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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING	)	Appearances:
	)	
	)	TIM W. CHUDY, TRINDA de MONYE
	)	and CHARLES P.R. MURRAY
- and -	)	for the Crown
	)	
	)	
MICHAEL THEODORE EDWARDS,	)	ANDREW J. SYNYSHYN and
	)	MYLES DAVIS
accused.	)	for the accused
	)	
	)	
	)	ORAL JUDGMENT DELIVERED:
	)	November 8, 2022 at 1 PM
	)	WRITTEN JUDGMENT DELIVERED:
	)	November 14, 2022

RULING ON *VOIR DIRE*

REMPEL, J.

Introduction

[1] Marlon Chamorro-Gonzales was shot in the head with a small caliber firearm in the early morning hours of a warm summer night in Winnipeg last year. The shooting took place just outside the main doors of a high-rise apartment complex on Kennedy Street, north of Portage Avenue (the "Building"). Notwithstanding the

best efforts of first responders who arrived at the scene, Mr. Chamorro-Gonzales succumbed to his injuries and died not long after the shooting. Mr. Edwards (the "Accused") is charged with second-degree murder with respect to this killing.

Issue

[2] The trial of this matter will proceed before me without a jury in February of next year. This is my decision with respect to the application brought by the Accused in which he asks that I issue declarations that his rights under ss. 8 and 9 of ***The Charter of Rights and Freedoms*** (the "***Charter***") were violated by members of the Winnipeg Police Service (the "WPS") when they arrested him and then searched the hotel room in which he was found without a warrant. A member of the WPS found a small caliber firearm inside the hotel room during that search. At the time, the firearm had a 22-caliber bullet casing jammed in its chamber.

[3] The Accused argues that at the time of his arrest the WPS did not have objectively reasonable grounds to believe that he had committed an offence and was subject to a warrantless arrest. According to the Accused, the warrantless search of his hotel room that immediately followed his wrongful arrest was presumptively unlawful and unreasonable. The remedy sought by the Accused for the alleged violations of his ***Charter*** rights is the exclusion of the firearm and ammunition that were seized during the unlawful search as evidence pursuant to s. 24(2) of the ***Charter***.

[4] Like any ***Charter*** *voir dire*, my analysis will include a review of the totality of the circumstances known to, and relied upon, by the WPS officers during the

time they were investigating the shooting and the subsequent arrest of the Accused.

Decision

[5] I am satisfied that the ***Charter*** rights of the Accused were violated at the time of his arrest and during the subsequent search of his hotel room, but I am not prepared to exclude the evidence seized by the WPS under the analysis required by s. 24(2) of the ***Charter***. My reasons follow.

Facts

[6] The facts are not complicated and are not disputed in a material way. The dispute centres on what conclusions I can reasonably draw from the totality of all of the circumstances.

[7] Around midnight on the night in question, a 9-1-1 call was made indicating that a shooting had occurred in close proximity to the Building and a victim was injured. One of the first WPS units was dispatched by 12:05 a.m. and arrived at the crime scene about five minutes later. When the first WPS vehicle arrived at the Building, first responders were already assisting the victim. One of the officers in that WPS vehicle (Constable DiBernardo) noted that the victim had a bullet wound to his forehead and there was no sign of a firearm nearby.

[8] Almost immediately after noting the injuries to the victim, Constable DiBernardo was approached by a male witness who indicated he lived in the Building and was on his balcony observing the street below when he heard an argument between some people followed by a loud pop and a sound akin

to clanging metal. Due to the fact that there were mature trees in full leaf blocking his view, the witness hurried down the stairs to see what had happened. When he realized that someone had been shot, the witness asked a bystander to call 9-1-1.

[9] The witness was unable to identify how many people he had heard during the course of the argument or offer descriptions of any of the persons who were arguing, but he did see a male/female couple crossing the street away from the crime scene towards a commercial building nearby.

[10] Constable DiBernardo was tasked by his supervisor to attend at the security office of The Manitoba Housing Authority, which manages and operates the Building, to obtain surveillance video of anyone seen entering or leaving the Building a few minutes before or after midnight. The surveillance video obtained by Constable DiBernardo about an hour later showed only two individuals entering or leaving the Building at the relevant time. The lobby camera shows them walking out the front door.

[11] The defence concedes the surveillance video shows the Accused and his girlfriend leaving a particular suite on the tenth floor of the Building and then taking the elevator down to the lobby before walking out the front doors. The cameras mounted on the outside of the Building were not functioning that night, so it is impossible to determine who or what the couple encountered after they passed through the front doors.

[12] The surveillance video from the tenth floor clearly shows that the girlfriend of the Accused had long black hair with streaks dyed red or hot pink and that she

was carrying what looked like a large poster board. The footage from the elevator shows the Accused was wearing dark coloured pants and a dark coloured t-shirt with what Constable DiBernardo believed was a Harley-Davidson logo. It is also evident from the surveillance video that the Accused had a large women's purse or handbag slung over his shoulder. There is no sign in the surveillance video of either the Accused or his girlfriend carrying or having possession of a firearm.

[13] Constable DiBernardo voiced on the WPS radio attached to the shoulder of his uniform that the surveillance video showed a male/female couple leaving the Building close to the time of the shooting and offered descriptions of the couple as I have already noted. Constable DiBernardo further indicated in his descriptions, that both the male and the female appeared to be Indigenous and the male was about 35 years of age. As he was watching the surveillance video, Constable DiBernardo had the video technician freeze the video at various times where the faces of the couple were in clear view so he could take four photographs of them on his smart phone. Thereafter he texted the photos to the WPS dispatcher for distribution to all units involved in the investigation.

[14] WPS officers considered the investigation to have a high priority. At the time, WPS investigators could not rule out that there was an active shooter moving about in this densely populated neighbourhood who might shoot again. In my view, the concerns of the WPS about the extreme danger posed to the public by the possibility that there was an active shooter in this neighbourhood were entirely reasonable.

[15] Multiple WPS officers were assigned to the investigation including several Tactical Support or "TAC" Units. WPS officers assigned to TAC units wear black vests and grey uniforms with WPS shoulder patches. The standard vehicle assigned to TAC units are black SUVs without police markings that have crash bars mounted on the front bumper and external grab bars on the roof and sides.

[16] A canine search of the crime scene was quickly abandoned when the dogs could not pick up a scent leading away from the crime scene. The officer in command decided the best course of action was to order several patrol cars and TAC units to drive around this downtown neighbourhood to look for a male/female couple matching the descriptions offered by Constable DiBernardo. The couple were considered to be persons of interest and potential witnesses to the crime rather than suspects at that time.

[17] Less than two hours after the shooting a TAC unit in a standard WPS black unmarked SUV was driving towards the corner of Portage Avenue and Colony Street where a Holiday Inn is located (the "Hotel"). The driver of the SUV was Sargent Lambert and his partner assigned to that shift, Constable Forscutt, was in the front passenger seat with his window down. They were on the lookout for a male/female couple that matched the descriptions voiced by Constable DiBernardo.

[18] As their SUV approached the Hotel, which is only a few blocks away from the Building, both officers noted a male/female couple sitting on a concrete planter outside the main doors of the Hotel with their backs to the street. The observation of red streaks in the hair of the female and the black t-shirt worn by the male was

enough to make Sargent Lambert bring the SUV to a complete stop at the curb just a few feet from where the couple was sitting.

[19] As both officers were inside the SUV observing the couple sitting on the planter, they both noted the female turned towards them in a way that allowed them both to see her face. After the female made visual contact with the officers, or the SUV, the couple immediately stood up and in the words of Sargent Lambert they then walked "with purpose" towards the main entrance of the Hotel.

[20] Constable Forscutt got out of the SUV first in an attempt to stop and question the couple before they got inside the Hotel, but he did not call out to them or ask them to stop. Although Constable Forscutt hurried to the main entrance of the Hotel, he could not get there before the sliding glass doors closed behind the couple. The glass doors were locked and Constable Forscutt banged on the glass to attract the attention of Hotel staff. As he was frantically trying to get the attention of Hotel staff, Sargent Lambert joined Constable Forscutt at the main entrance and they both fixed their eyes on the couple who were still inside the Hotel lobby.

[21] Given that the entrance doors and façade of the Hotel lobby are made of clear glass and well lit, Sargent Lambert and Constable Forscutt could easily see the couple walk past the front desk towards the elevator doors, which were a short distance away from the main entrance. Before Hotel staff could open the doors, Sargent Lambert and Constable Forscutt could both see the male at the elevator turn towards him and he saw what looked like a Harley-Davidson logo on his t-shirt. During the course of the *voir dire* it became clear that the logo on the

t-shirt was not Harley-Davidson, but a different corporate entity with similar characteristics.

[22] At that time both officers concluded not only that this male/female couple closely matched the descriptions offered by Constable DiBernardo, but that they were suspects in the shooting who were subject to arrest. The tipping point from persons of interest to suspects, in the minds of both officers, was the observation of the t-shirt logo. In their minds the couple they saw in the Hotel closely matched the couple observed on the Building surveillance video by Constable DiBernardo and this belief justified an arrest of the couple on a charge of attempted murder.

[23] By the time, Sargent Lambert and Constable Forscutt got through the front doors, the couple was already ascending in the elevator. The officers then watched the elevator floor indicator light flash each floor number as it climbed upwards and saw it stop on the ninth floor. Hotel staff informed them that the couple was staying in room 901. Before arriving at room 901 Sargent Lambert called for backup to assist in the arrest of the couple. As they were waiting for backup to arrive, they looked at the photos texted to the dispatcher and they were now quite certain that the couple they saw entering the Hotel was the same couple shown in the photos.

[24] Other TAC officers arriving at the scene were instructed by Sargent Lambert to clear each floor of the Hotel to make sure no one was hiding in hallways or other public areas. When the "all clear" was given, at least six officers were on the ninth floor outside room 901. Other officers were assigned to positions around the corner at the far end of the hallway to make sure they would remain out of

the line of fire if gunshots were fired. The scene was extremely tense and Sargent Lambert was taking every reasonable precaution to reduce the risk of anyone being shot during the upcoming arrests.

[25] Most of the officers outside room 901 had their weapons drawn and they could hear talking and laughter emanating from the room. One of the officers announced that WPS were at the door and gave a loud command that all occupants should come out with their hands up. The command was ignored and officers then used a key provided by Hotel staff to unlock the door. A safety latch prevented the door from fully opening so the command to the occupants to leave the Hotel room with their hands up was repeated.

[26] A short time later, the girlfriend of the Accused opened the door and entered the hallway. The Accused followed shortly behind her. They were both taken into custody without incident and notified of their arrest for attempted murder based on the information then available to Sargent Lambert. Before the couple arrived at WPS Headquarters, they were charged and cautioned on a charge of murder.

[27] The Accused and his girlfriend cooperated fully with WPS during the course of their arrests and transport to WPS Headquarters.

[28] The officer assigned to clear room 901 was also tasked with clearing the adjoining Hotel room, because the two rooms had a connecting doorway. Both of the connecting doors were locked when the initial search of room 901 was conducted. After the interior door in room 901 was opened, the assigned officer noted a small caliber firearm was leaning against the interior door to the adjoining

room which was still locked. The firearm did not have a bullet in the barrel but a casing was jammed in the chamber.

[29] Sargent Lambert testified the Hotel room had to be cleared as a matter of public safety to make sure no one else was hiding in the room or in need of medical attention. According to Sargent Lambert searching for evidence is also a standard part of clearing a room where suspects were located at the time of their arrest.

Reasonable Grounds to Arrest

[30] Sections 495(a) and (b) of the ***Criminal Code***, R.S.C., 1985, c. C-46, permit the arrest of any person without a warrant in two different circumstances. A police officer must find a person committing a criminal offence or believe on "*reasonable grounds*", that a person has or is about to commit a criminal offence.

[31] The law as to what constitutes the "*reasonable grounds*" for a warrantless arrest is summarized as follows in ***R. v. Tim***, 2022 SCC 12 (CanLII):

> [24] The applicable framework for a warrantless arrest was set out in *R. v. Storrey*, 1990 CanLII 125 (SCC), [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 CanLII 342 (SCC), [1997] 2 S.C.R. 13, at para. 24; *R. v. Stillman*, 1997 CanLII 384 (SCC), [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).

Investigative Detention

[32] The common law extends certain powers to the police to detain someone short of an arrest. Those powers are summarized as follows in ***R. v. McKenzie***, 2022 MBCA 3 (CanLII):

> [10] The Supreme Court has recognized several common law police powers that permit interference with an individual's liberty or property on the basis of the ancillary powers doctrine using the two-stage framework set out in *R v Waterfield*, [1963] 3 All ER 659 (CCA) (see *Fleming v Ontario*, 2019 SCC 45 at paras 41-55).
>
> [11] Under the *Waterfield* framework, the lawfulness of police action turns on whether (a) the action falls within the general scope of a statutory or common law duty, and (b) the action involves a justifiable exercise of police powers associated with the duty (see *Waterfield* at 661; and *Fleming* at para 46).
>
> [12] On the second stage of the *Waterfield* framework, a court assesses whether the interference was "reasonably necessary for the carrying out of the particular duty" (*R v MacDonald*, 2014 SCC 3 at para 36). To answer that question, several competing interests are weighed: (1) the importance of the performance of the duty to the public good, (2) the necessity of the interference with individual liberty for the performance of the duty, and (3) the extent of the interference with individual liberty (see *MacDonald* at para 37).

[33] The long recognized common law police power of investigative detention is reviewed at length In ***R. v. Mann***, 2004 SCC 52 (CanLII); [2004] 3 S.C.R. 59:

> 34 … The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

[34] ***McKenzie*** confirms:

> [14] The common law power of investigative detention is not limited to "a specific known criminal act" but extends to recent or ongoing criminal activity that is reasonably suspected (*R v Chehil*, 2013 SCC 49 at para 35).

[35] The public policy considerations that support the power of investigative detention are described in para. 13 of ***McKenzie*** as follows:

> [13] … An investigative detention affords police the ability to take reasonable measures to investigate an offence (see *R v Clayton*, 2007 SCC 32 at para 33). As was said in *Mann*, "police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing" (at para 16).

<u>The Standard for Reasonable Grounds to Suspect that Justifies Investigative Detention</u>

[36] The reasonably necessary standard for investigative detention involves both subjective and objective elements (***Mann***, at para 27). In that sense, it is the same as the warrantless arrest standard. However, the "reasonable grounds" standard for a warrantless arrest is higher than the "reasonable suspicion" standard that applies to an investigative detention. In ***R v. Molnar***, 2018 MBCA 61 (CanLII), which involved police sniffer dogs trained to detect illegal drugs, the Manitoba Court of Appeal described the difference as follows:

> [35] To conclude, the difference between reasonable suspicion to detain and reasonable and probable grounds to arrest is a matter of degree. Reasonable suspicion is generally framed in terms of possibility, while reasonable grounds for arrest is linked to probability. Reasonable suspicion is a lower threshold than reasonable grounds to believe. There was no evidence that the grey suitcase in question was the only grey suitcase in the baggage car bound for Washago. While the evidence was strong to establish a reasonable suspicion, particularly after Bernie's positive hit on the grey suitcase, in contrast to the cases cited above, the required strong connection between the grey suitcase and the

> accused for the RCMP to have objective reasonable grounds to arrest her did not exist.

[37] The nature of the assessment judges are to engage in with respect to the reasonable suspicion standard is set out in ***McKenzie*** as follows:

> [18] Reasonable suspicion is assessed by the court examining the totality of the circumstances known to the police at the time of the detention (see *Chehil* at paras 29-35; and *MacKenzie* at paras 71-73). This is a broad contextual inquiry that is "fact-based, flexible, and grounded in common sense and practical, everyday experience" to ascertain whether the constellation of factors rise above the level of a generalized suspicion or hunch (*Chehil* at para 29).
>
> [19] Because the reasonable suspicion standard is invariably fact-driven, there is little in the way of guidance as to when the threshold will be met. However, what is not disputed is that, if the sum of the objectively discernable facts support the conclusion of possible recent or ongoing criminal behaviour by the individual to be detained, then the standard of reasonable suspicion is met even if there is a reasonable innocent alternative in the circumstances. There is no duty on police to undertake further investigation to seek out exculpatory factors or to rule out possible innocent explanations (see *Chehil* at para 34). The nature of the judicial inquiry does not require a court to choose between competing inferences or assess which was the most likely possibility at the time. While the courts have an important duty to protect the rights and freedoms of everyone, they must be mindful in an after-the-fact assessment of the reality that police often have to make quick decisions in dynamic, unpredictable and dangerous situations based on imperfect, evolving or even wrong information. The Supreme Court has accepted that "more innocent persons will be caught" under the reasonable suspicion standard than the reasonable grounds standard (*MacKenzie* at para 85; and see *Chehil* at para 28).

Search Incidental to Investigative Detention

[38] Both ***Tim*** and ***McKenzie*** address the issue of searches incidental to the police power of investigative detention. In ***Tim***, the Supreme Court of Canada summarizes the search incidental to investigative detention power as follows:

> [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).

[39] ***McKenzie*** explains that greater limitations are placed on searches incident to investigative detention than warrantless arrest:

> [33] A protective search incident to an investigative detention does not arise as a matter of course. The court must be satisfied that the officer's decision to search was "reasonably necessary in light of the totality of the circumstances" (*Mann* at para 40). Such searches "must be grounded in objectively discernible facts to prevent 'fishing expeditions' on the basis of irrelevant or discriminatory factors" (at para 43). A protective search "cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition" (at para 40).
>
> [34] The conduct of the protective search "must also be confined in scope to an intrusion reasonably designed to locate weapons" (at para 41) and must be otherwise reasonably conducted (see para 45).

Analysis of the Arrest

[40] I cannot accept the arguments advanced by the Crown that there were objectively reasonable grounds for Sargent Lambert and Constable Forscutt to arrest the Accused.

[41] The admission of the defence that the Accused is the male depicted in the surveillance video leaving the suite on the tenth floor and then walking out of the lobby of the Building close to the time and in very close proximity to the crime scene does not amount to objective grounds to arrest in my view.

[42] Although this area of Winnipeg may not be bustling with people like "Grand Central Station" so late at night as the Crown argued, it is not a sleepy bedroom community on the outskirts of Winnipeg. The Building is not like a long-term care facility where residents do not leave after dark.

[43] Further, the Building is not the only high-rise multi-unit residential building in this neighbourhood. There are many similar sized high-rise buildings close to the crime scene. It is reasonable to think that other individuals or couples would have been out and about on a warm summer evening in Winnipeg, even if Covid-related public health restrictions in force at the time would have limited the number of restaurants, bars or social venues open to the public.

[44] Neither the surveillance video evidence nor the testimonial evidence indicated that the couple was seen arguing with the victim or that either one of them had a firearm in their possession at any time. The only evidence the WPS was working with was a surveillance video that showed a male/female couple walking out the front door of the Building close in time and place to where the victim was shot and that the woman had black hair with red streaks and the male was wearing a dark coloured t-shirt with what was incorrectly believed to be a Harley-Davidson logo. Further, a male/female couple was seen by a witness walking away from the area where the shot was fired. These circumstances do not amount to objective reasonable and probable grounds that the couple in the video had committed an offence.

[45] The fact that the couple walked away from Sargent Lambert and Constable Forscutt briskly or "with purpose" after the female apparently saw them or their

vehicle is also not enough to satisfy the requirement for objective reasonable and probable grounds to arrest them. My main reason for this conclusion is that I do not know what the female did or did not see when she turned toward the SUV. Further, everyone has the right to avoid talking to the police or to walk away from the police if they are not asked to stop. This is not necessarily indicative of involvement in criminal activity.

[46] I find myself in agreement with the defence that the couple could reasonably have been considered persons of interest or potential witnesses to a crime on the reasonable grounds to suspect standard. This means they could properly be subject to investigative detention, but not warrantless arrest.

[47] For all of these reasons I am satisfied the arrest of the Accused was unlawful and violated his rights under s. 9 of the ***Charter*** to be protected from arbitrary detention.

Analysis of the Search Incident to Arrest

[48] ***Tim*** teaches that a search incident to an unlawful arrest is also by definition unlawful and constitutes a breach of the s. 8 ***Charter*** right of an accused person to be protected from unreasonable search and seizure (paras. 48-50). In this case, the discovery of the firearm flowed immediately from the wrongful arrest of the Accused and this makes an analysis under s. 24(2) of the ***Charter*** necessary.

Should the Evidence be Excluded under s. 24(2) of the *Charter*?

[49] ***R. v. Grant***, 2009 SCC 32 (CanLII), [2009] S.C.R. 353, and ***R. v. Harrison***, 2009 SCC 34 (CanLII), [2009] 2 S.C.R. 494, define a three-step analysis to assess

whether evidence gathered after the breach of a ***Charter*** right should be excluded from evidence. The three factors for analysis are:

1. The seriousness of the activity that violates the ***Charter***;
2. The impact on the accused's interest that is protected by the ***Charter***; and
3. Society's interest in a decision based on the merits of the case.

[50] In ***R. v. Le***, 2019 SCC 34 (CanLII), the Supreme Court of Canada teaches the state bears the onus under the first line of inquiry, to show that the conduct of police was consistent with an understanding of the law that "… *they subjectively, reasonably, and non-negligently believe[d] to be the law*" (at para. 147) (citations omitted).

[51] In ***Tim***, the Supreme Court of Canada offers a succinct summary of the first line of inquiry, at para. 82:

> [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).

[52] The second line of inquiry requires judges to determine whether and to what extent, in the totality of the circumstances, the ***Charter*** violation actually undermined the interests protected by the right infringed. ***Le***, at para. 151, explains that judges are required to rank the seriousness of the ***Charter*** violation on a scale to determine what effect it has on the accused person's ***Charter***-protected rights. Significant negative impacts on ***Charter***-protected rights undermine public confidence in the administration of justice.

[53] The third line of inquiry focuses on the truth-seeking function of the trial process. Under this assessment, judges must weigh the negative impact of the admission of the evidence and what impact there might be if the evidence is excluded. Evidence that is reliable and relevant to the prosecution of a serious offence better serves the truth-seeking function of the criminal trial process (***Tim***, at para. 97).

[54] ***Tim*** offers the following summary of the final line of inquiry, at para. 96:

> (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).

<u>The Final Balancing of the Three Lines of Inquiry</u>

[55] In ***Molnar*** the Manitoba Court of Appeal describes the nature of the final balancing exercise with respect to the three lines of inquiry under a s. 24(2) analysis as follows:

> [39] Under section 24(2), evidence shall be excluded if, having regard to all of the circumstances, its admission will bring the administration of justice into disrepute. This inquiry requires the courts to balance individual and societal rights and requires a consideration of "all the circumstances" (*R v Grant*, 2009 SCC 32 at para 85), as "[n]o overarching rule governs how the balance is to be struck" (*Grant* at para 86).

[56] ***Tim*** describes the final balancing exercise as follows:

> [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).

Analysis of the Three Lines of Inquiry on these Facts

[57] The first line of inquiry under ***Grant*** pulls moderately toward exclusion. I am not satisfied that the actions of the WPS on these facts amount to misconduct that the court must disassociate itself from. The defence concedes the WPS had a reasonable basis on objective grounds to detain the Accused for investigative purposes because he was seen walking out of the lobby of the Building, which was immediately adjacent to the spot where the shooting occurred and close to the time when the witness heard that a shot was fired.

[58] I am not persuaded that the arrest or the subsequent search was a willful or reckless disregard of the Accused's ***Charter*** rights. The WPS had a bona fide

duty to react quickly and effectively to a dangerous situation that posed a grave danger to the public. In the heat of the moment the WPS made an honest mistake in believing that the facts justified a finding that the line separating investigative detention and warrantless arrest had been crossed. I am satisfied this honest mistake was made in good faith and their motivation was driven by an immediate and understandable concern for public safety.

[59] The second line of inquiry pulls only moderately towards inclusion. Although it was not argued that the search was lawful under a common law police power other than a search incidental to arrest, I am satisfied that the firearm would have been found in the Hotel room in any event. Even if the search does not meet the standard for a search incidental to investigative detention, it can arguably be justified as a search ancillary to the common law police powers and duties to keep the peace and preserve life or to investigate and prevent crime under the *Waterfield/Dedman* test (***R. v. Waterfield***, [1963] 3 All E.R. 659; ***R. v. Dedman***, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2).

[60] In ***R. v. Okemow***, 2019 MBCA 37 (CanLII), the Manitoba Court of Appeal upheld the decision of the trial judge that a warrantless search was reasonable at common law in a situation where police were dealing with "*an unknown, unpredictable, and potentially dangerous situation*" (at para. 46) where there were reasonable grounds for concern about public safety. ***Okemow*** offers a summary with respect to the "justifiability" of police conduct that interferes with individual liberty under the second prong of *Waterfield* test:

> [57] In *Farrah*, Chartier JA (as he then was), quoting from *Godoy* and *R v Simpson* (1993), 1993 CanLII 3379 (ON CA), 79 CCC (3d) 482 (Ont CA), summarised the law in relation to the second prong of the test. He stated (at para 40):
>
> > In *Godoy*, and more recently in *R. v. Clayton*, 2007 SCC 32 at para. 25, [2007] 2 S.C.R. 725, the Supreme Court of Canada adopted the factors developed by Doherty J.A. in *R. v. Simpson* (1993), 1993 CanLII 3379 (ON CA), 79 C.C.C. (3d) 482 (Ont. C.A.) to determine the "justifiability" of police conduct when it interferes with individual liberties (*Godoy* at para. 18):
> >
> > > In *Simpson*, *supra*, Doherty J.A. applied both *Waterfield*, *supra*, and *Dedman*, *supra*, and described what is meant by a "justifiable" use of police power as follows (at p. 499):
> > >
> > > > ... the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.
>
> [58] Chartier JA further observed (at para 41):
>
> In addition to these "justifiability" factors, there must be an evidentiary basis underlying the police safety concern (see *R. v. Cornell*, 2010 SCC 31 at para. 20, [2010] 2 S.C.R. 142, and *R. v. Golub (D.J.)* (1997), 1997 CanLII 6316 (ON CA), 102 O.A.C. 176 at para. 48). The police must not be speculating or acting on a hunch. They must have reasonable grounds for the concern (see *Cornell* at paras. 20-22).

[61] The Accused was not targeted because he was Indigenous. There was a clear nexus between the Accused and a recent violent offence, as he is shown on surveillance video walking out the Building close to the time and to the place where the victim was shot. The high degree of danger posed to the public properly raised reasonable suspicion in the minds of the investigating WPS officers as set out in ***Mann*** and prompted them to conduct a reasonable search of the Hotel room with a view to keeping the peace and preserving life and further to investigate crime.

[62] The third factor overwhelmingly pulls toward inclusion of the evidence given the strong public interest in an adjudication on the merits. The public is rightly concerned about gun violence and the continuing escalation of gun related offences in Winnipeg.

[63] In ***R. v. Mengesha***, 2022 ONCA 654 (CanLII), the Ontario Court of Appeal found that severe ***Charter*** breaches occurred after an unlawful search, but the impact of the breach on the ***Charter***-protected interest was not significant, as "*[t]he evidence would have been discovered in any event*" (para. 12). The unlawful search in ***Mengesha*** led to the discovery of cocaine, fentanyl and a loaded handgun. In this context, the Ontario Court of Appeal reached the following conclusion on an adjudication on the merits, at para. 14:

> [14] We do not agree that society's interest in adjudication weighs toward exclusion. On the contrary, the guns, fentanyl, and cocaine represent a serious and ongoing problem for society. Collectively, they amount to a significant danger to the community. The damage caused to families, innocent law-abiding citizens, and the social fabric cannot be overstated. Society looks to the courts to recognize the day-to-day danger caused by drugs and firearms.

Conclusion

[64] I find myself in agreement with the comments of the Ontario Court of Appeal in ***Mengesha*** that the seriousness of the offence weighs in favour of inclusion of the evidence because "*[e]xclusion would bring the administration of justice into disrepute*" (para. 15).

[65] Punishing the police is not the purpose of s. 24(2) of the ***Charter*** and in these circumstances I am satisfied that the inclusion of the evidence would vindicate rather than damage the reputation of the justice system (***Tim***, at para. 99).

[66] For all of these reasons the evidence seized in the Hotel room will be admitted into evidence at the trial proper.

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REMPEL, J.