



SUPREME COURT OF CANADA

CITATION: R. v. Tim, 2022 SCC
12

APPEAL HEARD: October 7,
2021

JUDGMENT RENDERED: April
14, 2022

DOCKET: 39525

BETWEEN:

Sokha Tim
Appellant

and

Her Majesty The Queen
Respondent

CORAM: Wagner C.J. and Moldaver, Côté, Brown, Rowe, Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:** Jamal J. (Wagner C.J. and Moldaver, Côté, Rowe and Kasirer
(paras. 1 to 101) JJ. concurring)

**DISSENTING
REASONS:** Brown J.
(paras. 102 to 104)

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Sokha Tim

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Tim

2022 SCC 12

File No.: 39525.

2021: October 7; 2022: April 14.

Present: Wagner C.J. and Moldaver, Côté, Brown, Rowe, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Constitutional law — Charter of Rights — Arbitrary detention — Search and seizure — Remedy — Exclusion of evidence — Police arresting accused for possession of controlled substance based on mistake of law about pill in accused's possession being controlled substance — Police subsequently conducting searches of accused and his car and finding drugs, ammunition and handgun — Whether arrest and subsequent searches infringed accused's rights against arbitrary detention and unreasonable search and seizure — If so, whether admission of evidence would bring

administration of justice into disrepute warranting its exclusion — Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).

The accused hit a roadside sign on a busy road and kept driving until his car stopped about a kilometre away. When a police officer arrived at the scene, he asked the accused for his driver's licence, vehicle registration, and proof of insurance. When the accused opened his car's door to get the documents, the officer saw him try to hide a small ziplock bag containing a single yellow pill. The officer correctly recognized the pill as gabapentin, which he mistakenly believed was a controlled substance under the *Controlled Drugs and Substances Act* ("CDSA"). The officer immediately arrested the accused for possession of a controlled substance.

After the accused was arrested, the police conducted four searches. Initially, they conducted both a pat-down search of the accused and a search of his car incident to arrest, through which they found fentanyl, other illegal drugs, and ammunition. Then, when the accused was being taken to the patrol car, the officer saw bullets falling from his pants. A second pat-down search was then conducted, during which a loaded handgun fell from the accused's pants. Finally, the accused was strip searched at the police station but no more contraband was found.

At trial, the accused applied to exclude the evidence obtained during the searches on the basis that the police had breached his rights against arbitrary detention and unreasonable search and seizure respectively guaranteed under ss. 9 and 8 of the *Charter*. The trial judge dismissed the application, holding that the warrantless arrest

did not violate s. 9 of the *Charter*, as the officer had reasonable and probable grounds to believe that an offence had been committed. He admitted the evidence and convicted the accused of several drug and firearm offences. A majority of the Court of Appeal found no breach of s. 8 or s. 9 of the *Charter* and dismissed the accused's appeal. The dissenting judge concluded that the police breached ss. 8 and 9 of the *Charter* and would have excluded all the evidence under s. 24(2) of the *Charter* and acquitted the accused.

Held (Brown J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Côté, Rowe, Kasirer and **Jamal JJ.**: The police breached s. 9 of the *Charter* by arresting the accused based on a mistake of law about the legal status of gabapentin. In addition, they breached s. 8 of the *Charter* by searching his person and car incident to the unlawful arrest. All of the impugned evidence was obtained in a manner that breached the *Charter* so as to trigger s. 24(2). However, the evidence should not be excluded under s. 24(2) because its admission would not bring the administration of justice into disrepute.

The right against arbitrary detention under s. 9 of the *Charter* is infringed when an arrest is based on a mistake of law. It is unlawful for the police to arrest someone based on a mistake of law and an unlawful arrest is necessarily arbitrary. A warrantless arrest is permitted pursuant to ss. 495(1)(a) and (b) of the *Criminal Code* when the arresting officer subjectively has reasonable and probable grounds for the arrest, and those grounds are justifiable from an objective viewpoint. The reasonable

grounds concept relates to the facts, not the existence of an offence in law. A warrantless arrest is lawful only if the arresting officer's reasonable belief in the facts, if true, traces a pathway to a criminal offence known to the law. If there is a mistake of law, it makes no difference whether the mistake involves a non-existent offence, or an existing offence that could not be engaged on the facts, even if true, relied on by the officer. The Court's conclusion in the civil cases of *Frey v. Fedoruk*, [1950] S.C.R. 517, and *Kosoian v. Société de transport de Montréal*, 2018 SCC 59, [2019] 4 S.C.R. 335, that a lawful arrest cannot be based on a mistake of law, applies equally in the criminal context. There are compelling considerations of principle and legal policy confirming this. Allowing the police to arrest someone based on what they believe the law is — rather than based on what the law actually is — would dramatically expand police powers at the expense of civil liberties.

In the instant case, the arrest of the accused was unlawful and arbitrary, contrary to s. 9 of the *Charter*. While the arresting officer subjectively believed that he had reasonable and probable grounds to arrest the accused for possession of a controlled substance under the *CDSA*, his subjective belief was based on a mistake of law, given that, even though he correctly identified the pill as gabapentin, he was mistaken about its legal status. His subjective belief thus was not — and could not be — objectively reasonable.

A warrantless search is *prima facie* unreasonable, and thus contrary to the s. 8 *Charter* right to be secure against unreasonable search or seizure. A search is

reasonable, and thus complies with s. 8 of the *Charter*, if: (1) the search is authorized by law; (2) the law authorizing the search is reasonable; and (3) the search is conducted in a reasonable manner. The police have a common law power to search incident to investigative detention under certain circumstances. In the present case, the initial pat-down search of the accused's person and the search of his car, which were purportedly conducted incident to arrest, infringed his s. 8 *Charter* right because the accused's arrest was unlawful. However, the second pat-down search and the strip search did not infringe s. 8. The second pat-down search of the accused's person was a lawful search incident to investigative detention relating to the traffic collision investigation. The arresting officer had reasonable grounds to believe that his safety or the safety of others was at risk. He expressed subjective concerns about safety, even if only implicitly, and those concerns were objectively reasonable in the circumstances. Moreover, the search was conducted reasonably. As for the strip search at the police station, given that the accused was lawfully arrested for the weapons offences after the ammunition and handgun fell from his pants, it was incident to this arrest and it was conducted reasonably.

Section 24(2) of the *Charter* is triggered where evidence is obtained in a manner that violates an accused's *Charter* rights. To determine whether evidence is so obtained, the courts take a purposive and generous approach. The entire chain of events should be examined, and evidence will be tainted if the breach and the discovery are part of the same transaction or course of conduct. The connection between the *Charter* breach and the impugned evidence can be temporal, contextual, causal, or a

combination of the three. A remote or tenuous connection between the *Charter* breach and the impugned evidence will not suffice to trigger s. 24(2). When evidence is obtained in breach of the *Charter*, the s. 24(2) inquiry then examines the impact of admitting this evidence on public confidence in the justice system over the long term, based on three lines of inquiry: (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 the merits. The final step of 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 reputations of the administration of justice.

In the instant case, all the evidence seized was obtained in a manner that breached the accused's *Charter* rights. With respect to the ammunition and illegal drugs seized during the first and second searches, this was the case because the accused's arrest for possession of a controlled substance and the searches of his person and car incident to arrest infringed ss. 8 and 9. As for the evidence found during the second pat-down search, there were temporal and contextual connections between the *Charter* breaches and the discovery of the evidence. The discovery of this evidence was very close in time to the *Charter* breaches and it flowed directly out of the same encounter with the police and was part of the same transaction or course of conduct as the first and second searches.

Under the first line of inquiry, the seriousness of the *Charter*-infringing

state conduct is situated at the less serious end of the scale of culpability and weakly favours exclusion. The conduct underlying the accused's arrest and the searches incident to arrest was inadvertent, not deliberate, and reflected an honest mistake about whether gabapentin was listed under the *CDSA*; the arresting officer tried to respect the accused's *Charter* rights throughout and at no time did the police conduct display wilful blindness or a flagrant disregard for those rights; and the facts disclose human error by a single, relatively inexperienced police officer with no evidence of a systemic problem or lack of training in the police force that contributed to the mistake. As to the second line of inquiry, the *Charter* breaches arising from the unlawful arrest and the first two searches had a moderate impact on the accused's *Charter*-protected interests, such that this line of inquiry pulls moderately toward exclusion. When the accused was unlawfully arrested, his liberty interests were lawfully restricted for the traffic collision investigation, which mitigates the impact of his arbitrary arrest to some extent. With regard to the impact of the s. 8 *Charter* breaches, the searches were minimally intrusive. Finally, as to the third line of inquiry — society's interest in the adjudication of the case on the merits — the evidence seized was reliable and relevant to the Crown's prosecution of serious offences and its admission would better serve the truth-seeking function of the criminal trial process than its exclusion. This line of inquiry pulls strongly toward admission. The final balancing does not call for exclusion of the evidence to protect the long-term repute of the justice system. Excluding the evidence would damage, rather than vindicate, the long-term repute of the criminal justice system.

Per Brown J. (dissenting): The appeal should be allowed. The evidence should be excluded, and verdicts of acquittal on all charges should be substituted.

There is agreement with the majority that (1) an arrest based on a mistake of law is unlawful, (2) in this case, it resulted in a breach of the accused's rights under s. 8 and s. 9 of the *Charter*, and (3) no deference is owed to the trial judge's findings on s. 24(2) given his legal errors. There is also agreement with the majority's account of the law and principles governing s. 24(2). There is disagreement on the application of the law and principles to the facts, as they relate to the seriousness of the *Charter*-infringing conduct. On that point, there is agreement with the dissenting judge at the Court of Appeal. Taking that into account, and accepting the majority's discussion of the other lines of inquiry, admitting the evidence would bring the administration of justice into disrepute.

Cases Cited

By Jamal J.

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Bourdon, 2016 ONSC 5707; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Loewen*, 2011 SCC 21, [2011] 2 S.C.R. 167; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. McDonnell*, [1997] 1 S.C.R. 948; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Hudson v. Brantford Police Services Board* (2001), 158 C.C.C. (3d) 390; *R. v. Douglas*, 2021 ONCJ 562; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Heien v. North Carolina*, 574 U.S. 54 (2014); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Orr*, 2021 BCCA 42, 399 C.C.C. (3d) 441; *R. v. Griffith*, 2021 ONCA 302, 71 C.R. (7th) 239; *R. v. Todd*, 2019 SKCA 36, [2019] 9 W.W.R. 207; *R. v. Canary*, 2018 ONCA 304, 361 C.C.C. (3d) 63; *R. v. Messina*, 2013 BCCA 499, 346 B.C.A.C. 179; *R. v. Wilson*, 2012 BCCA 517, 331 B.C.A.C. 195, leave to appeal refused, [2013] 3 S.C.R. xii; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Stairs*, 2022 SCC 11; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Rowson*, 2015 ABCA 354, 332 C.C.C. (3d) 165, aff'd 2016 SCC 40, [2016] 2 S.C.R. 158; *R. v. Thibodeau*, 2007 BCCA 489, 247 B.C.A.C. 103, leave to appeal refused, [2008] 1 S.C.R. xiii; *R. v. Ali*, 2022 SCC 1; *R.*

v. Golden, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Latimer*, [1997] 1 S.C.R. 217; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. Plaha* (2004), 189 O.A.C. 376; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. Goldhart*, [1996] 2 S.C.R. 463; *R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561; *R. v. Lichtenwald*, 2020 SKCA 70, 388 C.C.C. (3d) 377; *R. v. Reilly*, 2020 BCCA 369, 397 C.C.C. (3d) 219, *aff'd* 2021 SCC 38; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Keller*, 2019 ABCA 38, 372 C.C.C. (3d) 502; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Parranto*, 2021 SCC 46.

By Brown J. (dissenting)

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353.

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APPEAL from a judgment of the Alberta Court of Appeal (McDonald, Veldhuis and Wakeling JJ.A.), 2020 ABCA 469, 21 Alta. L.R. (7th) 95, 397 C.C.C. (3d) 163, 477 C.R.R. (2d) 11, [2021] 6 W.W.R. 55, [2020] A.J. No. 1426 (QL), 2020 CarswellAlta 2496 (WL Can.), affirming the convictions of the accused for weapons and drug offences. Appeal dismissed, Brown J. dissenting.

Daniel J. Song and Curtis Steeves, for the appellant.

Elisa Frank, for the respondent.

The judgment of Wagner C.J. and Moldaver, Côté, Rowe, Kasirer and Jamal JJ. was delivered by

JAMAL J. —

I. Introduction

[1] At issue on this appeal is whether the arrest of an individual based on a mistake of law and subsequent searches infringed the individual's rights against arbitrary detention (s. 9) and unreasonable search and seizure (s. 8) guaranteed under the *Canadian Charter of Rights and Freedoms*, and if so, whether the evidence obtained should be excluded under s. 24(2).

[2] The police investigated the appellant, Mr. Sokha Tim, for a traffic collision after he hit a roadside sign on a busy road in Calgary and kept driving until his car stopped. An officer found the appellant standing on the roadside by his damaged car and asked him for his driver's licence, vehicle registration, and proof of insurance. When the appellant returned to his car to get these documents, the officer saw him try to hide a yellow pill that the officer correctly identified as gabapentin, a prescription drug that the officer mistakenly believed was a controlled substance under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"). The officer then arrested him for possession of a controlled substance. The police conducted a pat-down search of the appellant and searched his car incident to arrest, finding fentanyl, other illegal drugs, and ammunition. Because the police saw bullets falling from the appellant's pants and believed that he was hiding something, they conducted a second pat-down search, this time finding a loaded handgun. A strip search at the police station found no further contraband.

[3] At trial, the appellant applied to exclude the evidence of the gun, ammunition, and drugs on the basis that the police had breached his rights under ss. 8 and 9 of the *Charter*. The trial judge dismissed the application, admitted the evidence, and convicted the appellant of several drug and firearm offences, including possession of fentanyl and a loaded prohibited firearm. A majority of the Court of Appeal of Alberta dismissed his appeal. The appellant now appeals to this Court as of right.

[4] For the reasons that follow, I would dismiss the appeal. The police breached s. 9 of the *Charter* by arresting the appellant based on a mistake of law about the legal status of gabapentin. They then breached s. 8 of the *Charter* by searching his person and car incident to the unlawful arrest. However, the subsequent pat-down search of the appellant was a lawful search incident to a parallel investigative detention for the traffic collision investigation. In addition, the strip search at the police station was a lawful search incident to arrest for possession of a prohibited firearm. Although all the impugned evidence was “obtained in a manner” that breached the *Charter*, I would not exclude it under s. 24(2). The *Charter* breaches were at the less serious end of the scale of culpability and only moderately impacted the appellant’s *Charter*-protected interests. On the other side of the ledger, the evidence was reliable and essential to the prosecution of serious offences. In my view, weighing these considerations, the admission of the evidence would not bring the administration of justice into disrepute.

II. Facts

[5] On the afternoon of October 8, 2016, a member of the public called 9-1-1 to report a single-vehicle collision on Memorial Drive in Calgary. The appellant's car had veered off the road, hit a roadside sign, and continued for about a kilometre before it became disabled. Fire, medical, and police services rushed to the scene. The appellant was standing at the side of the road talking to a firefighter when a police officer arrived.

[6] The officer, suspecting that the appellant had fled the scene of the collision, approached the appellant and asked if he had been involved in an accident. The appellant acknowledged that he had hit the sign, but he claimed that he could not stop. The officer asked the appellant for his driver's licence, vehicle registration, and proof of insurance. The appellant said he would get the documents from his car. The officer followed him as he did so.

[7] When the appellant opened the driver-side door, the officer saw a small ziplock bag containing a single yellow pill near the window controls in the door area. The appellant's eyes motioned to the pill, and he quickly swiped it to the ground outside of the car, as if he were trying to hide it. The officer recognized the pill as gabapentin, which he had seen trafficked on the street with illegal drugs such as fentanyl and methamphetamine. Because the officer believed that gabapentin was a controlled drug under the *CDSA*, he immediately arrested the appellant for possession of a controlled substance. He did not ask the appellant about the drug because he wanted to arrest and caution him without delay. However, as the officer later learned, gabapentin — which goes by the street name “gabby” or “gabbies” — is not a controlled substance but rather

a prescription painkiller and anti-seizure medication. It is also trafficked and used as a recreational drug for the high it creates.¹

[8] After the appellant was arrested, the police conducted four searches. The legality of those searches was challenged in the courts below and before this Court.

[9] In the first search, the officer conducted a pat-down search of the appellant's person incident to arrest. This search revealed live ammunition for a .22 calibre rifle and a .45 calibre handgun, five fentanyl pills, two pills later identified as hydromorphone (an opioid and controlled substance under the *CDSA*), two pills later identified as alprazolam (a tranquillizer and controlled substance under the *CDSA*), another gabapentin pill, three cell phones, and \$480 in cash.

[10] In the second search, another police officer, who arrived moments before the arresting officer placed the appellant under arrest, searched the appellant's car incident to arrest. He found a folded serrated knife, a canister of bear spray, four fentanyl pills, and two pills later identified as alprazolam.

[11] In the third search, the arresting officer searched the appellant's person again because he became concerned that the first search might have missed some items. His suspicions were aroused because the appellant was walking strangely while being

¹ See, e.g., *R. v. Blaney*, 2018 BCSC 2211, at paras. 3 and 11 (CanLII); *R. v. Jongbloets*, 2017 BCSC 2329, at para. 20 (CanLII); *R. v. J.G.B.*, 2020 YKTC 14, at paras. 6-7 (CanLII); *Pearce v. Canada (Attorney General)*, 2016 FC 1409, at para. 17 (CanLII); *R. v. Johnson*, 2018 SKQB 322, at para. 21 (CanLII), aff'd 2021 SKCA 63; *R. v. Qaqasiq*, 2020 NUCJ 36, at para. 17 (CanLII), aff'd 2021 NUCA 16; *R. v. Bourdon*, 2016 ONSC 5707, at paras. 14 and 475-76 (CanLII).

taken to the patrol car: he was limping and shaking his leg, as if he had something hidden in his pants or falling down his pant leg. The officer then saw .22 calibre ammunition fall from the leg of the appellant's pants. While searching his person, the officer touched the outside of the appellant's pants in his groin area and felt a metal object. A double-barrelled handgun immediately fell from his pants. The gun was loaded with two live rounds, one in each barrel.

[12] In the fourth search, the appellant was strip searched at the police station. The appellant was asked to strip down to his underwear and an officer searched around his waistband to see if he had hidden anything else. No more contraband was found.

III. Judgments Below

A. *Court of Queen's Bench of Alberta (Sullivan J.)*

[13] On a *voir dire*, the appellant asserted that the police had infringed his rights under ss. 8 and 9 of the *Charter*, and he sought to exclude the evidence of the fentanyl, ammunition, and handgun under s. 24(2). The trial judge held that the warrantless arrest did not violate s. 9 of the *Charter*, as the officer had reasonable and probable grounds to believe that an offence had been committed, even though possession of gabapentin was not an offence. The officer had a subjective belief that gabapentin was a controlled substance, and his belief was objectively reasonable given his experience seeing it trafficked with other street drugs and his observation of the appellant trying to hide the pill. The trial judge held that the searches at the scene were incident to a lawful arrest,

and they therefore did not infringe s. 8 of the *Charter*. Although the trial judge found no breach of s. 8 or s. 9 of the *Charter*, he said that he had considered all the factors under s. 24(2) and admitted the evidence. The appellant then pleaded guilty to possession of fentanyl and to several firearms offences.

B. *Court of Appeal of Alberta, 2020 ABCA 469, 397 C.C.C. (3d) 163 (McDonald and Wakeling J.J.A., Veldhuis J.A. (Dissenting))*

[14] The Court of Appeal of Alberta divided on whether ss. 8 and 9 of the *Charter* were infringed and whether the evidence should be excluded under s. 24(2).

[15] The majority found no breach of s. 8 or s. 9 of the *Charter* and dismissed the appeal. The officer had reasonable and probable grounds to believe that the appellant had committed an indictable offence, and the officer could thus arrest him without a warrant under s. 495(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The arresting officer's mistake of law — in believing that gabapentin was a controlled substance under the *CDSA* — did not invalidate the arrest. The officer was not enforcing a “non-existent law”; “[h]e was enforcing the *CDSA* pertaining to the possession of a controlled substance” (para. 36). Although the officer made a mistake of law, he believed on reasonable and probable grounds in a state of facts and law that, had they existed, would have resulted in the offence of possession of a controlled substance. The officer was not expected to be perfect in hindsight. He acted in good faith and his actions were reasonable in the circumstances. There was thus no breach

of s. 9 of the *Charter*. Since the arrest was lawful, the searches did not infringe s. 8 of the *Charter*. There was no need to consider s. 24(2).

[16] The dissenting judge concluded that the police breached ss. 8 and 9 of the *Charter*. The appellant's arrest was arbitrary and breached s. 9. Although the officer had a subjective belief that the appellant was in possession of a controlled substance, that belief was not objectively reasonable. The police must be familiar with and consult the legislation that they are enforcing. Here, the arresting officer made a mistake of law about the legal status of gabapentin. There were no safety concerns, urgency, or other circumstances requiring an immediate arrest, and the appellant was cooperating with the police at the time of his arrest. All four searches breached s. 8 of the *Charter*. The Crown conceded that the first and second searches breached s. 8 if the arrest was arbitrary. The dissenting judge ruled that the Crown did not prove independent grounds justifying the third and fourth searches. The officer's evidence did not establish grounds for a safety search incident to an investigative detention.

[17] The dissenting judge would have excluded all the evidence under s. 24(2) of the *Charter* and acquitted the appellant. The *Charter*-infringing state conduct was serious: the arresting officer was not acting in good faith, since his belief that the appellant had committed an offence was not reasonable in the circumstances; he did not make use of the investigative detention powers available to him; and he took no reasonable steps to investigate whether the appellant possessed a controlled substance. The impact on the appellant's *Charter*-protected interests was serious, since he was

subject to searches of varying degrees of intrusion, culminating in a highly invasive strip search. The final balancing led to excluding the evidence, as admitting it would bring the administration of justice into disrepute. Although society's interest in adjudicating this case on the merits supported admission of the evidence, the seriousness of the breaches and the impact on the appellant's *Charter*-protected interests supported exclusion.

IV. Issues

[18] The appellant raises three issues:

- A. Did the police infringe s. 9 of the *Charter* by arresting the appellant based on a mistake of law?
- B. Did the four searches infringe s. 8 of the *Charter*?
- C. Should the evidence be excluded under s. 24(2) of the *Charter*?

V. Analysis

- A. *Did the Police Infringe Section 9 of the Charter by Arresting the Appellant Based on a Mistake of Law?*

(1) Introduction

[19] The first issue is whether the police infringed the appellant's right against arbitrary detention under s. 9 of the *Charter* by arresting him based on a mistake of law. The Crown concedes that the appellant's arrest involved a mistake of law as to whether gabapentin was a controlled substance under the *CDSA*. However, the Crown claims that the majority of the Court of Appeal correctly held that an arrest based on a reasonable mistake of law is nevertheless lawful.

[20] I disagree. As I will explain, an arrest based on a mistake of law is unlawful and infringes s. 9 of the *Charter*.

(2) Applicable Legal Principles

(a) *Section 9 of the Charter*

[21] Section 9 of the *Charter* provides that “[e]veryone has the right not to be arbitrarily detained or imprisoned.” This Court has adopted a generous and purposive approach to the interpretation of s. 9, one that seeks to balance society's interest in effective policing with robust protection for constitutional rights (see *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 24; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 15-18 and 23). The purpose of s. 9, broadly stated, “is to protect individual liberty from unjustified state interference” (*Grant*, at para. 20; see also *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 25).

[22] Consistent with this purpose, a lawful arrest or detention is not arbitrary, and does not infringe s. 9 of the *Charter*, unless the law authorizing the arrest or detention is itself arbitrary (see *Grant*, at para. 54; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 20). Conversely, an unlawful arrest or detention is necessarily arbitrary and infringes s. 9 of the *Charter* (see *Grant*, para. 54; *R. v. Loewen*, 2011 SCC 21, [2011] 2 S.C.R. 167, at para. 3).

(b) *The Power of a Peace Officer to Arrest Without a Warrant*

[23] Sections 495(1)(a) and (b) of the *Criminal Code* provide that a peace officer may arrest without warrant “a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence” or “a person whom he finds committing a criminal offence”.

[24] The applicable framework for a warrantless arrest was set out in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51. A warrantless arrest requires both subjective and objective grounds. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint. The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer. The police are not required to have a *prima facie* case for conviction before making the arrest (see also *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 24; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 28; *R. v.*

Chehil, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45-47; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 73).

[25] The existence of reasonable and probable grounds is founded on the trial judge's factual findings. Although such factual findings attract appellate deference and are reviewable only for palpable and overriding error, whether the facts as found by the trial judge amount to reasonable and probable grounds is a question of law reviewable for correctness (see *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20).

[26] The specific s. 9 *Charter* issue raised here is whether an arrest based on a mistake of law is unlawful. Can a police officer arrest someone whom they believe has committed an offence, even if the facts relied on by the arresting officer, if true, do not involve unlawful conduct? In my view, the answer is no. As I will elaborate, precedent, principle, and legal policy preclude a lawful arrest based on a mistake of law.

(c) *Precedent*

[27] This Court first ruled that a lawful arrest cannot be based on a mistake of law in *Frey v. Fedoruk*, [1950] S.C.R. 517. *Frey* involved a civil action for false imprisonment brought by a “peeping tom” against a police officer and another person after the officer arrested the voyeur for breach of the peace. The Court held that the conduct for which the plaintiff was arrested was not a criminal offence and should not be recognized as a new offence at common law (voyeurism is now contrary to s. 162(1) of the *Criminal Code*). *Frey* is usually cited for the proposition that it is for Parliament

and not the courts to create new offences or to expand the basis of criminal liability (see *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 57; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 33; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 930; D. Stuart, *Canadian Criminal Law: A Treatise* (8th ed. 2020), at pp. 21-22; M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at pp. 6-7). But the Court in *Frey* also held that an officer's mistake of law in believing that certain conduct was a criminal offence could not provide "reasonable and probable grounds" for a warrantless arrest under what was then s. 30 of the *Criminal Code* (p. 531). A warrantless arrest is lawful only if the arresting officer's reasonable belief in the facts, if true, traces a pathway to a criminal offence known to the law. As Cartwright J. (as he then was) explained in *Frey*, at p. 531:

I think that [s. 30 of the *Criminal Code*] contemplates the situation where a Peace Officer, on reasonable and probable grounds, believes in the existence of a state of facts which, if it did exist would have the legal result that the person whom he was arresting had commit[t]ed an offence for which such person could be arrested without a warrant. It cannot, I think, mean that a Peace Officer is justified in arresting a person when the true facts are known to the Officer and he erroneously concludes that they amount to an offence, when, as a matter of law, they do not amount to an offence at all. "Ignorantia legis non excusat". [Emphasis added.]

[28] *Frey* was recently affirmed on this point in *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335. In *Kosoian*, a subway passenger sued the police when she was arrested and searched for refusing to comply with a subway pictogram warning passengers to hold an escalator handrail. The Court ruled that the

pictogram was simply a warning and did not create an offence, and the police officer's error of law in believing otherwise did not provide reasonable and probable grounds to arrest the passenger without a warrant under Quebec's *Code of Penal Procedure*, CQLR, c. C-25.1 ("C.P.P."). In *Kosoian*, at para. 78, citing *Frey*, Côté J. stated that the reasonable grounds concept relates to the facts, not the existence of an offence in law — and thus an arrest based on a mistake of law is unlawful, even if the arresting officer believes in good faith that the offence exists:

The exercise of these powers presupposes that there are reasonable grounds to believe an offence has been committed. The "reasonable grounds" concept relates to the facts, not to the existence in law of the offence in question (*Frey v. Fedoruk*, [1950] S.C.R. 517, at p. 531). If the offence that the police officer believes has been committed simply does not exist, neither the *C.P.P.* nor, for that matter, any other statute or common law rule gives the officer the power to require a person to identify himself or herself and to arrest the person if he or she refuses to comply (see *Moore v. The Queen*, [1979] 1 S.C.R. 195, at pp. 205-6, per Dickson J., dissenting; *R. v. Guthrie* (1982), 21 Alta. L.R. (2d) 1, at p. 8; *R. v. Coles*, 2003 PESCAD 3, 221 Nfld. & P.E.I.R. 98, at para. 14). An officer who makes an arrest on this basis is acting unlawfully, even if he or she believes in good faith that the offence exists (*R. v. Houle* (1985), 41 Alta. L.R. (2d) 295, at pp. 297-99; *Crépeau v. Yannonie*, [1988] R.R.A. 265 (Que. Sup. Ct.), at p. 269; see also P. Ceysens, *Legal Aspects of Policing* (loose-leaf), vol. 1, at p. 2-3). It was therefore incumbent upon Constable Camacho to verify the existence of the offence alleged against Ms. Kosoian before using the powers conferred on him by the C.P.P. [Underlining added.]

See, to similar effect, *Hudson v. Brantford Police Services Board* (2001), 158 C.C.C. (3d) 390 (Ont. C.A.), at para. 24, per Rosenberg J.A. (s. 25(1) of the *Criminal Code*, which protects a peace officer from civil liability when acting on "reasonable grounds", encompasses mistakes of fact, but "[i]t does not protect against reasonable mistakes of

law”); *R. v. Douglas*, 2021 ONCJ 562, at paras. 47-48 (CanLII), per Rose J. (“A lawful arrest must have lawful grounds, which excludes the possibility of a mistake of law.”). See also R. J. Marin, *Admissibility of Statements* (9th ed. (loose-leaf)), at § 9:51 (“[B]ecause the risk of abuse is undeniable, it is important there must be a legal basis for police actions. In the absence of justification their actions and conduct cannot be tolerated”); E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. (loose-leaf)), at § 5:59 (“[A]n officer who arrests someone on the basis of a ‘non-existent offence’ may be civilly liable”).

[29] Although *Frey* and *Kosoian* were civil cases, this Court’s conclusion that a lawful arrest cannot be based on a mistake of law applies equally in the criminal context. In both cases, this Court analyzed the lawfulness of a warrantless arrest based on a mistake of law as part of a chain of reasoning to find civil liability. That reasoning concerns the scope of police powers and applies equally to the criminal context. See *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 68, per McLachlin C.J. (The reasonable officer standard in civil cases “entails no conflict between criminal standards” but rather “incorporates them”); G. Cournoyer, *Code criminel annoté 2021* (2020), s. 129 ([TRANSLATION] “If the offence that the police officer believes has been committed simply does not exist, the officer does not have the power to require a person to identify himself or herself or the power to arrest the person if he or she refuses to comply.”).

(d) *Principle and Legal Policy*

[30] Compelling considerations of principle and legal policy confirm that a lawful arrest cannot be based on a mistake of law — that is, when the officer knows the facts and erroneously concludes that they amount to an offence, when, as a matter of law, they do not. Allowing the police to arrest someone based on what they believe the law is — rather than based on what the law actually is — would dramatically expand police powers at the expense of civil liberties. This would leave people at the mercy of what particular police officers happen to understand the law to be and would create disincentives for the police to know the law. Canadians rightly expect the police to follow the law, which requires the police to know the law. This Court has affirmed that “[w]hile police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is” (*Grant*, at para. 133; *Le*, at para. 149). Côté J. helpfully encapsulated the relevant considerations of principle and legal policy in *Kosoian*, at para. 6:

In a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law. Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force, which necessarily requires them to know the statutes, regulations and by-laws they are called upon to enforce. Police officers are thus obliged to have an adequate knowledge and understanding of the statutes, regulations and by-laws they have to enforce.

[31] It is thus unlawful for the police to arrest someone based on a mistake of law.

(e) *American Jurisprudence*

[32] Given the Canadian precedents on point, I see no pressing need to turn to American jurisprudence. The majority of the Court of Appeal of Alberta, however, found persuasive the reasoning of the majority of the Supreme Court of the United States in *Heien v. North Carolina*, 574 U.S. 54 (2014), which held that a traffic stop based on a reasonable mistake of law does not infringe the right to be secure against unreasonable search and seizure protected by the Fourth Amendment to the United States Constitution.

[33] In *Heien*, the police stopped a car because one of its two brake lights was out, even though the state law, while ambiguous, was later held to require only one working light. The police became suspicious during the stop, secured consent to search the car, and found cocaine. Under the Fourth Amendment, a traffic stop for a suspected offence is considered “a ‘seizure’ of the occupants of the vehicle” (p. 60).

[34] Writing for the majority, Chief Justice Roberts ruled that the traffic stop did not infringe the Fourth Amendment, as the officer made a reasonable mistake of law (pp. 66-68). Justice Sotomayor, dissenting, concluded that “an officer’s mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment” (p. 80).

[35] With respect, I do not find *Heien* to be helpful in deciding on the legality of an arrest based on a mistake of law under Canadian law. This Court has noted that the greatest caution must be exercised before transplanting American decisions under the Fourth Amendment to the Canadian context under s. 8 of the *Charter* (see *Hunter*

v. Southam Inc., [1984] 2 S.C.R. 145, at p. 161). This is in part because “the *Charter* regime mandates a more flexible and contextual approach to the admissibility of evidence than the United States Constitution; thus there is no counterpart to s. 24(2) of the *Charter* in that country” (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 546-47, per La Forest J.). This note of caution, coupled with this Court’s own precedents on point, provide good reasons not to import American precedent in this case.

(f) *Conclusion*

[36] Canadian law has long held that an arrest based on a mistake of law is unlawful, even if the mistake is made in good faith. The concept of “reasonable and probable grounds” for arrest relates to the facts, not the existence of an offence in law. A police officer makes a mistake of law when the officer knows the facts and erroneously concludes that they amount to an offence, when, as a matter of law, they do not.

(3) Application

[37] I will now apply the *Storrey* framework to the subjective and objective grounds for the warrantless arrest in this case.

[38] The arresting officer subjectively believed that he had reasonable and probable grounds to arrest the appellant for possession of a controlled substance under the *CDSA*. The arresting officer testified that he arrested the appellant because he saw him “swipe” a pill “to the ground”, and he believed that the appellant was “trying to hide it” from his view (A.R., at p. 141). The arresting officer immediately identified the pill as gabapentin, which he had seen “traded amongst people on the street” and “for some reason” believed was a controlled substance (A.R., at p. 145). He thus “arrested [the appellant] for possession of a controlled substance” (A.R., at p. 141). The question is then whether the arresting officer’s subjective belief was objectively reasonable.

[39] The arresting officer’s subjective belief that he had reasonable and probable grounds to arrest the appellant was based on a mistake of law, and thus was not — and could not be — objectively reasonable. The arrest was consequently unlawful and arbitrary, contrary to s. 9 of the *Charter*. As noted by the dissenting judge in the Court of Appeal of Alberta, at para. 66, the officer was not mistaken about any facts, because he correctly identified the pill as gabapentin. Instead, as the Crown conceded on appeal, the officer was mistaken as to the law on those facts — about the legal status of gabapentin, which was not a controlled substance under the *CDSA*.

[40] Before this Court, the Crown again concedes that the officer’s mistake “can be classified as a legal error” (transcript, at p. 25; see also R.F., at para. 43), but submits that the arrest was unlike the arrests in *Frey* and *Kosoian*. The Crown says that the

officer arrested the appellant for possession of a controlled substance under the *CDSA* — an existing offence at law.

[41] I do not accept this submission. The officer arrested the appellant for possession of gabapentin specifically. The officer knew the facts — he correctly identified the pill as gabapentin — but mistakenly concluded that possession of gabapentin was an offence, when, in law, it was not. That brings this case squarely within *Frey* and *Kosoian*. It makes no difference whether the mistake of law involves a non-existent offence, or an existing offence that could not be engaged on the facts, even if true, relied on by the officer. In both instances, the mistake of law precludes a lawful arrest. The courts below erred in concluding otherwise.

[42] To be clear, I am not suggesting that the police must see and correctly identify a specific drug from the hundreds of controlled substances under the *CDSA* before they may lawfully arrest a suspected drug offender. Police routinely arrest suspected drug offenders for potential infractions of the *CDSA*, even when they do not see or identify specific drugs. Courts routinely uphold the legality of such arrests, if they conclude that there were reasonable and probable grounds to arrest (see, e.g., *Loewen*, at paras. 7-8; *R. v. Orr*, 2021 BCCA 42, 399 C.C.C. (3d) 441, at para. 78; *R. v. Griffith*, 2021 ONCA 302, 71 C.R. (7th) 239, at paras. 29-33; *R. v. Todd*, 2019 SKCA 36, [2019] 9 W.W.R. 207, at paras. 6-11 and 44; *R. v. Canary*, 2018 ONCA 304, 361 C.C.C. (3d) 63, at paras. 25-31; *R. v. Messina*, 2013 BCCA 499, 346 B.C.A.C. 179, at

paras. 26-29; *R. v. Wilson*, 2012 BCCA 517, 331 B.C.A.C. 195, at paras. 14 and 52, leave to appeal refused, [2013] 3 S.C.R. xii).

[43] I conclude that the arrest was unlawful and infringed s. 9 of the *Charter*.

B. *Did the Four Searches Infringe Section 8 of the Charter?*

(1) Introduction

[44] I now turn to consider whether the four searches infringed the appellant's s. 8 *Charter* right "to be secure against unreasonable search or seizure". Recall that the four warrantless searches were: (1) an initial pat-down search of the appellant's person incident to arrest; (2) a search of his car incident to arrest; (3) a second pat-down search of his person; and (4) a strip search at the police station. As I will explain, I conclude that the first two searches breached s. 8 of the *Charter*, but the third and fourth searches did not.

(2) General Principles

[45] A warrantless search is *prima facie* unreasonable, and thus contrary to s. 8 of the *Charter*. The Crown bears the onus of demonstrating on a balance of probabilities that a warrantless search was reasonable (see *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 11; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 21; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 32).

[46] A search is reasonable, and thus complies with s. 8 of the *Charter*, if: (1) the search is authorized by law; (2) the law authorizing the search is reasonable; and (3) the search is conducted in a reasonable manner (see *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; *Caslake*, at para. 10; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518, at para. 36).

[47] Here, the laws potentially authorizing the searches are the common law powers to search incident to arrest (the first and second searches), to search incident to investigative detention (the third search), and to strip search (the fourth search). I will address each potential power below.

(3) The First and Second Searches: Unlawful Searches Incident to Arrest

[48] The Crown concedes that the first two searches — the initial pat-down search of the appellant’s person and the search of the appellant’s car on discovering the gabapentin — were purportedly conducted incident to arrest, and that if the appellant’s arrest was unlawful, then these searches were also unlawful and breached s. 8 of the *Charter*. I agree with this concession.

[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 (see *Saeed*, at para. 37; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 21 and 27; *R. v. Stairs*, 2022 SCC 11, at paras. 6 and 35).

[50] Here, the initial pat-down search of the appellant's person and the search of his car incident to arrest falter on the first condition: the appellant was not lawfully arrested. Thus, the first two searches necessarily breached s. 8 of the *Charter*.

(4) The Third Search: A Lawful Search Incident to Investigative Detention

[51] The dissenting judge concluded that the third search — the further pat-down search of the appellant's person — could not be justified as a search incident to investigative detention because the arresting officer did not have a subjective belief that his safety was at risk.

[52] I respectfully disagree. The third search was a lawful search incident to investigative detention relating to the traffic collision investigation.

[53] This Court in *Mann* recognized that the police have a common law power to search incident to investigative detention under certain circumstances. Speaking for the majority, Iacobucci J. stated that “police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary” (para. 45). He added that a police officer “may engage in a protective pat-down search of the detained individual” when the officer “has reasonable grounds to believe that his or her safety or that of others is at risk” (para. 45). In addition, both the investigative detention and the pat-down search “must be conducted

in a reasonable manner” (para. 45; see also *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at paras. 20 and 29-31).

[54] Here, the dissenting judge of the Court of Appeal appeared to accept that there was a lawful investigative detention, both for the drug investigation and for the traffic collision investigation. She said that she “agree[d] with the Crown that the objective factual matrix met the test for an investigative detention related to controlled substances” (para. 77). She also noted that, “[a]t trial, the appellant conceded [that] he was detained for the purposes of investigating the motor-vehicle accident in any event” (para. 77).

[55] The appellant, however, argues that the dissenting judge erred in finding grounds to detain him for the drug investigation. He submits that if the officer’s “mistake of law about [g]abapentin could not justify a warrantless arrest on reasonable and probable grounds, then it should similarly be incapable of supporting an investigative detention on reasonable suspicion that [the appellant] was connected ‘to a particular crime’” (A.F., at para. 94).

[56] I agree with the appellant. Just as a warrantless arrest based on a mistake of law infringes s. 9 of the *Charter*, so too does an investigative detention based on a mistake of law.

[57] However, the dissenting judge was correct that the police could detain the appellant for the traffic collision investigation, as the appellant conceded. The police’s

interaction with the appellant was at first a traffic collision investigation. The arresting officer testified that he came to where the appellant's damaged car had stopped and approached him because he suspected that he had fled the scene of a collision with a roadside sign.

[58] In doing so, the officer was properly exercising investigatory powers under provincial traffic law and the *Criminal Code*. Section 69(1)(a) of Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6, requires a driver or any other person in charge of a vehicle involved in a motor-vehicle accident on a road to "remain at the scene of the accident or, if the person has left the scene of the accident, [to] immediately return to the scene of the accident unless otherwise directed by a peace officer". The driver or any other person in charge of the vehicle must also provide the peace officer with requested information as provided by law (see *Traffic Safety Act*, s. 69(1)(c)). Thus, a driver involved in a car accident "ha[s] a duty, separate and apart from the criminal law, to remain at the scene of the accident" (*R. v. Rowson*, 2015 ABCA 354, 332 C.C.C. (3d) 165 ("*Rowson (ABCA)*"), at para. 44, aff'd 2016 SCC 40, [2016] 2 S.C.R. 158). There is "no ability to choose not to cooperate with the police if one is the driver of a car involved in an automobile accident" — such a driver is "not free to go" (*Rowson (ABCA)*, at para. 44). Furthermore, under s. 320.16(1) of the *Criminal Code*, it is an offence, in certain circumstances, to fail to stop after a traffic accident.

[59] As a result, the appellant had no right to refuse to cooperate with the police, nor was he free to go. He was lawfully detained as part of a traffic collision investigation, even if he could not be lawfully detained as part of a drug investigation.

[60] This takes me to whether the arresting officer had reasonable grounds to believe that his safety or the safety of others was at risk (see *Mann*, at paras. 40 and 45; see also *R. v. Thibodeau*, 2007 BCCA 489, 247 B.C.A.C. 103, at para. 10, leave to appeal refused, [2008] 1 S.C.R. xiii). The dissenting judge concluded that the officer had no such grounds. She cited the officer's testimony to the effect that he conducted another pat-down search because he was concerned that he may have "missed some items" after he saw bullets falling out of the appellant's pant leg, which she concluded showed that he did not believe that "his safety was at stake", but rather that he was "concerned about collecting evidence" (para. 80). The officer's testimony was as follows:

Q. [Crown counsel]: After you found these items [i.e., the drugs and ammunition found on the appellant], what did you do?

A.: So once I had found all these items on the accused, I started walking him towards my police vehicle. At that time, he started limping and shaking his leg, which seemed strange to me at the time. It's almost as though he had something falling down his pant leg or something concealed in his pants. So when I got him to my vehicle, before I placed him in the vehicle, more ammunition, like, .22 calibre ammunition, fell from inside of his pant leg, which was suspicious to me. So I conducted another search, thinking that I've missed some items. [Emphasis added.]

(A.R., at p. 150)

[61] On this basis, the dissenting judge inferred that “[t]he officer did not turn his mind to or have any concerns about conducting a safety search” (para. 81).

[62] I disagree. While the dissenting judge’s inference is *a* possible reading of the transcript, it is not the *only* possible reading, nor even the most plausible reading. I read the officer’s evidence in context as expressing concern for whether he might have “missed some items” that would pose a safety risk to himself or to others. The officer had just found bullets on the appellant during a pat-down search, and then he saw more bullets falling from his pants. The appellant was “limping and shaking his leg”, as if he had “something concealed in his pants”. The obvious “something” was a gun.

[63] This reading of the arresting officer’s evidence as expressing safety concerns is confirmed by the evidence of the other officer who was at the scene. He testified that he got out of his police cruiser “due to the fact that it was ammunition that was located”, and he therefore “stayed with them for a moment while [the arresting officer] continued to search” (A.R., at p. 163). This evidence also suggests that the officers suspected that the appellant might have been armed, thereby posing a clear risk to the police and the public.

[64] I therefore conclude that the arresting officer did express subjective concerns about safety, even if only implicitly, and that those concerns were objectively reasonable in the circumstances. When there are concealed bullets, there may be a concealed gun. The further pat-down search of the appellant’s person, in which the

officer dislodged a loaded handgun by merely touching the outside of the appellant's pants, was also conducted reasonably. This search did not breach s. 8 of the *Charter*.

(5) The Fourth Search: A Lawful Strip Search

[65] Although the dissenting judge did not separately address the strip search of the appellant at the police station, she seemed to conclude that it was unlawful on the same basis as the third search. No further evidence was found during the strip search.

[66] A strip search can be justified at common law as incident to a lawful arrest where there are “reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest” (*R. v. Ali*, 2022 SCC 1, at para. 2; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 99). Reasonable and probable grounds exist to justify a strip search “where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest” (*Ali*, at para. 2; see also *Golden*, at paras. 94 and 111). The strip search must also be conducted reasonably, in a manner that “interferes with the privacy and dignity of the person being searched as little as possible” (*Golden*, at para. 104).

[67] Here, the appellant was lawfully arrested for the weapons offences after the ammunition and the handgun fell from his pants. The officer testified that, following the third search, he “seized the items that fell onto the ground out of [the appellant’s] pant leg . . . and then [he] placed the [appellant] in [his] vehicle, where he was chartered and cautioned” (A.R., at p. 152). The officer’s language and conduct conveyed clearly

that the appellant was under arrest (see *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 25). His conduct had the effect of placing the appellant under arrest for possession of a prohibited firearm (*Latimer*, at para. 24). I thus infer from the record that the appellant was placed under arrest for possession of a prohibited firearm following the third search.

[68] The strip search at the police station was incident to this weapons arrest, because it was for the purpose of discovering concealed weapons or evidence related to the offence for which the appellant was lawfully arrested (see *Golden*, at para. 94). Strip searches unquestionably “represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them” (*Golden*, at para. 83). However, the strip search here was minimally intrusive, as it was conducted reasonably, in a manner consistent with this Court’s guidelines for strip searches (see *Golden*, at paras. 101-2). It was performed at the police station, it was limited to the appellant’s underwear waistband, and the appellant wore his underwear throughout the search.

[69] I therefore conclude that the strip search did not infringe s. 8 of the *Charter*.

(6) Conclusion

[70] The initial pat-down search of the appellant’s person and the search of his car infringed s. 8 of the *Charter*, but the further pat-down search and the strip search did not.

C. *Should the Evidence Be Excluded Under Section 24(2) of the Charter?*

(1) Introduction

[71] Given the breaches of ss. 8 and 9 of the *Charter*, the final issue to consider is whether the evidence should have been excluded under s. 24(2). Section 24(2) provides that when “a court concludes that evidence was obtained in a manner” that infringed a *Charter* right, “the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”.

[72] Because the trial judge erred in law in assessing the nature and extent of the *Charter* breaches, no appellate deference is owed to his “alternative” conclusion to admit the evidence. This Court must therefore consider that issue afresh (see *Grant*, at para. 129; *Le*, at para. 138; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 42).

[73] As I explain below, although all the impugned evidence was “obtained in a manner” that infringed the appellant’s *Charter* rights, the evidence should not be excluded under s. 24(2).

(2) Applicable Legal Principles

[74] Section 24(2) of the *Charter* is triggered where evidence is “obtained in a manner” that violates an accused’s *Charter* rights. A s. 24(2) inquiry examines the impact of admitting evidence obtained in breach of the *Charter* on public confidence in the justice system over the long term, based on three lines of inquiry: (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 the merits. A court’s task is to balance the assessments under these three lines of inquiry “to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute” (*Grant*, at para. 71; see also *Le*, at paras. 139-42).

[75] Section 24(2) does not create an automatic exclusionary rule when evidence is obtained in breach of a *Charter* right. The accused bears the onus of establishing that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute (see *Collins*, at p. 280; *Fearon*, at para. 89; see also S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams’ Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 19:12).

(3) All the Evidence Seized Was “Obtained in a Manner” That Breached the Appellant’s *Charter* Rights

[76] Because I have concluded that the appellant’s arrest for possession of a controlled substance and the searches of his person and car incident to arrest infringed ss. 8 and 9 of the *Charter*, the ammunition and illegal drugs seized during the first and

second searches were “obtained in a manner” that breached his *Charter* rights. This triggers consideration of whether to exclude this evidence under s. 24(2) of the *Charter*.

[77] The key disputed point concerns whether the loaded handgun and ammunition found during the third search were “obtained in a manner” that breached the appellant’s *Charter* rights. The Crown submits that because the appellant was lawfully detained for the traffic collision investigation when the police saw bullets falling from his pants, the nexus between the unlawful drug arrest and the discovery of the gun and ammunition is tenuous. The Crown also says that the bullets falling from the appellant’s pants was “a significant intervening factor”, effectively breaking the chain of causation between the unlawful arrest and first two searches, on the one hand, and the evidence obtained during the third search, on the other hand (R.F., at para. 81). As a result, the Crown submits that the evidence found during the third search was not “obtained in a manner” that breached the appellant’s *Charter* rights. By contrast, the appellant submits that his unlawful arrest for possession of a controlled substance triggered all four searches, thus providing a temporal, causal, or contextual connection between the *Charter* breaches and the discovery of the gun and ammunition on his person. According to the appellant, *all* the evidence was “obtained in a manner” that breached his *Charter* rights. As I will explain, I agree with the appellant.

[78] This Court has provided guidance as to when evidence is “obtained in a manner” that breached an accused’s *Charter* rights so as to trigger s. 24(2):

1. The courts take “a purposive and generous approach” to whether evidence was “obtained in a manner” that breached an accused’s *Charter* rights (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38).
2. The “entire chain of events” involving the *Charter* breach and the impugned evidence should be examined (*R. v. Strachan*, [1988] 2 S.C.R. 980, at pp. 1005-6).
3. “Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct” (*Mack*, at para. 38; see also *Wittwer*, at para. 21).
4. The connection between the *Charter* breach and the impugned evidence can be “temporal, contextual, causal or a combination of the three” (*Wittwer*, at para. 21, quoting *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45). A causal connection is not required (*Wittwer*, at para. 21; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 83; *Strachan*, at pp. 1000-1002).
5. A remote or tenuous connection between the *Charter* breach and the impugned evidence will not suffice to trigger s. 24(2) (*Mack*, at para. 38; *Wittwer*, at para. 21; *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40; *Strachan*, at pp. 1005-6). Such situations should be dealt

with on a case by case basis. There is “no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote” (*Strachan*, at p. 1006).

See also *R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561, at para. 72; *R. v. Lichtenwald*, 2020 SKCA 70, 388 C.C.C. (3d) 377, at para. 57; *R. v. Reilly*, 2020 BCCA 369, 397 C.C.C. (3d) 219, at paras. 75-76, aff’d 2021 SCC 38; and Hill, Tanovich and Strezos, at § 19:22.

[79] Here, I need not decide whether, as urged by the Crown, the bullets falling from the appellant’s pants broke the chain of causation between the appellant’s unlawful arrest and the unlawful first two searches, on the one hand, and the lawful third search, on the other hand. Even if it could be said that there was no causal connection between the *Charter* breaches and the discovery of the evidence during the third search, there were undoubtedly temporal and contextual connections that were neither tenuous nor remote. The connection between the *Charter* breaches and the impugned evidence from the third search was temporal, because the discovery of this evidence was very close in time to the *Charter* breaches. The connection was also contextual, because the discovery of this evidence flowed directly out of the same encounter with the police: the third search arose because the officer was concerned that he had “missed some items” during the first search. The third search was also part of the same transaction or course of conduct as the first and second searches: the encounter began as a traffic collision investigation that quickly led to an unlawful arrest for

possession of what was believed to be a controlled substance, which then immediately gave rise to safety concerns justifying the third search.

[80] Under this Court's generous approach to the "obtained in a manner" threshold requirement, these temporal and contextual connections are sufficient to require consideration of whether the evidence obtained from the third search should be excluded under s. 24(2) of the *Charter*, in addition to the evidence from the first two searches.

[81] I now turn to the three lines of inquiry under s. 24(2) of the *Charter*.

(4) The Evidence Should Not Be Excluded Under Section 24(2) of the *Charter*

(a) *The Seriousness of the Charter-Infringing State Conduct*

[82] The first line of inquiry under s. 24(2) considers the seriousness of the *Charter*-infringing state conduct. It asks whether the police engaged in misconduct from which the court should dissociate itself (see *Grant*, at para. 72). The concern of this inquiry is "not to punish the police", but rather to "preserve public confidence in the rule of law and its processes" (*Grant*, at para. 73). The court must situate the *Charter*-infringing conduct on a "spectrum" or a "scale of culpability" (*Grant*, at para. 74; *Paterson*, at para. 43; *Le*, at para. 143). At the more serious end of the culpability scale are wilful or reckless disregard of *Charter* rights, a systemic pattern of *Charter*-infringing conduct, or a major departure from *Charter* standards. Courts

should dissociate themselves from such conduct because it risks bringing the administration of justice into disrepute. At the less serious end of the culpability scale are *Charter* breaches that are inadvertent, technical, or minor, or which reflect an understandable mistake. Such circumstances minimally undermine public confidence in the rule of law, and thus dissociation is much less of a concern (see *Grant*, at para. 74; *Le*, at para. 143; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22).

[83] I would situate this case at the less serious end of the scale of culpability. I say this for three reasons.

[84] First, the *Charter*-infringing state conduct underlying the appellant's arrest and the searches incident to arrest was inadvertent, not deliberate, and reflected an honest mistake about whether gabapentin was one of the hundreds of controlled substances listed under the *CDSA*. While police officers are expected to know the law that they are enforcing, the arresting officer here had been on the force for only three years. In that brief time, he had seen gabapentin, which he knew by the street name "gabby", trafficked with controlled substances such as fentanyl and methamphetamine. His experience was consistent with the jurisprudence that often mentions gabapentin alongside other controlled substances, even though it is a prescription drug (see above, at para. 7). In short, a relatively inexperienced officer arrested the appellant based on an honest mistake (see *Fearon*, at para. 95).

[85] Nevertheless, I agree with the appellant, and with the conclusion of the dissenting judge (at para. 84), that even though the officer's mistake was not made in

bad faith, this alone does not make the *Charter* breach in “good faith” (see *Le*, at para. 147). Good faith on the part of the police, if present, would reduce the need for the court to dissociate itself from the police conduct (see *Grant*, at para. 75; *Paterson*, at para. 44). Good faith cannot be claimed if the *Charter* breach arises from a police officer’s negligence, unreasonable error, ignorance as to the scope of their authority, or ignorance of *Charter* standards (see *Grant*, at para. 75; *Buhay*, at para. 59; *Le*, at para. 147; *Paterson*, at para. 44). I also accept that “[e]ven where the *Charter* infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct” (*Paterson*, at para. 44; see also *Harrison*, at paras. 24-25). Even so, in my view, the officer’s mistake and the ensuing *Charter* breaches remain honest and inadvertent, rather than wilful or reckless.

[86] Second, at no time did the police conduct display wilful blindness or a flagrant disregard for the appellant’s *Charter* rights (see *Grant*, at para. 75). To the contrary, the arresting officer tried to respect the appellant’s *Charter* rights throughout. His unchallenged evidence was that he arrested the appellant immediately, before asking him about the drug, because he wanted to advise him of his *Charter* rights without delay.

[87] I therefore disagree with the assertion of the appellant, and of the dissenting judge (at paras. 85-87 and 89), that the seriousness of the *Charter* breaches is aggravated by the officer’s failure to deploy non-*Charter* infringing investigatory

techniques, such as using a brief investigative detention to confirm his suspicion about the legal status of gabapentin (see *Collins*, at p. 285). In my view, that assertion is based on a false premise. The trial judge found as fact that the officer *believed* rather than merely *suspected* that gabapentin was a controlled substance. Although the officer should have had an adequate understanding of the law that he was enforcing, he did not arrest the appellant based on a mere suspicion.

[88] Third, there is no evidence before the Court of a systemic problem or lack of training in the Calgary police force that contributed to the officer's honest mistake. This Court has noted that "while evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor" (*Harrison*, at para. 25). While not a mitigating factor, the absence of a systemic problem informs the court's task of situating the officer's mistake on a scale of culpability. As stated above, dissociation is less of a concern for an inadvertent or technical error (see *Grant*, at para. 74; *Le*, at para. 143; *Harrison*, at para. 22). In this case, the facts disclose human error, plain and simple, by a single, relatively inexperienced police officer.

[89] Given the officer's honest mistake, the lack of a flagrant disregard for *Charter* rights, and the lack of a systemic problem, I would situate the *Charter*-infringing state conduct at the less serious end of the scale of culpability. This factor favours exclusion, but only weakly.

(b) *The Impact on the Appellant's Charter-Protected Interests*

[90] The second line of inquiry under s. 24(2) considers the impact of the breach on the accused's *Charter*-protected interests. It asks whether the breach "actually undermined the interests protected by the right infringed" (*Grant*, at para. 76; *Le*, at para. 151). This involves identifying the interests protected by the relevant *Charter* rights and evaluating how seriously the breaches affected those interests (see *Grant*, at para. 77). As with the first *Grant* line of inquiry, the court must situate the impact on the accused's *Charter*-protected interests on a spectrum, ranging from impacts that are fleeting, technical, transient, or trivial, 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 that admission of the evidence would bring the administration of justice into disrepute. This is because "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" (*Grant*, at para. 76; see also *Le*, at para. 151; *Harrison*, at para. 28).

[91] In this case, I have found three *Charter* breaches: a breach of s. 9 in the appellant's unlawful arrest; and two breaches of s. 8 in the unreasonable search of the appellant's person and car incident to arrest. The interests protected by s. 9 of the *Charter* include the protection of "individual liberty from unjustified state interference" (*Grant*, at para. 20; *Le*, at para. 152), while the interests protected by s. 8 of the *Charter* include individual privacy and human dignity (see *Grant*, at para. 78; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 91). I would characterize the breaches here as

having had a moderate impact on the appellant's *Charter*-protected interests: while the impact was not fleeting, technical, transient, or trivial, it was not profoundly intrusive either.

[92] With regard to the impact of the s. 9 *Charter* breach, the appellant submits that his arbitrary arrest involved “unsanctioned state violence” on his liberty interest (A.F., at para. 122). He says that his arrest on a busy road was not brief or fleeting, and that handcuffs restricted his liberty and movement. Yet, as the Crown rightly notes, and as the appellant appropriately concedes, he was lawfully detained for the traffic collision investigation. He had to remain at the scene and cooperate with the police regarding the collision — he was not free to go (see *Rowson (ABCA)*, at para. 44; see also *Hill, Tanovich and Strezos*, at § 19:36). Because the appellant's liberty interests were lawfully restricted for the traffic collision investigation, this mitigates the impact of his arbitrary arrest to some extent.

[93] With regard to the impact of the s. 8 *Charter* breaches, the first search, a pat-down search, is a “relatively non-intrusive procedure” (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 185), one that is “minimally intrusive” (*Mann*, at para. 56). The search here fit that description. The same can be said of the second search, a search of the appellant's car incident to arrest, given the reduced expectation of privacy in a car (see *MacKenzie*, at para. 31; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 38; *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 534).

[94] On the other side of the ledger, I am not prepared to speculate as to whether the evidence would have been discovered absent the *Charter* breaches. It is true that if the evidence were only discoverable through the *Charter* breach, then there would be a greater impact on the accused's *Charter*-protected interests (see *Grant*, at paras. 122 and 137; *R. v. Keller*, 2019 ABCA 38, 372 C.C.C. (3d) 502, at para. 64). However, "in cases where it cannot be determined with any confidence whether evidence would have been discovered" absent a *Charter* breach, "discoverability will have no impact on the s. 24(2) inquiry" (*Grant*, at para. 122; see also Hill, Tanovich and Strezos, at § 19:49). Courts should not engage in speculation about discoverability (see *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 70).

[95] Collecting these factors under the second line of inquiry, in my view, the *Charter* breaches arising from the unlawful arrest and the first two searches had a moderate impact on the appellant's *Charter*-protected interests. The appellant was unlawfully arrested, but he was also lawfully detained for the traffic collision investigation; the searches were minimally intrusive, and I am not prepared to speculate on the issue of discoverability. These are not profoundly intrusive impacts, but they are not fleeting, technical, transient, or trivial either. This line of inquiry pulls moderately toward exclusion.

(c) *Society's Interest in the Adjudication of the Case on the Merits*

[96] The third line of inquiry considers factors such as the reliability of the impugned evidence and its importance to the Crown's case. It asks "whether the truth-

seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (*Grant*, at para. 79). Reliable evidence critical to the Crown’s case will generally pull toward inclusion (see *Grant*, at paras. 80-81; *Harrison*, at paras. 33-34).

[97] Here, the evidence seized was reliable and relevant to the Crown’s prosecution of serious offences. The appellant concedes that the admission of this evidence would better serve the truth-seeking function of the criminal trial process than its exclusion. I agree.

(d) *The Final Balancing*

[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).

[99] I have concluded that the first line of inquiry under *Grant* pulls weakly toward exclusion and the second does so moderately, but the third pulls strongly toward admission. In my view, on these facts, the final balancing does not call for exclusion of the evidence to protect the long-term repute of the justice system. A relatively inexperienced police officer made an honest mistake about the legal status of gabapentin, a prescription drug that is traded on the street and that the appellant tried to hide during a lawful traffic collision investigation. That led to an arrest and searches incident to arrest, and to the discovery of a loaded gun, ammunition, and fentanyl — a drug that has been described as “public enemy number one” (*R. v. Parranto*, 2021 SCC 46, at para. 93, per Moldaver J.). Excluding this evidence would simply punish the police — which is not the purpose of s. 24(2) — and would damage, rather than vindicate, the long-term repute of the criminal justice system.

[100] I conclude that the admission of the evidence would not bring the administration of justice into disrepute. I would therefore admit the evidence and affirm the convictions on all charges.

VI. Disposition

[101] For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

BROWN J. —

[102] I endorse my colleague's conclusions, and his reasons therefor, that (1) an arrest based on a mistake of law is unlawful, (2) in this case, it resulted in a breach of the appellant's rights under s. 8 and s. 9 of the *Charter*, and (3) no deference is owed to the trial judge's findings on s. 24(2) given his legal errors.

[103] I also agree with my colleague's account of the law and principles governing s. 24(2). My point of respectful departure is on their application to the facts of the case, specifically as they relate to the seriousness of the *Charter*-infringing conduct. On that point, I adopt the reasons of Veldhuis J.A., at paras. 84-89 (2020 ABCA 469, 397 C.C.C. (3d) 163).

[104] Taking that into account, and accepting my colleague's discussion of the other lines of inquiry under *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, I find that admitting the evidence would bring the administration of justice into disrepute. I would therefore allow the appeal, exclude the evidence, and substitute verdicts of acquittal on all charges.

Appeal dismissed, BROWN J. dissenting.

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