Court of King's Bench of Alberta

Citation: R v Desylva, 2025 ABKB 36

Date: 20250123
Docket: 230238818Q1
Registry: Calgary

2025 ABKB 36 (CanLII)

Between:

His Majesty the King

Crown

- and -

Austin Desylva

Accused

Reasons for *Charter* Decision
of the
Honourable Justice K.D. Yamauchi

I. Introduction

[1] Mr. Desylva makes an application pursuant to section 8 of the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*], in which he alleges that members of the Royal Canadian Mounted Police ("RCMP") breached his rights under the *Charter*. That section provides:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

[2] Mr. Desylva asks this Court to consider granting him a remedy under *Charter* s 24(2), which provides:

> 24.(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms

> guaranteed by this Charter, 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.

[3] In particular, he applies to have the evidence the RCMP seized from his clothing be excluded.

2025 ABKB 36 (CanLII)

II. Agreed Statements of Fact

[4] The parties tendered two agreed statements of fact, which this Court marked as exhibits in the *voir dire*. The following narrative is taken *verbatim* from the first agreed statement of fact (Exhibit VD 2-1).

> 1. On February 24th, 2023 at approximately 11:00pm, RCMP Cst. Reyno La Cock was conducting a "Checkstop" (alcohol roadside screening) of motorists in the town of Canmore, Alberta. Cst. La Cock was dressed in full RCMP uniform and operating an RCMP vehicle equipped with operational emergency equipment.
> 2. The dash camera video from officer La Cock's vehicle capturing the following events is admitted as a true and accurate depiction of the events that occurred, as described below.
>
> a. At approximately 11:09pm Cst. La Cock noticed a white Buick Verano (the "Buick") conduct a U-turn to avoid the Checkstop and believed this may be because the driver could have been impaired.
>
> b. Cst. La Cock pursued the Buick in his RCMP vehicle (full lights and sirens) and attempted to conduct a traffic stop. The driver of the Buick did not stop.
>
> c. Not far into the flight, the driver of the Buick took a sharp left turn, rolled down the driver side window of the Buick and discharged a firearm at Cst. La Cock's vehicle, striking the windshield (as depicted in the following photograph)
>
> …
>
> d. The pursuit continued and at approximately 11:14pm the driver discharged a firearm for a second time towards Cst. La Cock's vehicle. The bullet went through an exterior door and became lodged in the wall of a home of a Canmore resident.
>
> e. At approximately 11:16pm the Buick entered a cul-de-sac and the Buick got stuck in the snow.
>
> f. Constable La Cock discharged his standard issued RCMP sidearm at the driver 25 times.

g. At 11:18pm, the driver moved to the passenger seat of the Buick, opened the door and ran into the adjacent woods. Officers did not pursue on foot, fearing for their safety.

h. Police immediately searched the Buick and there were no other occupants.

i. A K9 police Unit and Emergency Response Team (ERT) members were determined necessary and dispatched from other detachments. An Ambulance was also arranged for in case the driver was found injured.

j. At 1:03am ERT members began their search for the driver. Moments later, ERT members located Mr. Desylva, seriously injured lying outside the residence at 1214 - 11 Street.

k. Police moved Mr. Desylva onto a gurney and carried him into an ambulance.

…

4. Mr. Desylva had been struck by bullets in the head and neck area. His right mandibular ramus (jaw) was shattered, and his lateral right pterygoid plate (top of mouth) was fractured. A bullet was lodged in his esophagus and required surgery to remove. Mr. Desylva also had frostbite from exposure that night.

5. Police believed Mr. Desylva had been shot and was in severe medical distress.

6. ERT Officer(s) placed Mr. Desylva under arrest. The existence of reasonable and probable grounds to arrest Mr. Desylva for the driving and firearms offences committed by the driver of the vehicle is admitted.

7. Once in the ambulance Mr. Desylva was transported to Canmore Hospital, where he received initial medical treatment and the clothes he was wearing when he was located by police were removed by medical staff and bagged.

8. Mr. Desylva was soon after helicoptered to Foothills Hospital in Calgary and ultimately survived his injuries. He remained in Intensive Care for 15 days and in hospital for two weeks afterward.

9. Sergeant Wrobel, Commanding Officer of the Canmore RCMP Detachment, was the ranking officer involved in the ongoing investigation until Sgt. Joly took over as Team Commander. Sgt. Joly from Airdrie Detachment was tasked as the Team Commander and arrived at 4:47 am to Canmore, relieving Officer Wrobel.

10. Sgt. Joly tasked Officer Pumphrey to attend to the Canmore Hospital and seize any clothing that remained there of Mr. Desylva.

2025 ABKB 36 (CanLII)

11. At approximately 11:00am (approximately 10 hours after the arrest of Mr. Desylva), Officer Pumphrey and Officer Ciccone attended the Canmore Hospital.
12. The white powdered substance that was seized by Officer Pumphrey was determined through forensic analysis to be 40 grams of cocaine.
13. The cash and cocaine discovered by Officer Pumphrey are essential pieces of evidence relied upon in the expert report of ALERT Detective Bradley Lacher which concludes that "...it is my expert opinion the cocaine located on Austin DESYLVA was possessed for the purpose of trafficking."

[5] The following narrative is taken *verbatim* from the second agreed statement of fact (Exhibit VD 2-4).

1. Cst. Goryachev was a member of Canmore RCMP on February 24 & 25, 2023.
2. He had been an RCMP Officer for 7.5 years.
3. His commanding Officer was Sgt. Wrobel.
4. He had heard on the police radio information about someone shooting at Officer La Cock during a criminal flight.
5. He believed that Mr. Desylva was the suspect.
6. He observed ERT personnel assist Emergency Medical Service personnel loading Mr. Desylva into an ambulance near where the Buick had been abandoned.
7. He believed that Mr. Desylva had been arrested and searched by other police officers.
8. He was instructed by Cpl. Graff to accompany Mr. Desylva for the purposes of safety and security (public and medical personnel safety) and in case Mr. Desylva tried to escape.
9. He rode in the back of the ambulance with at least two EMS personnel and Mr. Desylva who was on a stretcher.
10. During the ride, EMS personnel were actively working on Mr. Desylva.
11. Mr. Desylva was injured, making guttural sounds, making erratic hand-movements and saying "help me!", his nose and mouth were bleeding.
12. The drive took approximately 5-10 minutes to arrive at the Canmore Hospital.
13. At the Hospital EMS unloaded Mr. Desylva and took him to the emergency room.
14. He thinks Mr. Desylva was wearing clothes at that time.
15. Cst. Goryachev watched as they placed Mr. Desylva into a bed. When he saw the doctor(s) start to work on Mr. Desylva, he exited the room after

2025 ABKB 36 (CanLII)

removing the handcuffs from Mr. Desylva in the emergency room from one hand (they were only attached to one hand).

16. At some point, he became aware that Mr. Desylva was being transported in the STARS helicopter to another hospital and he handed off continuity of Mr. Desylva to Officer Little. He wasn't sure if Mr. Desylva was wearing his clothes when transported by STARS.
17. He was at the Canmore Hospital for approximately 30-60 minutes in total.
18. At no point did he search Mr. Desylva.
19. He had no knowledge of what hospital staff did with any items of Mr. Desylva including his clothes. He didn't see hospital staff remove Mr. Desylva's clothes.
20. He believed that Mr. Desylva was searched by police before being loaded in the ambulance.
21. He did not think about searching Mr. Desylva because he believed other police already had.

III. Evidence

[6] This Court heard from a number of officers who added detail to the foregoing narrative. All witnesses that this Court heard during this *voir dire* are members of the RCMP. This Court will provide a summary of their evidence only insofar as necessary to consider the issue before it in this *voir dire.*

[7] Sgt. Jack Wrobel was the acting Detachment Commander of the Canmore RCMP detachment in February of 2023. His role as acting Detachment Commander was to look after both the operational and administrative sides of the detachment.

[8] Sgt. Wrobel described the event that is before this Court as an “extremely significant event” for Canmore detachment. Canmore has around 23 RCMP officers who work out of its detachment. On the night in question, there were four officers actively on duty. Sgt. Wrobel was not on duty at the time the event occurred, but Cpl. Kevin Graff called him at home at 12:50 a.m. on the morning 25 February 2023, to advise him of the event.

[9] When Sgt. Wrobel arrived at the Canmore detachment, no one was there as everyone was responding to this significant event. He tried to call every member who was on duty that night, but no one answered their cellular telephones. So, Sgt. Wrobel listened to the radio to try to get a sense of what was going on.

[10] Sgt. Wrobel testified that four officers are “absolutely insufficient” to deal with an investigation of this type. Sgt. Wrobel sent out emails and texts to various other detachments asking for help and added resources, including the RCMP detachments in Banff, Lake Louise, Cochrane, and Airdrie. There were various sections of the RCMP involved in this investigation, including the forensic identification section, the Airdrie General Investigation Section and the Cochrane Crime Reduction Unit, the latter two of which would eventually lead the investigation. The RCMP Emergency Response Team (“ERT”) was contacted by the “real-time operator” to

2025 ABKB 36 (CanLII)

assist with this matter. ERT is in Calgary, so it would have taken time for the ERT members to arrive on scene in Canmore. Sgt. Wrobel does not know when the ERT members arrived.

[11] Eventually, Cst. La Cock returned to the Canmore detachment and provided Sgt. Wrobel with a summary of what had gone on. Of note was the fact that it was a police-involved shooting and that Cst. La Cock was fired upon by the suspect. Cst. La Cock was not injured.

[12] Sgt. Wrobel described his duties in this type of investigation. His primary duty was to ensure that the public was safe. Once he was convinced that the public was safe, his next role was to preserve life. He also tried to figure out the crime scenes that require management with the goal of protecting the scenes to make sure they were not disturbed, and to collect evidence. At that moment, Sgt. Wrobel felt there were two crime scenes, namely, where Cst. La Cock's vehicle was initially fired upon and where Cst. La Cock fired at the suspect's vehicle.

[13] Sgt. Wrobel testified that one of the most urgent of the steps was the preservation of evidence. This included obtaining evidence from the scenes, as well as collecting evidence from the suspect himself including his clothing. Sgt. Wrobel testified that there is a general policy in the RCMP to maintain continuity of exhibits. If the evidence is clothing, it must be properly secured and seized. Sgt. Wrobel did not task anyone with seizing the suspect's clothing. Other RCMP members were dealing with this aspect. Sgt. Wrobel was receiving updates concerning evidence that was being seized and secured.

[14] Sgt. Wrobel was aware that the suspect's body had been found by the ERT and that his body was transported first to the Canmore Hospital, then by STARS to the Foothills Hospital in Calgary. Sgt. Wrobel was aware that the suspect had suffered major injuries and gunshot wounds. Sgt. Wrobel did not task any officer to travel with the suspect to the Canmore Hospital, and he had no conversations with that officer.

[15] Sgt. Wrobel tasked two officers to go to the Foothills Hospital. One accompanied the suspect in the STARS helicopter. The other drove from Canmore to Calgary.

[16] After his shift, Sgt. Wrobel took the memory card from Cst. La Cock's camera in his vehicle.

[17] Because the police were involved in a shooting, the Alberta Serious Incident Response Team ("ASIRT") would conduct its own investigation. ASIRT arrived at 3:27 a.m. Sgt. Wrobel conducted a briefing with ASIRT, Cochrane RCMP, and Airdrie RCMP at 5:41 a.m. After that, Sgt. Joly took command.

[18] Cst. Matthew Maitre is a member of the RCMP's ERT, which is activated when the RCMP is involved in a high-risk situation involving drugs and guns. It is outside general duty. ERT members receive special training that continues throughout the ERT officer's career.

[19] Cst. Maitre received a telephone call at his Airdrie home at 23:25 hours on 24 February 2023, with a direction that he travel to Canmore to where the suspect's motor vehicle was located. He arrived in Canmore and parked some distance away from the suspect's vehicle so he could put on his gear. Cst. Maitre's role was to assist the RCMP Police Dog Service in their tracking of the suspect. In addition to Cst. Maitre, there were three other members of the ERT assisting the dog handler and the Police Service Dog.

[20] Once he was geared up, Cst. Maitre and the ERT team members began track. They went past the suspect's vehicle into the woods when Cpl. Luke Johnston called out "hold," which

2025 ABKB 36 (CanLII)

means he spotted something of interest. Cpl. Johnston trained his flashlight on a body that was in the prone position facing them, so they held their respective positions. The officers knew that the suspect had fired at a police vehicle so he could still be armed. Cst. Maitre and Cst. Allen broke off to flank the person, meaning they went to the other side of the person, perpendicular to the other ERT members. This was for safety reasons. Csts. Maitre and Allan approached the person. Cst. Maitre could see the person's left hand. The person's right hand was not visible and he had blood in his face area. Cst. Allan spoke to the person and told the person they were approaching. Cst. Maitre grabbed the person's left hand and handcuffed it. The hand was frozen. The person was hypothermic and was non-responsive except for a few moans. Cst. Maitre grabbed the person's right hand and handcuffed both hands behind his back. The person was seriously injured. A medic-trained ERT member, Cst. Kim, was called so he could deal with the person's trauma. Cst. Maitre removed the handcuffs, so the medic could roll the person over. Cst. Maitre noted that the person's shirt was pulled open so that Cst. Kim could check for "deadly bleeding," which is a wound that could lead to death if not treated immediately. Cst. Maitre did not recall whether there was a pat down search for deadly bleeding or a search incident to arrest.

[21] When asked during cross-examination whether it was important to conduct a search incident to arrest at that time, Cst. Maitre responded by saying, "No, the focus was to get him medical care." By that time, the person was not a threat. He had no dexterity and there was no concern for officer safety. Even if there was a concern, saving the person's life was paramount. Besides, there was no weapon on him.

[22] When Cst. Kim had completed his tasks, the person was put on a "litter" to carry him out. A litter is a rigid plastic sheet with handles. The officers took the person to the ambulance and put him on the gurney. Cst. Maitre understood that a police officer entered the ambulance. Cst. Maitre was then asked to do an "article search" of the area to see if the person had dropped anything.

[23] This whole process took about 20 to 30 minutes. The person was taken into custody at 1:00 a.m.

[24] Cst. Maitre testified that on his way to the scene and while he was gearing up, he believed the suspect to be Mr. Desylva. Twenty days before, Cst. Maitre was involved in a search of a residence. During that search, Mr. Desylva tried to flee from the back of the residence. While he was fleeing, he began digging into his pockets at which time an RCMP Service Dog was released. The officers discovered a 9mm loaded magazine on Mr. Desylva's person. This was in Cst. Maitre's mind as he began his search for the suspect. Then, as he was approaching the person who was lying prone on the ground, he identified the person as Mr. Desylva.

[25] Cst. Maitre testified that Mr. Desylva was "definitely not dressed for the weather." It was -25 Celsius and Mr. Desylva was in "a simple pair of pants and sweater." He had no gloves. His hands were frozen "like clumps of ice," and he was gasping for air. He was not conscious or alert. He appeared to have a bullet entry wound in his mouth.

[26] Cst. Maitre testified that when an ERT officer arrests a person, they put the person on the ground to secure the person, then they undertake a head to toe search before turning the person over to a general duty officer for processing. In this case, no one conducted any search of Mr. Desylva because of his severe injuries and his physical condition. Rather, their priority was to make sure he lived by getting him the medical care he needed. Cst. Maitre confirmed that if he

2025 ABKB 36 (CanLII)

was on general duty, he would do a search incident to arrest to obtain evidence and ensure there was no safety threat.

[27] As Sgt. Wrobel testified, Sgt. Dennis Joly relieved Sgt. Wrobel of his duties on the morning of 25 February 2023. Sgt. Joly was assigned as the Team Commander in this matter. His role was generally to oversee this investigation. Sgt. Joly resides in Cochrane, so he left his residence at 2:30 a.m. on 25 February 2023. He put together a team of about 10 RCMP members as well as other specialized teams, such as forensics, ERT, collision reconstruction, and digital field services for cellular devices. He was in command of all the personnel resources, which totalled about "25 plus" members.

[28] He became aware that someone was under arrest at around the time he left his residence. When he arrived in Canmore, he met support officers and ASIRT. He understood that the suspect had been located and arrested, and that he was being treated in the Foothills Hospital. He understood that the suspect was Mr. Desylva. He was not sure if the suspect had been searched after he was arrested.

[29] At the time he arrived, Sgt. Joly did not know the whereabouts of the suspect's personal effects. At 9:00 a.m., Sgt. Joly asked Sgt. Spencer of the Airdrie detachment to go the Foothills Hospital to seize the suspect's personal effects. The only thing that Sgt. Spencer located was the suspect's underwear, which he seized.

[30] After learning this, Sgt. Joly suspected that the remainder of the suspect's personal effects were likely at the Canmore Hospital, where he was first transported. Sgt. Joly discussed this with the Command Triangle and at 10:30 a.m. directed Sgt. Matthew Pumphrey to go to the Canmore Hospital to seize the suspect's personal effects. This was about ten and a half hours after the suspect was arrested. Sgt. Joly did not at that time know the identity of the officer who had arrested the suspect or whether that officer searched the suspect. Sgt. Joly did know that Cst. Goryachev accompanied the suspect to the Canmore Hospital in the ambulance and remained with the suspect while he was being tested at the Canmore Hospital. Sgt. Joly did not know who removed the suspect's clothing.

[31] Sgt. Joly testified that he has had occasion to deal with individuals charged with firearms offences and driving offences involving criminal flight. He saw evidentiary value in seizing effects, such as keys, wallets, identification, cellular telephones, guns, bullets, and evidence of ownership of firearms. He knew the suspect was in the Foothills Hospital, having suffered gunshot injuries, and he was getting life-saving treatment. So along with the usual types of evidence involved in such offences, Sgt. Joly saw evidentiary value in evidence from clothing, such as gunshot residue, blood, and DNA on the clothing.

[32] As for the authority under which Sgt. Pumphrey would be dealing with the suspect's clothing, Sgt. Joly was of the view that Sgt. Pumphrey would be searching and seizing the suspect's clothing incidental to the suspect's arrest. When asked during cross-examination whether Sgt. Pumphrey should have obtained a telewarrant, Sgt. Joly responded saying that he did not think it was necessary, as the search Sgt. Pumphrey was undertaking was incident to arrest, even though the search took place ten and a half hours after the suspect's arrest. He agreed that at that time there were no officer safety concerns, and the clothes were in a secure location. When counsel suggested that there was no urgency in terms of time, Sgt. Joly responded saying that the evidence had to be protected. Because no one knew what they would find, the best

2025 ABKB 36 (CanLII)

practice was to remove the wet items so they could be separated and dried. He did not tell Sgt. Pumphrey that this search was incident to the suspect's arrest.

[33] Sgt. Joly went through with this Court, his procedure for arresting a person charged with the firearms offences and driving offences which is what the suspect in the case at bar was facing, including the search incident to the arrest of that person. The search incident to arrest was primarily for public and police safety, but it also served the purpose of protecting evidence and preventing the suspect from escaping. In this case, the suspect was not booked into custody. The priority for the police was for them to undertake life-saving measures.

[34] Sgt. Matthew Pumphrey missed calls from Canmore in the early morning hours of 25 February 2023, but he received a call at 7:30 a.m. Sgt. Pumphrey is with the Cochrane RCMP detachment, in charge of the General Investigation Section and the Crime Reduction Unit. He was requested to report to the Canmore detachment, so he gathered his "gear" and went to Canmore. He arrived at the Canmore detachment just after 10:00 a.m. Sgt. Joly was the Team Commander. Sgt. Pumphrey's role in this investigation was a "task chaser." In that role, he took direction from Sgt. Joly even though they held the same rank in the RCMP.

[35] Sgt. Pumphrey described the hierarchy of a major case management. At the top of the management is a Command Triangle that is made up of a Team Commander (which was the position that Sgt. Joly held), a Primary Investigator, and a File Coordinator. The purpose of the Command Triangle is to ensure an investigation is completed thoroughly to the best of the officers' ability.

[36] Sgt. Joly directed Sgt. Pumphrey and Cpl. Stefan Ciccone to go to the Canmore Hospital to seize the suspect's clothing. Sgt. Joly also told them that the suspect was no longer in the Canmore Hospital, as he had been transported to the Foothills Hospital. The suspect was in custody. Sgt. Pumphrey testified that Sgt. Joly did not convey any sense of urgency to this direction. Sgt. Pumphrey did not recall whether he knew the suspect's name when they went to hospital. He did see the suspect's name on a label on one of the bags that he seized at the Canmore Hospital.

[37] There was no discussion between Sgt. Pumphrey and Sgt. Joly about whether Sgt. Pumphrey should obtain a warrant to seize the suspect's clothing. Sgt. Pumphrey did not believe he needed a warrant, nor did he contemplate obtaining one. When questioned during cross-examination, he was aware that he could have obtained a telewarrant. When they left detachment, he knew he was going to be undertaking a warrantless seizure.

[38] When they arrived at the Canmore Hospital at 11:00 a.m., he and Cpl. Ciccone went to the front desk, identified themselves as police officers, and told the person that they were there to pick up the clothing of a victim of a police shooting. The person directed the two officers to two bags that were located about four or five feet from the desk in the emergency room area, but Sgt. Pumphrey could not recall exactly where the bags were located. Sgt. Pumphrey seized both bags. The hospital employees who were present told Sgt. Pumphrey that they had not put the clothes in the bags, but those who were on night shift had placed the clothing into the bags.

[39] Sgt. Pumphrey was the one who seized the clothing. Cpl. Ciccone was there to process the clothing once Sgt. Pumphrey seized it. After Sgt. Pumphrey seized the two bags, the officers left the hospital and returned to the Canmore detachment. They placed the two bags in a cell. Sgt. Pumphrey did not approach the Command Triangle to obtain further direction. He immediately

2025 ABKB 36 (CanLII)

opened the bags and began to remove the items of clothing from the bags. Everything in the bags was wet. To prevent the loss of evidence and contamination of the clothing, Sgt. Pumphrey laid the clothing out on fresh brown paper to dry. Sgt. Pumphrey saw this as an exigent circumstance. As well, Sgt. Pumphrey went through any pockets of the clothing and removed any items to allow them to dry. This was part of Sgt. Pumphrey's training, *viz*, if exhibits were wet with blood or other moisture, they had to be dried before any processing could take place. This prevents a deterioration of the evidence through the growth of mould or other process.

[40] Sgt. Pumphrey knew, at this time, that Cst. La Cock had pursued the suspect's vehicle and there was a shooting between Cst. La Cock and the vehicle's occupant about 10 hours before Sgt. Pumphrey seized the suspect's clothing. Because of the factual circumstance of which Sgt. Pumphrey was aware, the evidence he was trying to protect was blood, DNA, identification (driver's license or health card), car keys, ammunition, gunshot residue, documents linking the suspect to the vehicle, and other things about which they might not have known, such as evidence that would show why the suspect fled.

[41] Sgt. Pumphrey was primarily concerned about losing blood and DNA evidence from the wet clothing, and any deterioration of the evidence because of mould growth. He could not tell this Court how long it takes for mould to begin to grow on wet clothing. He also could not tell this Court the size of a blood sample necessary to undertake a DNA analysis. Nor did he know how wet clothing could affect forensic testing. His training told him to allow items to dry to prevent contamination or upset forensic testing, although he did not know the exact reason why this was so. Sgt. Pumphrey was not concerned about the contamination or deterioration of certain evidence such as car keys and identification through mould or wetness, other than items such as a health care card or gunshot residue that could be damaged by moisture. He also confirmed that the clothing had already been wet for about 10 hours before he and Cpl. Ciccone arrived at the hospital. Sgt. Pumphrey testified during cross-examination that it would be possible for one of the officers to maintain continuity of the two bags at the hospital, while the other obtained a warrant. Even though he was challenged in this regard, he was firm in his belief that despite this, he still had to lay the clothing out to dry immediately once he seized the clothing. He had done this throughout his career. When asked again whether he could have obtained a telewarrant, he did not agree. He had to lay the clothing out to dry.

[42] When counsel asked him whether he turned his mind to the authority he had to search the suspect's clothing, Sgt. Pumphrey testified that he was faced with an exigent circumstance, *viz*, the loss of evidence and that the search he was undertaking was incident to the suspect's arrest, although he was not the arresting officer. Sgt. Pumphrey did not know the name of the arresting officer. Nor did he know how many officers were involved in the chain of contact with the suspect from time of arrest to the time Sgt. Pumphrey seized the suspect's clothes. Sgt. Pumphrey did not know if the suspect was searched before he was put into the ambulance at the scene or whether there was an officer in the ambulance as the suspect was being transported to the Canmore Hospital. Sgt. Pumphrey did not know if anyone kept an eye on the suspect's clothes while the clothes were in the hospital.

[43] As Sgt. Pumphrey was removing the clothes from bags to dry, Cpl. Ciccone was taking photographs of the items that were being removed from the bags. The Crown went through each photograph that Cpl. Ciccone had taken and had the officers identify the items for this Court. The photographs were made exhibits in this *voir dire*. This Court will not describe each photograph, but certain items are of importance for the purpose of this *voir dire*, which are as follows:

2025 ABKB 36 (CanLII)

- the bags had a label affixed with the accused person's name on it
- many items contained a red stain that Cpl. Ciccone and Sgt. Pumphrey identified as possibly being blood
- a significant amount of cash and two lighters
- empty baggies
- a jacket with holes that were consistent with bullet holes and red stains on the jacket
- a large clear plastic bag with a white powdery substance that Cpl. Ciccone and Sgt. Pumphrey suspected was cocaine, with red stains on it

[44] In February 2023, Cpl. Ciccone was a constable in the Crime Reduction Unit in Cochrane. Like Sgt. Pumphrey, he had missed a number of telephone calls from about 1:00 a.m. on 25 February 2023. He received a call at 9:00 a.m. that morning with a direction that he go to Canmore. He went to Canmore with Sgt. Pumphrey.

[45] They arrived in Canmore at about 10:00 a.m. They did not know the time that the suspect was arrested. They went to the scene where the suspect's vehicle was stopped and talked with officers who were present. It was there that they learned that the suspect was arrested at about 1:00 a.m., although they did not speak with the arresting officer. They did not know whether any searches had been done on the suspect's body or clothing. They also learned that the suspect was seriously injured.

[46] Cpl. Ciccone was tasked, along with Sgt. Pumphrey, with seizing the suspect's clothing from the Canmore Hospital. They went to the Canmore Hospital at 11:00 a.m. They were in a covert police vehicle. It was Cpl. Ciccone's view that the seizure of the clothing and the search of the clothing was incident to the suspect's arrest. Cpl. Ciccone testified that he had been involved in a number of traffic stops in which he searched suspects incident to arrest. The primary reason for such searches is officer safety, which did not concern Cpl. Ciccone in this case. The officers did not discuss whether they should obtain a warrant to seize and search the suspect's clothing. Their purpose was to seize evidence that related to the offences that the suspect allegedly committed. As for the firearms offences, they would be looking for any evidence such as holes in clothes because the suspect was allegedly shot by a police officer, the firearm, shell casings, ammunition, cartridges, and gunshot residue on clothing. They were also seeking to preserve DNA evidence. As to the driving offences they would be looking for things such as motor vehicle keys, the identification of the suspect, and documents identifying who owned the vehicle.

[47] They entered the hospital and identified themselves as police officers. The front desk staff directed them to the treatment room. They went into the treatment room. The treatment room was empty. It was an area where there were multiple beds and curtains separating the beds. Persons in the treatment room directed them to two bags on the floor beside a bed that contained the clothing that hospital staff had taken off the suspect who had been arrested for firearms and driving offences. Sgt. Pumphrey seized bags. Cpl Ciccone observed a tag on the bags with "Austin Desylva" on them. The hospital staff advised the officers that this was the clothing that was taken off the suspect.

2025 ABKB 36 (CanLII)

[48] The officers then took the bags to the Canmore detachment, with the intention of unloading the clothing from the bags so the clothing would dry out. Sgt. Pumphrey took the bags out of the police vehicle and carried the bags into the detachment and placed them in a secure cell. The bags appeared to be tied, but there was no official exhibit seal on them.

[49] Once the bags were in a cell at the Canmore detachment, Cpl. Ciccone testified that they were secure. During cross-examination, he testified that he could have obtained a telewarrant at that time, but he did not. Neither he nor Sgt. Pumphrey discussed this. By this time, they were not concerned about officer safety; just the preservation of the evidence, and they wanted to dry the clothing as soon as possible. But they went beyond removing the clothing from the bags. They searched the clothing without a warrant.

[50] Cpl. Ciccone did not handle the bags. Sgt. Pumphrey laid clothes out to dry. The reason for doing this was when clothes are soiled by liquids or water, they need to dry so that evidence would not to be destroyed by mould or by the liquid itself. If the suspect who was wearing the clothes had been injured, his clothes would be soaked with blood. As well, it was cold and snowy around the area of the arrest, so the clothes were wet from the snow.

[51] The officers found no shell casings, live cartridges, or motor vehicle keys. They did not swab for DNA.

[52] Cpl. Ciccone's other roles in this investigation were that of the affiant for informations to obtain warrants ("ITOs"). He drafted four ITOs throughout the file, some of which were omnibus ITOs, involving a search warrant for the vehicle, digital forensic analysis of cellphones, production orders for medical records from the hospitals and STARS, a DNA warrant, and production orders for a number of telephone numbers.

[53] He discussed the ITO for a search warrant of suspect's vehicle, which he obtained on 27 February 2023. The vehicle was towed to a secure compound in Dave Moore Towing and Recovery, which is where vehicles remain until the police can obtain a search warrant.

[54] Cpl. Ciccone also discussed the difference between a search of a motor vehicle and search incident to arrest. He testified that a motor vehicle search would be more extensive. It would include a forensic examination and a detailed search of the whole of the vehicle, which would be far beyond a search incident to arrest, which is what a clothing search would involve. A search incident to arrest would occur immediately or within a few hours after arrest. The motor vehicle search had to wait until the forensic identification department could make someone available to do the search. In the case at bar, this occurred two days after the suspect was arrested.

[55] During cross-examination, Cpl. Ciccone confirmed that the emergency area of a hospital is a "pretty secure location," although there would be several people who would be "in and out of there." Of course, it is not as secure as a police station, so there could be a danger of loss of evidence if it remained too long in the hospital. That said, Cpl. Ciccone was not concerned about evidence being lost when he and Sgt. Pumphrey went to the hospital. His bigger concern was about the evidence being wet, as the evidence could deteriorate. However, a few more hours likely would not have made a difference, although Cpl. Ciccone testified that he was not an expert who could testify to that fact.

2025 ABKB 36 (CanLII)

IV. Discussion

A. *Charter* Section 8

[56] As a preliminary matter, this Court must discuss Mr. Desylva's privacy rights in the clothing he was wearing at the time he was admitted to the Canmore Hospital. After all, this is the essence of *Charter* s. 8. As the Supreme Court of Canada said in ***Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc***, [1984] 2 SCR 145 at 159-60, 33 Alta LR (2d) 193, 55 AR 291:

> This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

[57] In the case at bar, the Crown concedes that Mr. Desylva had a reasonable expectation of privacy in his clothing. And no one is arguing that he had abandoned this expectation when medical personnel removed his clothing from his body and turned it over to the RCMP. In ***R v Pickton***, 2006 BCSC 1098, 260 CCC (3d) 232, Pickton was admitted to the hospital as a result of a stab wound to his neck. Justice Williams addressed an individual's reasonable expectation of privacy while attending for medical treatment when he said:

> ... An individual attending for medical treatment in those circumstances is reasonably entitled to expect that his clothing will be safely held by the facility until discharge when it will be returned. The Supreme Court of Canada has recognized that in the context of the reasonable expectation of privacy, "hospitals have been identified as specific areas of concern in the protection of privacy. given the vulnerability of individuals seeking medical treatment": *R. v. Colarusso* (1994). 87 C.C.C. (3d) 193 at para. 70 (S.C.C.) ...
>
> ***Pickton*** at para 38

[58] In the case at bar, Mr. Desylva had a subjective expectation of privacy, and that expectation is objectively reasonable. After all, the "contents of one's clothing and pockets can contain information that can tend to reveal intimate details of the lifestyle and personal choices of an individual": ***R v Auclair***, 2023 ONSC 6590 at para 39, 541 CRR (2d) 295.

[59] The RCMP's search of Mr. Desylva's clothing was done without a warrant. In ***R v Collins***, 1987 SCC 11, [1987] 1 SCR 265 at 278, 33 CCC (3d) 1, 56 CR (3d) 193, Justice Lamer, as he then was, after quoting from ***Southam*** at 161 said, "once the [accused] has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable." He went on to state that the Crown has a duty to establish on a balance of probabilities that the search was authorized by law, that the law itself is reasonable, and that the manner in which the search was carried out was reasonable: *ibid*. See also ***R v Caslake***, [1998] 1 SCR 51 at para. 10, 121 CCC (3d) 97, 13 CR (5th) 1; ***R v Nolet***, 2010 SCC 24 at para 21, [2010] 1 SCR 851, 256 CCC (3d) 1, 76 CR (6^{th}) 1. This principle was recently repeated in ***R v Reeves***, 2018 SCC 56 at para 14, [2018] 3 SCR 531, 367 CCC (3d) 129, 50 CR (7^{th}) 357.

2025 ABKB 36 (CanLII)

[60] It is interesting to note that in ***Pickton*** and ***Auclair***, the courts cautiously observed that the patient's reasonable expectation of privacy could be attenuated. In ***Pickton***, Justice Williams observed, "Mr. Pickton was not under arrest or otherwise detained at the time of the seizure. Those are factors that would have diminished his reasonable expectation of privacy": ***Pickton*** at para 39. In ***Auclair***, Justice Bordin said:

> In my view, the expectation of privacy is similarly diminished in a hospital ICU. Patients are subject to more scrutiny. It is routine to have clothes removed. Other patients are in close proximity. Nurses are responsible for the medical care and safety of the patient and others. It would not be reasonable to expect to be free from the possibility that clothes and belongings in an ICU setting might need to be searched.
>
> ***Auclair*** at para 44.

[61] But even if medical personnel could properly seize a patient's clothing in the hospital setting, the police in seizing the clothing from the medical personnel is still subject to court oversight. In both ***R v Dyment***, [1988] 2 SCR 417, 45 CCC (3d) 244, 66 CR (3d) 348, and ***R v Colarusso***, [1994] 1 SCR 20, 26 CR (4th) 289, 87 CCC (3d) 193, the Supreme Court of Canada was considering the application of *Charter* s 8 to situations in which the police seized bodily fluids from medical personnel. In ***Colarusso***, Justice La Forest, for the majority, said, "the actions of the agents of the criminal law enforcement arm of the state will be subject to scrutiny under s. 8 of the *Charter* even if ... the initial non-police seizure would not run afoul of the *Charter*": ***Colarusso*** at para 56 [cited to SCR]. In ***Dyment***, Justice La Forest said, "the focus of enquiry must be on the circumstances in which the police officer obtained the sample": ***Dyment*** at 431 [cited to SCR]. He went on to say:

> ... I cannot conceive that the doctor here had any right to take Mr. Dyment's blood and give it to a stranger for purposes other than medical purposes unless the law otherwise required, and any such law, too, would be subject to *Charter* scrutiny. Specifically, I think the protection of the *Charter* extends to prevent a police officer, an agent of the state, from taking a substance as intimately personal as a person's blood from a person who holds it subject to a duty to respect the dignity and privacy of that person.
>
> ***Dyment*** at 432.

[62] With respect, arguably, because a person's clothing contains "intimate details of the lifestyle and personal choices of [that] individual," this Court should subject its examination to the seizure of that clothing with the same level of scrutiny as did the court in ***Dyment*** and ***Colarusso***. In other words, it should focus not on what the medical personnel did in the case at bar, but the police action following their receipt (or seizure) of Mr. Desylva's clothing.

[63] Does the fact that Mr. Desylva was under arrest at the time the RCMP seized and searched his clothing diminish his reasonable expectation of privacy, as Justice Williams observed in ***Pickton*** at para 39. In ***Cloutier c Langlois***, [1990] 1 SCR 158, 53 CCC (3d) 257, 74 CR (3d) 316, Justice L'Heureux-Dubé, for the court, said:

> … [T]he common law as recognized and developed in Canada holds that the police have a power to search a lawfully-arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the

2025 ABKB 36 (CanLII)

> police and the accused, prevent the prisoner's escape or provide evidence against him.
>
> ***Cloutier*** at 180-81 [cited to SCR, emphasis added].

[64] She went on to say, with respect to the evidence aspect:

> The effectiveness of the system depends in part on the ability of peace officers to collect evidence that can be used in establishing the guilt of a suspect beyond a reasonable doubt. The legitimacy of the justice system would be but a mere illusion if the person arrested were allowed to destroy evidence in his possession at the time of the arrest. These interests have been recognized since the courts first considered the power to search; in [*Dillon v. O'Brien* (1887), 16 Cox C.C. 245 (Exch.)] at p. 250, Palles C.B. wrote:
>
> > ... the interest of the State in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form.
>
> ***Cloutier*** at 182-83.

[65] Thus, a search without a warrant incident to arrest is authorized by law and is reasonable provided the arrest is lawful and the search incident to arrest is conducted in a reasonable manner.

[66] The common law power of the police to conduct a search incident to arrest was specifically discussed in ***Caslake***. Chief Justice Lamer said that a search incident to arrest is a common law rule that would authorize the search: ***Caslake*** at para 12. He went on to say that such a search does not require the police to have reasonable and probable grounds, as the arrest itself provides those grounds: ***Caslake*** at para 13. The Chief Justice went on to say:

> ... [S]earches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question. The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy ... This means, simply put, that the search is only justifiable if the purpose of the search is related to the purpose of the arrest.
>
> ***Caslake*** at para 17.

[67] There is a subjective element and an objective element to the search. As the Chief Justice later said, "The subjective part of the test forces the police officer to satisfy him or herself that there is a valid purpose for the search incident to arrest before the search is carried out": ***Caslake*** at para 27. The objective element requires that the officer's belief that the valid purpose that will be served by the search must be a reasonable one: ***Caslake*** at para 19. Again, the police do not have to have reasonable and probable grounds to conduct the search. The only requirement the police must have before undertaking the search is that there is some reasonable basis for doing what the police officer did: ***Caslake*** at para 20, The Chief Justice went on to say, "if the

2025 ABKB 36 (CanLII)

justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested": ***Caslake*** at para 22.

[68] In the context of a pat-down search incident to an investigative detention, Justice Iacobucci, for the majority, in ***R v Mann***, 2004 SCC 52 at para 40, [2004] 3 SCR 59, 185 CCC (3d) 308, 21 CR (6th) 1 said, "The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It 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." There are a few observations that must be made about this comment. First, in the case at bar, Mr. Desylva was not being *detained* for the purpose of investigation. He had been arrested, so the search was arguably incident to that arrest. Second, Justice Iacobucci expressed his concern that there might be a "vague or non-existent concern for safety." In the case at bar, the justification for the search was for, among others, the purpose of securing evidence, as Chief Justice Lamer authorized in ***Caslake***. Given the officers' concerns for the integrity of the evidence, their justification was not vague or non-existent. Nor was it based on hunches or mere intuition.

[69] In ***Cloutier*** the court was dealing with a so-called "frisk search" that the police undertook immediately after they arrested the accused person. In ***Caslake***, the search of the accused person's vehicle occurred six hours after the police arrested the accused person. Chief Justice Lamer said:

> The temporal limits on search incident to arrest will also be derived from the same principles. There is no need to set a firm deadline on the amount of time that may elapse before the search can no longer said to be incidental to arrest. As a general rule, searches that are truly incidental to arrest will usually occur within a reasonable period of time after the arrest. A substantial delay does not mean that the search is automatically unlawful, but it may cause the court to draw an inference that the search is not sufficiently connected to the arrest. Naturally, the strength of the inference will depend on the length of the delay, and can be defeated by a reasonable explanation for the delay.
>
> ***Caslake*** at para 24.

[70] In ***Caslake***, the Chief Justice said that the six-hour delay in searching the vehicle was not of itself problematic given that there were only two police officers in detachment, and the regular policing commitments and other investigating matters demonstrated that there is a reasonable explanation for the delay in searching the vehicle. Furthermore, had the searching officer searched the vehicle, even hours later, for the purpose of finding evidence which could be used at the accused person's trial on the charge for which the accused person was arrested, this would have been within the scope of the search incident to arrest power. However, the officer testified that the sole reason for the search was to comply with a policy requiring that the contents of an impounded vehicle be inventoried. As a result, this was not a legitimate purpose of a search incident to arrest.

[71] In ***R v Drynock***, 2019 BCSC 1133, Drynock was in custody in Merritt, British Columbia for a murder that was committed in Surrey, British Columbia. The investigating officers were in Surrey, so they travelled to Merritt, which was about three and a half to four hours away. On their arrival in Merritt, they undertook other investigative steps. These police officers conducted a search incident to arrest about 23 hours after Drynock's arrest. Drynock alleged that in so doing to police breached his *Charter* s 8 rights. Justice Verhoeven found as follows:

2025 ABKB 36 (CanLII)

> The delay in the search makes no difference in the circumstances of this case. Drynock remained in custody in the detachment prior to transport to court for his April 10 appearance on the other charges. The items were held in the detachment. There was no urgency, and nothing changed or practically speaking could change, due to the delay. Robson and Waterman took advantage of the time to carry out other investigative steps while they were in Merritt, such as going to the Coldwater Hotel to attempt to seize the video evidence.
>
> In the context of whether the search was truly incidental to arrest, delay is relevant, but not determinative. Delay may cause the court to draw a negative inference on that question, which may be rebutted by a proper explanation for the delay: Caslake, paras. 24-25, 28. However in this case I draw no such negative inference. In any event, there is a reasonable explanation for the delay.
>
> ***Drynock*** at paras 138-39.

[72] In the case at bar, the police lawfully arrested Mr. Desylva. Had Mr. Desylva not been in mortal danger, the police likely would have conducted a search incident to his arrest immediately after he was placed under arrest, given that he had fired at Cst. La Cock. Sgt. Joly and Cst. Maitre both explained to this Court how they would undertake a search incident to the arrest of an individual at roadside. Their primary interests in conducting such a search incident to arrest was to ensure the public was safe, to ensure the arresting officer was safe, to collect evidence surrounding the charge for which the person was arrested, and to ensure that the person arrested could not escape lawful custody. However, in the view of the circumstances in the case at bar, the police correctly prioritized Mr. Desylva's life and safety over searching him incident to his arrest.

[73] Cst. Maitre described the "trauma" that Mr. Desylva was facing. Sgt. Joly testified that the police priority in respect of Mr. Desylva was to undertake life-saving measures. And Cst. Goryachev described Mr. Desylva's condition as he was being transported to the hospital as "making guttural sounds, making erratic hand-movements and saying "help me!", his nose and mouth were bleeding." Mr. Desylva argued that the ERT members should have told Cst. Goryachev that they did not perform a search incident to arrest. The agreed statement of facts in respect of Cst. Goryachev says that he was of the belief that the ERT members had searched Mr. Desylva incident to his arrest. This, Mr. Desylva argues, was a failure on the part of these officers, as he appears to suggest that they could have searched him at this time. Was it really reasonable for the police to undertake a search incident to arrest when Mr. Desylva's life was hanging by a thread while he was lying prone in the snow? Or while the emergency medical services team was tending to him while he was making guttural sounds, bleeding and saying "help me"? To repeat, the officers were more concerned about saving Mr. Desylva's life than searching his body for weapons and evidence.

[74] The evidence suggests that Mr. Desylva's clothing was removed at the Canmore Hospital and remained there until Sgt. Pumphrey and Cpl. Ciccone seized that clothing. The police did not search Mr. Desylva's clothes until 11-hours after his arrest. A search incident to arrest must be incidental to that arrest. As Chief Justice Lamer said in ***Caslake***, any delay may cause this Court to draw a negative inference, but the Crown may rebut that inference with a reasonable explanation. As this Court just explained, the initial reason the police did not search Mr.

2025 ABKB 36 (CanLII)

Desylva's clothing was because they were dedicated to their overriding duty to save his life. That alone is a reasonable explanation.

[75] Mr. Desylva was then transported from the scene by emergency personnel. The RCMP detachment in Canmore is a small detachment, in which officers were trying to accomplish a multitude of tasks to investigate this "extremely significant event." Sgt. Wrobel testified that he was reaching out to other detachments to recruit other RCMP members to assist in this investigation and Sgt. Joly testified that he brought in members from Cochrane and Airdrie to assist in this investigation, along with other specialized teams from around the province. In fact, the two officers Sgt. Joly tasked with recovering Mr. Desylva's clothing were from Cochrane. They had to make their way to Canmore to receive their instructions.

[76] This Court finds that the delay was not problematic, given these circumstances. There was reasonable explanation for the delay in conducting the search incident to Mr. Desylva's arrest. Such delay did not have a negative impact on the nature of the seized items. The subjective part of the test requires the police officer to satisfy him or herself that there is a valid purpose for the search incident to arrest before the search is carried out, *viz*, to discover evidence of the firearms offence and the reason for Mr. Desylva's criminal flight from the police officers. The police officers' belief that a valid purpose will be served by the search was, in these circumstances, a reasonable one.

[77] Mr. Desylva argues that the Sgt. Joly, Sgt. Pumphrey, and Cpl. Ciccone committed a serious breach of *Charter* s 8 by not obtaining a warrant before seizing and searching the two bags containing Mr. Desylva's clothing and by searching the clothing itself. All of them testified that they did not feel they needed to obtain a warrant as the search they were conducting was incident to arrest.

[78] As well, all of them testified that there were exigent circumstances, in any event, as they were concerned that evidence could be lost because the content of the two bags was wet, which could result in deterioration or contamination of the evidence and destruction because of mould. The fact that all these officers expressed the same concern, and that they received this information as part of their training, indicates to this Court that they honestly believed this to be true. Counsel asked Sgt. Pumphrey whether he had any knowledge of how long it takes for mould to begin growing or the size of a blood sample necessary to undertake a DNA analysis. Of course, Sgt. Pumphrey did not know, but he was not tendered as an expert in either of these areas. He was a police officer tasked with a duty imposed by the Team Commander. Further Mr. Desylva argues that the existence of DNA was irrelevant to this investigation, as the only DNA that could be found on Mr. Desylva's clothing was his. However, at the time that Sgt. Pumphrey was conducting his search, he did not know whether the existence of DNA would be relevant to this investigation. The investigation was in its very early stages.

[79] Mr. Desylva also appears to argue that neither Sgt. Pumphrey nor Cpl. Ciccone were the arresting officers, so they could not undertake a search incident to arrest. In ***R v Tuduce***, 2011 ONSC 2749 at para 38, Justice Taylor said, "***Caslake*** at least implicitly approves the search incident to arrest being completed by an officer other than the arresting officer." Justice Taylor went on to say:

> ... I therefore conclude that the search was a continuation of the search incident to arrest commenced by Constable Foster. I do not believe Detectives McLinden and Klingenberg were prohibited from completing Constable Foster's search simply

2025 ABKB 36 (CanLII)

> because they also concluded that Adrian Tuduce should be charged with other offences in addition to the offence for which he had been arrested originally.
>
> ***Tuduce*** at para 40.

[80] Sgt. Pumphrey could undertake the search incident to arrest even though he was not the arresting officer. The fact that Mr. Desylva was originally charged with driving and firearms offences does not preclude him from being charged with other offences arising from the searches of his clothing.

[81] On appeal, the Ontario Court of Appeal found that the police provided a "reasonable explanation for the delay" in undertaking the search incident to arrest, given the holding in ***Caslake*** at para 24, which this Court quoted above: ***R v Tuduce***, 2014 ONCA 547 at paras 66-68314 CCC (3d) 429.

[82] This Court finds that the Crown has met its burden of rebutting the presumption of unreasonableness of the RCMP's warrantless search and seizure of Mr. Desylva's clothing and the evidence they discovered therein. This was a search incident to the arrest of Mr. Desylva and the Crown has provided this Court with a reasonable explanation for the delay in undertaking that search. The officers did not breach *Charter* s 8.

B. *Charter* Section 24(2)

[83] Because of the conclusion this Court has reached with respect to whether the RCMP, in the case at bar, has breached Mr. Desylva's *Charter* s 8 rights, an analysis of *Charter* s 24(2) is not necessary. It will nonetheless examine Mr. Desylva's *Charter* s 8 rights in the light of *Charter* s 24(2).

[84] In ***R v Harding***, 2010 ABCA 180 at para 37, 27 Alta LR (5th) 228, 482 AR 262, the court outlined the test that this Court must apply in its analysis, when it said:

> In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (S.C.C.), the Supreme Court of Canada developed a revised framework for determining whether evidence obtained in breach of the *Charter* must be excluded under section 24(2) identifying three avenues of inquiry which should guide courts in the delicate balancing exercise mandated by that section: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.

[85] ***R v Grant***, 2009 SCC 32 at para 71, [2009] 2 SCR 353 provides what might be called a fourth step in a court's *Charter* s 24(2) analysis, when it said:

> ... The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. ...

[86] A *Charter* s 24(2) analysis starts from the position that there has been a breach of the *Charter*. This is important, as this fact has already brought the administration of justice into disrepute. The *Charter* s 24(2) analysis seeks to ensure that courts do not allow a situation where there is <u>further</u> damage to the repute of the administration of justice through the admission of the

2025 ABKB 36 (CanLII)

evidence acquired as a result of that breach: ***Grant*** at para 69. As mentioned earlier, this Court found no breach of *Charter* s 8.

[87] This Court will now turn to the ***Grant*** factors.

1. The Seriousness of the Charter-Infringing State Conduct

[88] The first factor this Court must consider is to examine the police or state conduct that led to the *Charter* violation. This conduct can range from deliberate, severe, reckless or wilful to inadvertent or minor. The more deliberate or severe the conduct, the greater the likelihood that society will not tolerate such conduct. As a result, societal needs will direct that courts exclude the evidence that resulted from that conduct.

[89] When undertaking this analysis, the Supreme Court of Canada directed trial courts to adopt a holistic analysis to situate properly state conduct on the "scale of culpability": ***R v McColman***, 2023 SCC 8 at para 58, 423 CCC (3d) 423, 86 CR (7th) 229. In the case at bar, the Crown argues that the RCMP were acting in good faith by putting Mr. Desylva's life before any desire to conduct any sort of search incident to his arrest. Time passed before the RCMP could even locate Mr. Desylva's clothing, and then find officers who were available to conduct the seizure of Mr. Desylva's clothing and search it. On the one hand, this Court recognizes the emergent and fluid nature of the situation in which the police found themselves. They had a suspect who had suffered possible mortal wounds who needed to be tended to. They could not begin a search incident to arrest at that time, or the suspect could have died. Arguably, even a pat-down search might have proved fatal. As well, this Court has found that this was a search incident to Mr. Desylva's arrest, so the RCMP would not be required to comply with exacting standards.

[90] On the other hand, Mr. Desylva's clothing was not going anywhere, and Mr. Desylva was in the intensive care unit for 15 days. Arguably, the RCMP could have obtained a telewarrant before they opened the two bags, which they did not even consider. Mr. Desylva argues that the officers should have recognized the legal uncertainty in proceeding without a warrant. The uncertainty arises from their authority to conduct a search incident to arrest 11 hours after Mr. Desylva was arrested and their ability, indeed duty, to obtain a warrant. In the face of that uncertainty, "the police officers should have acted with more prudence ... 'the police would do well to err on the side of caution'": ***McColman*** at para 60, quoting ***R v TELUS Communications Co***, 2013 SCC 16, [2013] 2 SCR 3 at para 80. In such a case, "the police officers had a duty to act cautiously and to question the limits of their authority": ***McColman*** at para 63.

[91] However, the officers' *bona fide* concern was that the wet evidence could deteriorate, or mould could begin to grow on it. And one factor that allows for a search incident to arrest is the preservation of evidence. All officers are trained to begin the drying process of wet evidence immediately. None of the officers expressed any concern about the extent of their authority. This Court had no evidence of the time it would take for the evidence to deteriorate so there is even uncertainty on this Court's part as to whether the officers had sufficient time to obtain such a warrant, given that the evidence was already sitting in a wet state for 11 hours in the warmth of a hospital.

[92] Because of the competing concerns between the deterioration of evidence and the time to the obtain a telewarrant, the first factor does not pull in favour of exclusion or inclusion.

2025 ABKB 36 (CanLII)

2. The Impact of the Breach on the *Charter*-Protected Interests of the Accused

[93] The second factor requires this Court to examine the accused person's rights that the *Charter* protects and determine the impact of the *Charter* violation on his rights. Like the first factor, courts must examine this through society's prism and there is a "sliding scale" of the impact a *Charter* breach may have on the accused person ranging from fleeting and technical to profoundly intrusive: ***Grant*** at para 76. The more intrusive the breach on the accused person's rights, the more likely that society will see an individual's *Charter*-protected rights as meaningless. Society will direct courts to exclude such intrusive evidence.

[94] In ***Grant***, the majority illustrated how this "sliding scale" works using *Charter* s 8, when it said:

> ... [A]n unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.
>
> ***Grant*** at para 78.

[95] In the case at bar, had Mr. Desylva not been in a state of medical distress, the RCMP likely would have conducted a search incident to his arrest, by means, for example, of a pat-down search or "frisk search," as in ***Cloutier***. Both Sgt. Joly and Cst. Maitre testified to this fact. Such a search would not demean Mr. Desylva's dignity, nor would it be intrusive, such as in the case of a strip search or a body cavity search: ***Grant*** at para 114.

[96] Although discoverability of the evidence "should ... not be determinative of admissibility," it retains "a useful role": ***Grant*** at paras 121-22. The more likely it is that the evidence would have been discovered even without the *Charter* breach, the less will be the impact of the *Charter* breach on the accused person's *Charter*-protected right: *ibid*.

[97] In the case at bar, had the RCMP conducted a pat-down search incident to Mr. Desylva's arrest, but for his serious medical distress, the evidence would have been discovered through the non-intrusive "frisk search."

[98] This factor favours inclusion of the evidence.

3. Society's Interest in the Adjudication of the Case on its Merits

[99] The majority in ***Grant*** summarized this factor as, "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. This analysis requires the court to examine the quality of the evidence against the means by which the police obtained the evidence. The latter, in part, is examined during the first two factors. The former examines the reliability of the evidence. This examination cannot be done in a vacuum. For example, evidence that the police obtain through an unjustified strip search, although reliable, trenches severely on an accused person's *Charter*-protected rights. Society has no interest in having a court adjudicate a case based on such ill-gotten evidence, no matter how reliable, and, accordingly, society will direct courts to exclude such evidence. On the other hand, society will not tolerate a court excluding properly obtained evidence that is relevant and reliable.

2025 ABKB 36 (CanLII)

[100] The majority in ***Grant*** at para. 83, also pointed to the importance of the evidence to the prosecution's case. It said:

> The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.
>
> ***Grant*** at para 83.

[101] In ***McColman***, the court described what the trial court should consider in its analysis:

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

[102] In ***R v Chan***, 2013 ABCA 385 at paras 48-49, the court made the following comment, which is *apropos* to the case at bar:

> ... [T]he seriousness of the offence should not overwhelm other relevant considerations.
>
> However, we consider society's interest in the adjudication of the merits to be greater where the offence is one that so literally involves the safety of the community. As the trial judge noted, a loaded handgun in a vehicle is extremely dangerous.

[103] The fact that Mr. Desylva was allegedly shooting at Cst. La Cock's vehicle, which hit the vehicle and a house, illustrates how "extremely dangerous" this matter was.

[104] In the case at bar, the drugs and cash that the RCMP seized when searching Mr. Desylva's clothing is reliable. It is important to the Crown's case, as it supports the *Controlled Drugs and Substances Act* charges, but, as well, they could support Mr. Desylva's motive for his actions in evading arrest and shooting at the RCMP officer who was pursuing Mr. Desylva: ***R v Salah***, 2015 ONCA 23 at paras 64-66. Possessing narcotics for the purpose of trafficking is a very serious offence, which carries a lengthy prison term. Equally serious is the attempted murder of a police officer. See ***R v Hennessey***, 2010 ABCA 274 at para 16.

[105] The third ***Grant*** factor favours inclusion.

4. Whether, Considering All the Circumstances, Admission of the Evidence Would Bring the Administration of Justice into Disrepute

[106] Once it has considered the three ***Grant*** factors, this Court must examine what it has found, balance them and complete its analysis by determining the effect of admitting the evidence will have on society's confidence in the justice system. This is not a scientific exercise.

2025 ABKB 36 (CanLII)

In fact, “No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible”: ***Grant*** at para 86

[107] When considering the seriousness of the *Charter*-infringing state conduct, this Court attempted to balance the RCMP’s *bona fides* in their putting Mr. Desylva’s health and safety before undertaking their search incident to his arrest. On the other hand, they had considerable time before they began searching Mr. Desylva’s clothing, as his clothing was not going anywhere, and Mr. Desylva was in the intensive care unit of the Foothills Hospital for 15 days. The RCMP could have obtained a warrant during that period. Because of this balancing, this Court found that this factor favours neither inclusion nor exclusion, although it does not find that the RCMP’s actions were on the most serious end of the spectrum.

[108] The impact on Mr. Desylva’s *Charter*-protected rights was not great, as the evidence would have been discovered had the RCMP conducted a “frisk search” immediately on his arrest, but for the medical distress in which he found himself. The search itself was not intrusive. Nor did it drastically trench on his privacy rights or his dignity.

[109] The drugs and cash are reliable, and they are important to the Crown’s case concerning the drug charges and the motive for committing the collection of other charges that he faces. The evidence points to Mr. Desylva’s motive to evade the police and risk the lives of the police and anyone who happened to be on the streets of Canmore. He operated his vehicle dangerously, at excessive speeds, ignoring traffic signs and he shot at the police. Like Justice Heeney noted in ***R v Rafferty***, 2012 ONSC 703 at para 140, “The evidence existed independently of the *Charter* breach.” In the case at bar, the drugs and cash have strong probative value. This favours their inclusion.

[110] This Court finds that two of the ***Grant*** factors favour inclusion and one factor is of neutral weight, depending on one's interpretation of that factor. In ***R v Twitchell***, 2010 ABQB 693 at para 38, 511 A.R. 33, Justice Clackson found that the police conduct was "at the bottom of the scale of seriousness." This Court finds that the RCMP’s failure to obtain a warrant in the circumstances would be at the bottom of the scale of seriousness. It was certainly not flagrant or deliberate. As for the evidence itself, it is reliable, was unaffected by the delay, and was entirely discoverable.

[111] In the end, for this Court to exclude the drugs and the cash would bring the administration of justice into disrepute. The administration of justice is better protected by not excluding that evidence.

2025 ABKB 36 (CanLII)

V. Conclusion

[112] As a result of the forgoing, this Court finds that the evidence that the RCMP seized from Mr. Desylva's clothing be admitted into evidence. This Court dismisses Mr. Desylva's *Charter* s 8 application.

Heard on the 13th day of January, 2025, to the 16th day of January, 2025.
Dated at the City of Calgary, Alberta this 23rd day of January, 2025.

K.D. Yamauchi
J.C.K.B.A.

Appearances:

Adam Garrett and Aaron Rankin
Alberta Crown Prosecution Service
Appeals and Specialized Prosecutions Office
for the Crown

Dale Wm. Fedorchuk, K.C.
Fedorchuk LLP
for the Accused

2025 ABKB 36 (CanLII)