouchaba's reach, it was reasonable for them to respond to the events as they unfolded. Some aspects of their responsive actions were not Charter-compliant. However, I am not persuaded the officers' conduct overall demonstrates the kind of wilful or reckless disregard, or a pattern of inattention to Charter rights in favour of furthering an investigation, that falls at the more serious end of the scale and requires the Court to dissociate itself.
- [34] Nor is there evidence of a deliberate police pattern of non-compliance with legal requirements. This case is distinguishable from both *R. v. Harrison*, 2009 SCC 34 and *R. v. Mian*, 2014 SCC 54, on which Mr. Khouchaba relies. Unlike here, in *Harrison*, the initial vehicle stop was found to be unlawful; the officer continued with the stop despite not having any grounds to believe an offence was being committed. More critically, the Court found the officer's evidence untruthful and misleading, and characterized his conduct as "brazen" and "flagrant". This impacted its seriousness. Likewise, in *Mian*, the conduct was found to be egregious and deliberate, and therefore serious, including because the traffic stop was unlawful and the police testimony was misleading. I have made no such findings here.
- [35] As well, in terms of the more serious breach of s. 10(b), the officers testified that some of the delay in completing their investigation and transporting Mr. Khouchaba to the detachment was because their vehicle was not equipped to secure or transport prisoners and they had to wait for a transport vehicle to arrive. Cpl. Gudjonson also provided Mr. Khouchaba his s. 10(b) rights upon his subsequent arrest. While neither fact cures or justifies the violations, I find the evidence counters the suggestion of wilful or deliberate failures to comply.
- [36] Viewing all four breaches together, I find they collectively fall around the middle of the spectrum of seriousness. Accordingly, I find the first Grant factor pulls moderately in favour of exclusion.

The impact on the accused's Charter-protected interests

- [37] To assess the seriousness of the impact of a breach on the accused's Charter-protected interests, the Court evaluates the "extent to which the breach actually undermined the interests protected by the right infringed": Grant at para. 76; Tim at para. 90. The Court must identify the interests protected by the relevant Charter rights and evaluate how seriously the breaches affected those interests: Tim at para. 90, citing Grant at para. 77. Again, the

impacts are situated on a spectrum and the impacts of a breach may range from fleeting, technical, transient or trivial to ones that are profoundly intrusive or that seriously compromise the interests underlying the right infringed: Tim at para. 90.

- [38] The more serious the impact on an accused's constitutionally protected interests, the greater the risk that admitting the evidence will bring the administration of justice into disrepute. Admission of the evidence in such circumstances may convey to the public that Charter rights are empty promises, causing "public cynicism" and bringing the administration of justice into disrepute: Grant at para. 76; Tim at para. 90.
- [39] Section 10 of the Charter is one of the provisions that seeks to address the imbalance of power between the state and a person under its control due to a detention: Grant at para. 22. Section 10(a) ensures detainees know why they have been detained "so they can make appropriate choices about whether to submit to detention, cooperate with the authorities, obtain counsel, and exercise other legal rights": Jeeves at para. 51. The s. 10(b) right to retain and instruct counsel is meant to guard against self-incrimination and to assist a detainee to regain their liberty; it ensures a detainee can obtain the legal advice necessary to make free and informed choices about how to exercise their rights, including whether to speak to authorities: R. v. Suberu, 2009 SCC 33 at paras. 40-41; Grant at paras. 95 and 125.
- [40] Mr. Khouchaba says the impacts of the s. 10 breaches on his Charter-protected interests were significant because the breaches undermined the very interests protected by s. 10. He says his already vulnerable position vis-à-vis the officers was exacerbated because he was unaware the reasons for his detention had shifted. More importantly, he says he was deprived of the ability to obtain legal advice about the scope of his rights and how he might choose to exercise them, including whether to continue speaking with the police. Mr. Khouchaba says the failure to facilitate his access to information that would have allowed him to make meaningful and informed choices created an "unfair playing field", with significant impacts on his Charter-protected interests.
- [41] I disagree. In my view, even when considered collectively, the breaches of s. 10 did not have a significant impact on Mr. Khouchaba's Charter-protected interests. The failure to provide the necessary information to Mr. Khouchaba, both when the investigation shifted and again after his initial arrest, did not generate any further evidence. I agree with the Crown that the evidence Mr. Khouchaba seeks to have excluded is all real, physical evidence that existed independently of the breaches. The lack of information about his rights did not cause Mr. Khouchaba to make any inculpatory statements, nor did the police attempt to elicit further evidence after his initial arrest. In circumstances where I found Mr. Khouchaba's initial arrest to be lawful, giving rise to the authority to search incident to arrest, I am also not of the view that the s. 10 breaches themselves assisted police in gathering evidence against Mr. Khouchaba.

- [42] Upon his subsequent further arrests following the searches of the vehicle, Mr. Khouchaba was provided with his s. 10 rights. Nothing happened in the intervening period that could be characterized as seriously compromising Mr. Khouchaba's interests. Further, there is no suggestion of any causal connection between the s. 10 breaches and the physical evidence in the trunk; the lack of such a connection mitigates the seriousness of any impact of the breach: *R. v. Robertson*, 2017 BCSC 965 at para. 37, varied on other grounds, 2019 BCCA 116; *R. v. Choi*, 2021 BCCA 410 at paras. 98-99.
- [43] Turning to s. 8, broadly speaking, the interests protected by s. 8 of the Charter include individual privacy and human dignity: *Tim* at para. 91; *Grant* at para. 78. A search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans their dignity, is more serious than one that does not: *Grant* at para. 78.
- [44] Here, the s. 8 breach only involved a search of the trunk of Mr. Khouchaba's vehicle, so human dignity is not at issue. While there is some expectation of privacy in relation to a vehicle, the case law is clear that any such expectation is significantly reduced because of the highly regulated aspect of driving on a public road: *R. v. Fedan*, 2016 BCCA 26 at paras. 65-66; *R. v. Belnavis*, [1997] 3 S.C.R. 341 at para. 38; *Tim* at para. 93.
- [45] Mr. Khouchaba accepts that the privacy interests in a vehicle are different from that in a home, but says the expectation of privacy is not as low as the Crown suggests. He emphasizes that the firearm and ammunition were not in plain view, but rather required *Cst. Kenny* to first move a safe and open a bag, suggesting a higher level of intrusiveness. I disagree.
- [46] The Crown does not argue there is no expectation of privacy in a vehicle, only that it is greatly reduced. There is ample case law supporting the Crown's position. In contrast, Mr. Khouchaba offered no authority to support his position that there is a greater expectation of privacy in the contents of a vehicle's trunk when not plainly visible. In addition, the evidence on the voir dire demonstrates that on more than one occasion, Mr. Khouchaba invited the officers to check the trunk for the camping equipment. I accept that at least some of those invitations may have occurred after the focus of the investigation had shifted, and therefore after the breach of Mr. Khouchaba's ss. 10(a) and (b) rights. However, in the circumstances, Mr. Khouchaba's repeated requests for the officers to check the trunk suggests he could not have reasonably had a significant expectation of privacy with respect to its contents. Viewing the evidence in totality, and given the greatly reduced expectation of privacy in respect of a vehicle, I find the impact on Mr. Khouchaba's s. 8 privacy rights to fall at the lower end.

- [47] In reaching the above conclusions about impacts, I acknowledge that if the evidence was only discoverable as a result of the Charter breaches, then there will be a greater impact on the accused's Charter-protected interests: Tim at para. 94; Grant at paras. 122 and 137. However, where it cannot be determined "with any confidence" if the evidence would have been discovered but for the Charter breach, then "discoverability" does not impact the s. 24(2) inquiry: Tim at para. 94, citing Grant at para. 122.
- [48] The Crown concedes a temporal relationship between the ss. 10(a) and (b) breaches when the investigation shifted and the police conduct in locating the firearm in the trunk; the subsequent dialogue between Mr. Khouchaba and the officers led to the search of the trunk. Mr. Khouchaba says the firearm and ammunition were only discovered because of the dialogue subsequent to those breaches. However, I previously found Mr. Khouchaba's initial arrest to be lawful. Since that arrest authorized an incidental search, I cannot say with any confidence that the evidence in the trunk would not have been discovered absent the Charter breaches.
- [49] Considering the impacts on Mr. Khouchaba's Charter-protected interests cumulatively, I conclude those impacts fall at or just above the lower end of the spectrum and the second line of inquiry under Grant pulls only slightly towards exclusion.

Society's interest in the adjudication of the case on its merits

- [50] The third component of the Grant framework considers the infringement from the perspective of the public and asks if the truth-seeking function of the criminal trial process would be better served by the admission or exclusion of the evidence: Grant at paras. 79, 82; Tim at para. 96. Under this line of inquiry, the Court will consider the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the offence. The latter factor can cut both ways; society has an interest in seeing a determination on the merits where the offence is serious, but also has an interest in a justice system that is above reproach: Grant at paras. 81, 83-84; see also R. v. Beaver, 2022 SCC 54 at para. 129.
- [51] Excluding relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, at the ultimate cost of bringing the administration of justice into disrepute: Grant at para. 81. As a result, and while it is only one factor to be considered, reliable evidence, such as physical evidence, is generally less likely to be excluded.
- [52] In this case, the impugned evidence is highly reliable, physical evidence that exists independently of the breaches. It is vital to the portion of the Crown's case that deals with the firearms charges. I agree with the defence that, unlike in certain other cases to which I was referred, exclusion of the evidence found in Mr. Khouchaba's trunk would not gut the entirety of the Crown's case. It would still be possible for the Crown to pursue the four charges that relate to drug trafficking. However, the Crown would not have a viable case in

relation to the other five firearms offences. In effect, exclusion of the evidence from the trunk would eliminate more than half of the Crown's case.

- [53] Both the drug trafficking and the firearms charges at issue here are very serious in nature. With respect to drug trafficking, in *R. v. Smith*, 2017 BCCA 112 at paras. 48-49, the Court of Appeal recognized that the introduction of the kinds of drugs found in Mr. Khouchaba's vehicle into the illicit drug trade caused catastrophic individual and societal harm. In *Jeeves*, the Court characterized drugs like fentanyl and its derivatives as a scourge in relation to which society has a significant interest in adjudication: *Jeeves* at para. 57. These are but two such examples of similar commentary.
- [54] Turning to the firearms offences, in his dissent in *R. v. Omar*, 2018 ONCA 97, Brown J.A. held at para. 135 that "a community's desire to live free from the lethal threat of illegal handguns" is "a most rational desire for a necessary component of the rule of law." Brown J.A. concluded at para. 137 that it is "fundamental to our social order that Canadian citizens can walk their public streets and exercise their Charter liberty rights without finding themselves at the wrong end of an illegal handgun" and that "society's interest in the adjudication of the merits [is] greater where the offence is one that so literally involves the safety of the community" (citing *R. v. Chan*, 2013 ABCA 385 at para. 49). In allowing the appeal substantially for the reasons of Brown J.A., the Supreme Court of Canada confirmed these safety concerns support a significant societal interest in the adjudication of offences related to illegal firearms.
- [55] Viewed as a whole, I find the third line of inquiry pulls strongly in favour of admissibility in this case. As in *Jeeves*, the impugned evidence is highly reliable physical evidence that existed independently of the breaches and was not obtained through conscription or interference with Mr. Khouchaba's dignity or bodily integrity. It is also vital to the more than half of the Crown's case that directly and literally engages the safety of the community in respect of the risk from illegal firearms and ammunition. I find admission of the evidence would better serve the truth-seeking function of the criminal trial process.

Overall balancing and conclusion

- [56] As noted, the final step in the s. 24(2) analysis is a qualitative balancing exercise that is incapable of mathematical precision. As Justice Jamal explained at para. 98 of *Tim*, "each factor must be assessed and weighed in the balance, focusing on the long-term integrity of and public confidence in the administration of justice." The exercise is prospective and societal in nature, aiming to ensure that further damage is not done and focusing on the broad impact of the admission of the evidence on the long-term reputé of the justice system: *Tim* at para. 98.
- [57] More recently in *Beaver*, Justice Jamal emphasized that the weighing exercise involves considering and balancing "the cumulative weight of the first two lines of inquiry against the third": *Beaver* at para. 134, citing *R. v. Lafrance*, 2022 SCC 32 at para. 90. Where the first two

lines pull strongly toward exclusion, the third line of inquiry will seldom tip the scales. However, where the first two lines of inquiry do not militate strongly in favour of exclusion, the third line becomes particularly important, and will often confirm that the administration of justice would not be brought into disrepute by admission of the evidence: *R. v. Le*, 2019 SCC 34 at para. 142. This does not mean the third line of inquiry will automatically trump the other two lines in each such case. Rather, where a compelling public interest in admitting the evidence overwhelms the weight of the first two lines of inquiry, the administration of justice will not be brought into disrepute by its admission: *Beaver* at para. 134.

- [58] I have concluded the seriousness of the Charter-infringing conduct pulls moderately in favour of exclusion. The initial ss. 10(a) and (b) breaches and the breach of s. 8 all fall at the lower end of the spectrum. However, because the further breach of s. 10(b) after Mr. Khouchaba's initial arrest represents a much more concerning departure from well-established constitutional standards, in sum, I consider the cumulative conduct to fall towards the middle of the scale, pulling moderately in favour of exclusion.
- [59] On the other hand, I find the impacts on Mr. Khouchaba's Charter-protected interests fall toward the lower end of the scale. Mr. Khouchaba had a significantly reduced expectation of privacy in his vehicle; the search of the trunk was minimally intrusive, with a minimal impact on his s. 8 privacy rights: *Tim* at para. 93. The breaches of s. 10 did not generate further evidence, nor did those breaches result in Mr. Khouchaba incriminating himself. Further, while there is a temporal connection between the s. 10 breaches and the discovery of the evidence in the trunk because they are part of the same transaction, there is no direct causal connection. The lack of that connection attenuates the seriousness of any impacts: *Choi* at paras. 98-99. Nor is it possible to say with confidence if the evidence in the trunk would have been discovered absent the Charter breaches. The second line of inquiry therefore pulls only weakly in favour of exclusion.
- [60] In my view, the cumulative weight of the first two lines of inquiry do not make a strong case for exclusion, while the third factor pulls strongly toward admission. However, each case necessarily turns on its own unique facts and the balancing exercise is not "simply a question of whether the majority of the relevant factors favour exclusion in a particular case": *Harrison* at para. 36; *Tim* at para. 98.
- [61] Here, the police conducted a lawful traffic stop that quickly evolved into a criminal investigation for a weapons-related offence, and then evolved again following what I have determined was a valid arrest and a lawful search of the interior of the vehicle incident to arrest. While the officers' actions fell short of Charter-compliance, they were operating in a context where the legal standard is not always easy to recognize in the moment: *Jeeves* at para. 63. I am not persuaded the facts of this case show a pattern of disregard for Charter rights such that admission of the evidence from the trunk would bring the administration of justice into disrepute.

[62] The highly reliable nature of the real evidence found in the trunk plays a crucial role in the Crown's case for the firearms offences. Those offences give rise to significant community safety concerns and a strong societal interest in adjudication of such charges on their merits. As a result, I find the strong pull of the third line of inquiry outweighs the cumulative weight of the first two lines under Grant. In these circumstances, having balanced the relevant considerations and given the need to adopt a prospective and societal focus, I find that, on balance, admitting the evidence in issue would not bring the administration of justice into disrepute. Mr. Khouchaba's application to have the evidence found in the trunk of his vehicle excluded pursuant to s. 24(2) of the Charter is therefore dismissed.

"K. Wolfe, J."

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