

CANADA / JUDGMENT

R. v. Watroba

2025 BCSC 2209

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2209 R. v. Watroba

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Watroba,

2025 BCSC 2209

Date: 20251001

Docket: 93995-2; 93995-3

Registry: Kelowna

Rex

v.

Darren Chester Watroba

Before: The Honourable Justice Stephens

Oral Ruling #2 on Voir Dire #1

Re Further Alleged Charter Breaches and s. 24(2) application to exclude evidence

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused:

N. Acker

Place and Date of Trial:

Kelowna, B.C.

September 29, 2025

Place and Date of Judgment:

Kelowna, B.C.

October 1, 2025

Overview

[1] THE COURT: The accused, Darren Chester Watroba, is charged with three counts in Indictment 93995-2, that he:

Count 1

did carry or have in his possession, the machete, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code.

Count 2

did unlawfully possess a controlled substance, to wit: Fentanyl / a benzodiazepine namely Flualprazolam, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 3

did unlawfully possess a controlled substance, to wit: Fentanyl, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

[2] The charges relate to events on December 19, 2021, at or around noon outside the Orchard Park Mall in Kelowna.

[3] At the commencement of trial, the defence brought a Charter application relating to alleged Charter breaches of ss. 8, 9, and 10(b).

[4] On March 7, 2025, I made a ruling on voir dire (indexed at 2025 BCSC 815, the "RFJ"), in this voir dire, dealing with: the alleged breaches of s. 10(b); whether the accused Mr. Watroba's detention was lawfully authorized; whether searches discovering a machete, a pocket knife, a bandana, and baggies of alleged drugs and capsules were conducted contrary to s. 8 of the Charter; and whether the accused was lawfully arrested by police for a s. 88(1) offence and for two Controlled Drug and Substances Act, S.C. 1996, c. 19 [CDSA] offences, s. 5(2) and s. 4(1): RFJ at para. 120.

[5] Defence now applies to exclude evidence pursuant to s. 24(2) of the Charter on the basis of breaches of Mr. Watroba's Charter rights under ss. 8, 9, and 10(b).

RFJ Findings: Factual Background

- [6] I do not intend to repeat all the findings I made on the RFJ, which I adopt for the purposes of this ruling.
- [7] However, some of the main findings I made in the RFJ are as follows:
- a) The accused was seen by police outside the entrance of the mall, wearing what appeared to be a machete in a sheath: at para. 37;
 - b) I found that the machete was a menacing instrument which reasonably drew the attention of police officers when they saw it, even from inside the mall: at para. 67;
 - c) It was worn by the accused and positioned in such a way that it was readily accessible by the accused with his right hand (at para. 67) and worn by the accused in a manner for apparent readily-accessible use: at para. 73;
 - d) He was detained for investigation purposes: at para. 38;
 - e) Constable Erbes had not at that time formed the subjective grounds for arrest at the outset of contact with the accused: at para. 42;
 - f) It is more likely than not that Constable Erbes did not provide the accused with the right to counsel upon detention: at para. 55;
 - g) Police officers conducted a pat-down safety search of Mr. Watroba for officer and public safety: at para. 39;
 - h) The machete was examined and removed. A bandana with a large metal nut (which was referred to as a makeshift mace) and a pocket knife were located by police in the accused's pockets during the pat-down search: at para. 39;
 - i) The search further indicated that the accused was wearing a fanny pack under his arm: at para. 40;
 - j) Constable Erbes searched inside of the fanny pack and located bags of substances (including that which the Crown asserts contained fentanyl, being in a large white baggie and a small black baggie), as well as a bag of capsules: at para. 40;
 - k) Constable Erbes formed subjective grounds to arrest the accused for the s. 88(1) offence after locating the drugs in the fanny pack: at para. 41;
 - l) Constable Erbes then advised the accused, while outside the mall, that he was under arrest for all three offences: possession of a dangerous weapon contrary to s. 88(1); possession for the purposes of trafficking contrary to s. 5(2) of the CDSA; and simple possession contrary to s. 4 of the CDSA: at para. 43;
 - m) Outside the mall, upon arrest, the accused was advised of his right to counsel by Constable Erbes and he declined counsel: at para. 44;
 - n) The accused was handcuffed: at para. 45;

- o) In his police vehicle, Constable Cumming again formally gave the accused a s. 10(a) and 10(b) Charter warning related to the arrest for the three offences. The accused declined counsel to Constable Cumming: at para. 47;
 - p) I found that the substances alleged to be drugs were all found in the fanny pack (or satchel) and that this happened prior to the accused being arrested at the mall: at para. 33; and
 - q) The accused was arrested for all three arrests at the same time: at para. 30.
- [8] I found that the pat-down search for safety purposes was initially justified: at para. 91.
- [9] I found the searches obtaining the machete and bandana with nut and the pocket knife in the accused's pockets were not conducted contrary to s. 8 of the Charter: at para. 100.
- [10] However, the search of the fanny pack (satchel) that found baggies containing substances went beyond the scope of a justifiable pat-down safety search incident on detention: at para. 101.
- [11] So, the baggies of alleged drugs and capsules were located by police in the satchel in a manner contrary to s. 8 of the Charter: at para. 109.
- [12] Excising the unlawfully obtained bags of substances from consideration, the police still had reasonable and probable grounds to arrest the accused for a s. 88(1) offence: at para. 117.
- [13] However, excising from consideration the baggies of substances obtained contrary to s. 8 during the search on detention, the police lacked reasonable and probable grounds to arrest the accused for the two other s. 5(2) and s. 4(1) CDSA offences: at para. 119.
- [14] I therefore concluded at para. 120:
- a) the accused's s. 10(b) Charter right was breached on detention;
 - b) the detention was lawfully authorized;
 - c) the detention search uncovering the machete, a pocket knife, and a bandana was lawfully authorized;
 - d) the detention search uncovering baggies of alleged drugs and capsules was conducted contrary to s. 8 of the Charter;
 - e) the accused was lawfully arrested by police for the s. 88(1) offence; and
 - f) the accused was not lawfully arrested for the two CDSA offences, s. 5(2) and s. 4(1).

Issues

- [15] The remaining issues on voir dire are:
- a) Were there any further Charter breaches?
 - b) Should evidence be excluded pursuant to s. 24(2) of the Charter?

Issue 1: Were There Any Other Charter Breaches?

[16] I said this at the end of my RFJ:

[122] other than the machete, pocket knife, bandana, and bags with substances, there was in evidence on voir dire photos of other items described, on which I have made no specific findings as to breach.

[123] Namely, there were photos of multiple items including needles, empty baggies, a tub labelled caffeine, and a scale, among other items (see e.g., Tab 1, Exhibit F, Photos 5, 6, 9, 10 to 12, and 19), some of which relate to the testimony of Constable Erbes about the accused's backpack. Counsel's submissions were not directed at these items specifically.

[124] I have made no findings of whether those other items specifically were obtained by police contrary to the Charter. Counsel can advise me whether they wish to make further submissions about such other items and seek a ruling on them with respect to alleged Charter breaches prior to any s. 24(2) determination.

[17] At this hearing, defence counsel submitted that all of the items which were identified in photos and not subject to my RFJ were discovered in the accused's backpack and were obtained contrary to s. 8 of the Charter. Defence submitted that, just like the fanny pack, for the same reasons as set out in my RFJ, the police search of the accused's backpack went further than legally permissible for a search incident to detention and constituted an unlawful search. Defence submitted that the search of the backpack was the continuation of the breach I found in the RFJ of the search of the fanny pack.

[18] For clarity, the items subject to this separate Charter breach ruling are those items, other than the items referred to at para. 120 of my RFJ, which are shown in Exhibit F, Tab 1, Photos 4, 5, 6 (other than the Nintendo), 9-12, and 19, (the "Other Items"). The Other Items included, among other items as shown in the photos:

- a) a scale (see for example Photos 11 and 12);
- b) a tub labelled "caffeine anhydrous" (see for example Photo 9);
- c) empty baggies (see for example Photos 6 and 10); and
- d) needles (see for example Photo 6).

[19] I add again for clarity that in Photo 1, a gold-coloured bag of some sort is shown sitting on top of the accused's backpack at the mall. It is also shown in a plastic bag in the centre of Photo 6 displaying items seized by police. I am aware of no evidence on Voir Dire 1 describing what that gold-coloured bag is or what was in it, and it was not the specific subject of the defence submissions on this Charter hearing or that of the Crown. My ruling does not deal with that particular gold-coloured bag item, which is not included in the Other Items as I have defined it in the ruling.

Findings - Alleged Charter breaches regarding Other Items

- [20] I find, on a balance of probabilities, that the Other Items were all found in the accused's backpack.
- [21] There was not much evidence adduced on voir dire as to where and when specifically the backpack was searched.
- [22] On this application, defence bears the onus to establish a Charter breach occurred (although the Crown has the onus to justify a warrantless search): *R. v. Donovan*, 2024 BCCA 213 at para. 22. And the party seeking to have evidence excluded bears the burden of proving its exclusion is required: *R. v. Fearon*, 2014 SCC 77 at para. 89.
- [23] From the evidence adduced on this voir dire, I find, on a balance of probabilities, that the accused's backpack was searched back at the police detachment after the accused was arrested.
- [24] This finding that the accused's backpack was searched at the police detachment after the accused was arrested is supported by the following evidence on Voir Dire 1:
- a) the evidence at Photo 1, which shows the intact backpack at the scene outside the mall;
 - b) there was no evidence adduced on Voir Dire 1 that the backpack was searched at the mall at the same time as the fanny pack;
 - c) Constable Erbes' evidence that the backpack shown in Photo 1 was taken back to the detachment;
 - d) Photo 10, which shows the backpack unzipped at a location which does not appear to be outside and I find is indoors; and Constable Erbes testified that this is where the items shown in Photo 10 (including the scale) were found, which is consistent with the police search of the backpack taking place at the police detachment;
 - e) Constable Erbes' evidence that the scale was found in the backpack, consistent with Photo 10;
 - f) Constable Erbes' testimony about Photo 4 items;
 - g) Constable Erbes testified that most of the items in Photo 6 were from the backpack; I note he also refers to a Nintendo in that photo, which he testified Mr. Watroba had in his hands at the time of contact with him; and
 - h) Constable Erbes' evidence that the tub labelled "caffeine" shown on top of a scale in Photo 9 was in the backpack.
- [25] In short, I find that factually the backpack was searched incident to arrest after Mr. Watroba had been lawfully arrested for a s. 88(1) offence.

[26] I further find that the search of the backpack locating the Other Items was a valid search incident on arrest on the s. 88 offence.

[27] *R. v. Stairs*, 2022 SCC 11 at para. 34, states that the law

for search incident to arrest permits the police to search a lawfully arrested person and to seize anything in their possession or the surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at pp. 180-81). This search power is "extraordinary" because, unlike other police powers, it requires neither a warrant nor reasonable and probable grounds (*Fearon*, at paras. 16 and 45).

[28] There is evidence on *Voir Dire* 1 to support a finding that the police were searching the backpack to provide evidence against the accused.

[29] In *R. v. Tim*, 2022 SCC 12 at para. 49, the Court states:

[49] To be valid, a search incident to arrest must meet three conditions: (1) the person searched is lawfully arrested; (2) the search is "truly incidental" to the arrest, i.e., for a valid law enforcement purpose related to the reasons for the arrest; and (3) the search is conducted reasonably

[30] Constable Erbes testified about the Other Items, some of which were photographed together with the machete and improvised mace and pocket knife: see Photos 4 and 5. On the whole of the evidence on *Voir Dire* 1, I find the search of the backpack followed after the arrest of the accused. Given the machete and improvised mace which had been seized incident to the lawful detention, the further search of the backpack was reasonable following the accused's arrest on the s. 88(1) offence.

[31] If it is necessary to extract from consideration the accused's arrest for CDSA offences, which I found in the RFJ were done unlawfully, in order to analyze the alleged Charter breach issue regarding the Other Items, I do not accept defence's arguments that there is no evidence that the accused would have been brought back to the detachment had he only been arrested for the s. 88 offence, and that this is purely speculative. I have found the accused was lawfully arrested for a s. 88 offence and, in light of my findings in that regard in my RFJ, I am satisfied that, and I find that, given the conduct of police searching the accused and Constable Erbes' evidence that the accused was known to him and he believed him to be involved in drug trafficking (as found in RFJ at para. 117), a search of his backpack incident to arrest would have followed on that basis, even if factually they had simply arrested him only for a s. 88 offence.

[32] I therefore find the search of the backpack happened after the accused was lawfully arrested for a s. 88 offence incidental to the arrest for a valid law enforcement purpose and was conducted reasonably, and I make this finding with the reference point being a lawful arrest for s. 88(1), excising the unlawful arrest for CDSA offences.

- [33] Accordingly, I find there was no s. 8 Charter breach associated with the search of the backpack uncovering the Other Items.
- [34] For this reason, when conducting the s. 24(2) analysis, I will only consider the Charter breaches set out in para. 120 of my RFJ, including the seizure of "baggies of alleged drugs and capsules" (the "Unlawfully Obtained Evidence") which was done contrary to s. 8 of the Charter: at para. 120(d).
- [35] For clarity, Photo 8 includes a baggie which Constable Erbes had testified was found in the accused's pockets, but, in my RFJ, I found that "baggies of alleged drugs and capsules were located by police in the satchel": RFJ at paras. 109, 120(d). I find on a balance of probabilities that the baggie in Photo 8 was not in the accused's pockets but within the accused's fanny pack and, on a balance of probabilities, find that all of the items shown in Photo 8 were found in the fanny pack and therefore form part of the Unlawfully Obtained Evidence.

Issue 2: Should the Unlawfully Obtained Evidence Be Excluded Pursuant to s. 24(2) of the Charter?

- [36] There are two stages of the s. 24(2) analysis:
- a) Was the evidence obtained in a manner that infringed the rights or freedoms of the accused guaranteed by the Charter (the threshold stage)?
 - b) If so, should the evidence be admitted or excluded (the evaluative stage, applying the three-part *R. v. Grant*, 2009 SCC 32, test and analysis)?

Grant at paras. 59, 131.

- [37] I apply the *Grant* analysis to determine if the Unlawfully Obtained Evidence, obtained in violation of the accused's Charter rights, should be admitted under s. 24(2). This framework requires an inquiry into the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and society's interest in the adjudication of the case on its merits: *Grant* at para. 71; *R. v. Pawar*, 2020 BCCA 251 at para. 27; and *R. v. McColman*, 2023 SCC 8 at para. 54.

[38] *Grant* states:

- [85] the three lines of inquiry identified reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by Charter breach would bring the administration of justice into disrepute.

[39] *R. v. Côté*, 2011 SCC 46, explains:

- [48] After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination. There is no "overarching rule" that governs how a court must strike this balance (*Grant*, at para. 86). Rather, "[t]he evidence

on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute" (Harrison, at para. 36). No one consideration should be permitted to consistently trump other considerations. In all cases, courts must assess the long-term repute of the administration of justice.

Consideration of lawful discoverability in the 24(2) analysis

- [40] Crown made submissions as to whether the Unlawfully Obtained Evidence was discoverable and how, if at all, this should impact the s. 24(2) analysis. Defence argues that the Crown's submissions in this regard rely on unfair speculation about what could have occurred. Defence characterized arguments about discoverability as impermissibly speculative and submitted that the court at this stage must determine admissibility based on what the police did, not what they could have done.
- [41] However, Grant states that while "discoverability should not be determinative of admissibility" (at para. 121), it nevertheless "retains a useful role" in the s. 24(2) analysis:
- [122] Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the Charter-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.
- [42] Pawar also confirms that, while not determinative, "[d]iscoverability may be a relevant factor under the first and second branches of the Grant test" analysis (at para. 85):
- [86] As Justice Cromwell (for the majority of the Court) explained in *Côté*:
- [72] [T]he fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search will tend to lessen the impact of the illegal search on the accused's privacy and dignity interests protected by the Charter.
- [87] At the same time, Cromwell J. was careful in *Côté* to note that a finding of discoverability should not invariably lead to the admission of unconstitutionally obtained evidence: at para. 70. Giving the discoverability doctrine a long leash in cases of this kind risks judicial condonation of serious privacy breaches resulting from unacceptable conduct by investigatory agencies: see *Le* at para. 158, quoting from *R. v. Collins*, [1987] 1 S.C.R. 265 at 281. If no remedy is available for unjustified warrantless entries of private dwelling-houses in cases where grounds to obtain a warrant existed at the time of the unlawful entry, there

will be little incentive for the police to adopt Charter-compliant behaviour. More importantly, the administration of justice may fall into disrepute in the long term if remedies are not granted for the violation of well-established constitutional precepts.

[43] See also *Côté* per Justice Cromwell:

[69] Discoverability remains a relevant factor under the current s. 24(2) analysis. *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, is an example. Binnie J., writing for the Court, found that the fact that non-bodily physical evidence obtained in breach of an accused's s. 8 right would otherwise have been discovered was one of the points favouring the admissibility rather than the exclusion of the evidence.

[70] While discoverability may still play a useful role in the s. 24(2) analysis, it is not determinative. A finding of discoverability should not be seen as necessarily leading to admission of evidence. Nor should courts engage in speculation. As stated in *Grant*, where it cannot be determined with any confidence whether evidence would have been discovered in the absence of the Charter breach, discoverability will have no impact on the s. 24(2) inquiry. In appropriate cases, discoverability may be relevant to the first two branches of the *Grant* analysis.

[44] In oral submissions, defence counsel relied on my finding at para. 107 of the RFJ, where I stated, "[i]n deciding whether the police infringed Charter rights, they are to be judged on what they did, not what they could have done": *R. v. Whitaker*, 2008 BCCA 174 at para. 65." Defence argued that reasoning from what might have happened is impermissible speculation in the s. 24(2) analysis.

[45] But as *Grant* and these other case authorities confirm, in a s. 24(2) analysis, I may consider matters of discoverability unless "it cannot be determined with any confidence whether evidence would have been discovered in the absence of the Charter breach": *Côté* at para. 70.

[46] I am also mindful that in considering lawful discoverability, that this factor can, in certain circumstances, "cut both ways" and add to the seriousness of a breach, for example, where the police have displayed "blatant disregard for the accused's rights": *Côté* at para. 68, citing *R. v. Buhay*, 2003 SCC 30.

Threshold stage: Obtained in a manner that infringed the Charter

[47] I find at the outset that the Unlawfully Obtained Evidence was obtained in a manner that infringed or denied the accused's rights or freedoms guaranteed by the Charter.

[48] Crown concedes in its written submissions that there is a nexus between the following found breaches and the Unlawfully Obtained Evidence:

- a) there is a causal nexus between the s. 8 breach arising from the search of the fanny pack and the discovery of the drugs in the fanny pack;

- b) there is a contextual and a temporal nexus between the s. 10(b) breach arising from the failure to immediately advise the accused of his right to access counsel upon detention and the items discovered in the fanny pack; and
- c) there is a contextual and temporal relation between the s. 9 breach arising from the arrest for possession for the purposes of trafficking as a result of the search of the fanny pack and the contents of the fanny pack.

First Grant factor: The seriousness of the breach

[49] Grant states:

- [72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.
- [50] This analysis "necessitates an evaluation of the seriousness of the state conduct that led to the breach" and the "main concern is to preserve public confidence in the rule of law and its processes": Grant at para. 73.
- [51] The McColman case states the court must situate the police conduct on a scale of culpability: at para. 58.
- [52] I find that the fanny pack was an item with an elevated privacy interest and the unlawful search of it impacted the accused's privacy.
- [53] However, with respect to the s. 8 breach and the unlawful arrest for the CDSA offences (RFJ at para. 120(d) and (f)), I note that I found in the RFJ that the police did have a legal basis to detain the accused at the outset and did have lawful grounds to arrest the accused for the s. 88 offence.
- [54] Further, in my RFJ, I made no finding that Constable Erbes was being dishonest in his testimony, although I did find there were inconsistencies in his evidence in the voir dire which detracted from the reliability of his evidence: at para. 29.
- [55] Constable Erbes testified that his interaction with Mr. Watroba occurred outside a mall, that Mr. Watroba was wearing a machete and in Mr. Watroba's pocket he found what he perceived to be an improvised weapon, and that it was a fluid situation, and I accept that evidence.

- [56] While the unlawful search of the fanny pack was a significant violation and was followed by an unlawful arrest for CDSA offences, the conduct of the police in respect of these Charter breaches in the circumstances militate towards a finding of moderate seriousness on the spectrum.
- [57] I further find that the police were not acting in a flagrant or egregious manner when conducting the search of the fanny pack on the accused in the way they did.
- [58] I may at this stage also consider the matter of lawful discoverability. The fanny pack was searched unlawfully since it went further than was justified on a search incident to detention: RFJ at paras. 101-109. However, Mr. Watroba had come to the police officers' attention standing outside the mall, wearing a machete: RFJ at paras. 67-75. Police had lawful grounds to detain and then arrest the accused, Mr. Watroba, for the s. 88 offence. I find they would have lawfully discovered the Unlawfully Obtained Evidence in the fanny pack incident to the arrest for the s. 88 offence, which would have in turn led to a lawful arrest for the CDSA offences.
- [59] These factors further serve to attenuate the seriousness of these breaches. I find they were moderate in severity along the spectrum. These were serious but not egregious breaches.

The s. 10 breach

- [60] With respect to the distinct breach of s. 10 on detention, Crown submits at para. 26 of its written submissions:

In this case, the failure to advise the accused of his right to access counsel upon detention was aggravated somewhat by the rejection of Constable Erbes' evidence that he had done so. Further, as the evidence was proffered by Cst Erbes, there can no excuse in delaying the informational component of s. 10 due to the exigencies of the encounter with the accused.

- [61] I find the s. 10 violation to be a serious breach.
- [62] Considering the s. 10 breach cumulatively with the other Charter breach and the unlawful arrest for the CDSA offences, I consider that the first factor pulls towards exclusion of the Unlawfully Obtained Evidence, but not at the strongest end of the spectrum.

Second Grant factor: The impact of the breach on the accused's Charter-protected interests

- [63] Grant states:

- [76] This inquiry focusses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of

justice into disrepute.

- [64] The "first and second lines of inquiry are distinct. The first line of inquiry evaluates the state conduct itself, while the second line of inquiry goes further and assesses the impact of the state conduct on the accused's Charter-protected interests": *McColman* at para. 59.
- [65] I return to the consideration of lawful discoverability at Stage 2 of the analysis. Regarding the s. 8 breach and the accused's unlawful arrest contrary to s. 9, here again I find that the contents of the fanny pack would have been lawfully searched incident to arrest following discovery of the machete and bandana on the accused's person and pockets on the search incident to detention. A lawful search incident to arrest would have lawfully uncovered the contents of the fanny pack containing the Unlawfully Obtained Evidence. As I noted in the RFJ, the entire interaction between police and the accused at the mall took about 20 or so minutes: at para. 7. I find that the impact of the breach on the accused's Charter rights consequent on the unlawful search of the fanny pack was relatively "fleeting" (*Grant* at para. 76), since the fanny pack would have been ultimately lawfully searched during the interaction as a search incident to arrest for a s. 88 offence.
- [66] I find the accused would also have been lawfully arrested for the CDSA offences, since the contents of the fanny pack constitute reasonable and probable grounds for arrest for such offences. I address the legal test for reasonable and probable grounds to arrest at paras. 113-116 of the RFJ, referring to *R. v. Glendinning*, 2019 BCCA 365 at para. 3, *R. v. Beaver*, 2022 SCC 54, and *R. v. MacCannell*, 2014 BCCA 254, and adopt them here in my s. 24(2) ruling:
- [114] The standard of reasonable and probable grounds imports a test or standard that is lower than the standard of civil proof, or proof on a balance of probabilities: *R. v. Glendinning*, 2019 BCCA 365 at para. 3.
- [115] The police do not need to establish that the offence was committed on a balance of probabilities: *R. v. Beaver*, 2022 SCC 54 at para. 72(6). The police are also not required to undertake further investigation to seek exculpatory facts or rule out possible innocent explanations for the event before making an arrest: *Beaver* at para. 72(6). All the officer must have is an objectively reasonable basis for meeting the reasonable and probable grounds standard, without necessarily ruling out potential innocent inferences, defences, or lawful excuses: *R. v. MacCannell*, 2014 BCCA 254 at para. 45.
- [116] As set out in *Beaver*, "[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience': at para. 72(5).

- [67] I find this is not a situation where a risk of impermissible speculation precludes consideration of lawful discoverability, since I find from the evidence as a whole that the police would have searched the fanny pack after arrest for the s. 88 offence, just as they did in fact search the accused's backpack for evidence at the police detachment following his arrest.
- [68] That finding is supported by the evidence on voir dire, and this is not a situation, in my view, where I do not have any confidence that this would have occurred, so as to constitute impermissible speculation, which would preclude consideration of lawful discoverability in the s. 24(2) analysis: Côté at para. 70.
- [69] I again, for purposes of the second branch of the test, respectfully reject defence's submission that it is merely speculative to find that the police would have conducted further searches of the accused following an arrest for the s. 88 offence only, and I find instead that such further searches would have occurred in such circumstances.
- [70] Defence also argued that these breaches had serious impacts on the accused. Defence argued that the accused endured the embarrassment of his fanny pack being searched and of being arrested outside the mall, and that this must militate strongly towards exclusion of the Unlawfully Obtained Evidence.
- [71] But I have found in the RFJ that the police did lawfully detain the accused at the mall, lawfully searched him incident to detention, and then lawfully arrested him for a s. 88(1) offence. Without minimizing the embarrassment to Mr. Watroba on the search of his fanny pack and the arrest by the police outside the mall, the police detained and then conducted a search of the machete and of his pockets, and then arrested him under s. 88, all lawfully at that time outside the mall, and so some form of embarrassment to him was already consequent in that context from what the police had the power to do lawfully at that time.
- [72] Further, while the accused was not told he had a right to counsel on detention, Mr. Watroba did not make a statement on detention which forms part of the Unlawfully Obtained Evidence.
- [73] In my view, there is not a strong causal connection between the s. 10 denial of the accused's rights to counsel on detention and the discovery of the Unlawfully Obtained Evidence sought to be excluded. This is a relevant factor in the s. 24(2) evaluative and balancing exercise (*R. v. Choi*, 2021 BCCA 410 at paras. 98, 100) and attenuates the impact of the s. 10 Charter breach.

Consideration of the number of breaches

- [74] Defence submits that the court must consider the cumulative effect of multiple breaches and consider them as a whole. The defence argues this was not a dangerous or dynamic situation, the accused was cooperative and compliant, and this is a relevant factor to consider.

- [75] The fact of cumulative breaches will not necessarily result in the exclusion of evidence: *R. v. Trieu*, 2010 BCCA 540 at para. 93.
- [76] Further, in the reasons of Rowe and O'Bonsawin J.J. in *R. v. Zacharias*, 2023 SCC 30, it is stated (see also para. 2):
- [52] An unlawful arrest that is a consequential breach must be factored into the first and second stages of the s. 24(2) analysis, but is unlikely to significantly impact the overall seriousness of the Charter-infringing state conduct. In the absence of additional state misconduct, the focal point for evaluating seriousness is likely to remain the initial breach: in this case, the preceding unlawful search.
- See also *R. v. Pahal*, 2025 ONCA 668 at para. 73.
- [77] Further, in *Zacharias*, Rowe and O'Bonsawin J.J. also stated:
- [54] we do not rule out the possibility that where the initial breach involves deliberate, intentional, or flagrant state misconduct, subsequent actions taken as a consequence of that initial breach may increase the overall seriousness of the Charter-infringing state conduct. The s. 24(2) analysis, of course, will depend on the facts of the case, and all cases will require "an evaluation of the seriousness of the state conduct that led to the breach" (*Grant* 2009, at para. 73).
- [78] In my view, the accused's unlawful arrest for CDSA offences, contrary to s. 9 of the Charter, was a consequential breach on the unlawful search on detention of the fanny pack, but I find it should not significantly impact the overall seriousness of the Charter-infringing state conduct: *Zacharias* at para. 52. Even considering the additional breach, this factor does not strongly favour exclusion because the police's conduct was not flagrant or egregious.
- [79] Further, while I do not minimize the seriousness of the police's breach of the accused's s. 10 rights on detention, given the fluid nature of the situation outside the mall and that the police did have a lawful basis to detain and search the accused on detention, I do not find, despite the additional s. 10 breach, that the police's conduct overall "demonstrated a pattern or attitude of disregard for Charter rights or for the law generally": *Trieu* at para. 97.

Conclusion on the second branch

- [80] In sum, like *McColman*, I find the police had the power to detain the accused and search him incident to that detention, but they did not act within the legal limits of their powers. Without minimizing the seriousness of the impact on the accused, I find that what occurred was not an egregious intrusion into the accused's Charter-protected interests in the circumstances. This factor moderately favours exclusion of the evidence: *McColman* at para. 68.

Third Grant factor: Society's interest in the adjudication of the case on its merits

[81] The "third line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": McColman at para. 69.

[82] Grant states:

[79] This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.

[Emphasis in original.]

[83] Under this third line of inquiry, courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence, although this final factor can cut both ways: Grant at paras. 81, 83-84. "While the public has a heightened interest in a determination on the merits where the offence is serious, it also has a vital interest in maintaining a justice system that is above reproach": McColman at para. 70.

[84] While the "concern for truth-seeking is only one of the considerations under a s. 24(2) application", the "public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis": Grant at paras. 80-81. The "exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute": Grant at para. 81.

[85] In *R. v. Omar*, 2019 SCC 32, a majority of the Supreme Court of Canada allowed an appeal substantially for the reasons of Brown J.A. of the Ontario Court of Appeal in 2018 ONCA 975 [Omar ONCA]. Brown J.A. of the Court of Appeal had quoted a decision of another court that had stated, "[W]e consider society's interest in the adjudication of the merits to be greater where the offence is one that so literally involves the safety of the community": at para. 137

[86] Here the Unlawfully Obtained Evidence is reliable, important to the Crown's case, and concerns an offence which implicates the safety of members of society.

[87] The evidence's reliability is not undermined by the Charter infringements.

[88] In saying this evidence is "reliable," I mean this within the meaning of the s. 24(2) jurisprudence and express no views in this ruling on the ultimate weight of the evidence in this trial, nor come to any conclusions as to its weight or the ultimate impact of any of the Unlawfully Obtained Evidence on the Crown's case to prove the alleged acts and charges in the indictment.

[89] I find this third factor pulls strongly and militates in favour of admitting the Unlawfully Obtained Evidence: McColman at para. 73.

Balancing the factors and conclusion on s. 24(2) application

[90] R. v. Tim, 2022 SCC 12 states:

[98] The final step in the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term repute of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision (see Grant, at paras. 86 and 140; Harrison, at para. 36). Each factor must be assessed and weighed in the balance, focussing on the long-term integrity of, and public confidence in, the administration of justice (see Grant, at para. 68). The balancing is prospective: it aims to ensure that evidence obtained through a Charter breach "does not do further damage to the repute of the justice system" (Grant, at para. 69). The balancing is also societal: the goal is not to punish the police, but rather to address systemic concerns by analyzing "the broad impact of admission of the evidence on the long-term repute of the justice system" (Grant, at para. 70; see also Le, at para. 139).

[91] I find that:

- a) The first Grant factor pulls towards exclusion of the Unlawfully Obtained Evidence, but not at the strongest end of the spectrum.
- b) The impact of the Charter breaches on the accused's protected interests with respect to the contents of the fanny pack and on his lawful arrest for CDSA offences was significant but fleeting, and so not at the most serious end of the scale. I find it to be moderate.
- c) The breach of the s. 10 right was serious, but the impact on the accused was not at the most serious end of the spectrum, since the accused did not, as a result, provide inculpatory testimonial evidence to the police.
- d) Overall, I find the impact of the Charter breaches on the accused's protected interests to be moderate.
- e) The police's conduct was not egregious and not a blatant disregard of the accused's rights.
- f) The value of the evidence is considerable, being reliable and central to the Crown's case.
- g) The charges in this case for possession for purposes of trafficking under the CDSA are serious. The public has an interest in seeing the case adjudicated on its merits. In saying this, I am mindful that "the seriousness of the offence and the reliability of the evidence should not be permitted to 'overwhelm' the s. 24(2) analysis": Côté at para. 48.

- [92] These considerations must be balanced in determining whether admitting the evidence of the Unlawfully Obtained Evidence would put the administration of justice into disrepute. In doing so, I have considered the long-term reputé of the administration of justice: Grant at para. 61.
- [93] The police had a lawful reason to detain the accused, given the machete he was wearing.
- [94] I have found a lawful discovery of the baggies with alleged substances in the fanny pack would have occurred following his arrest for a s. 88 offence, as would his subsequent lawful arrest for the two CDSA offences.
- [95] The seriousness and impact of the breach on the accused's Charter-protected rights weigh in favour of excluding the evidence, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission, given the offences alleged: Omar ONCA.
- [96] The first line of inquiry moderately favours exclusion of the evidence, and the second line of inquiry also does so moderately. However, the third line of inquiry pulls strongly in favour of inclusion and, in my view, outweighs the cumulative weight of the first two lines of inquiry because of the important and reliable nature of the evidence, as well as the important public policy concerns about trafficking of fentanyl in Canadian society: R. v. Parranto, 2021 SCC 46, paras. 87-101 per Moldaver J.
- [97] Having regard to all the circumstances, I conclude that the administration of justice is best served by admitting the Unlawfully Obtained Evidence.

Order

- [98] The defence's application for exclusion of evidence pursuant to s. 24(2) of the Charter is dismissed.
- [99] This concludes my ruling. Those are my reasons.

"Stephens J."

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