

CANADA / JUDGMENT

R. v. Breton

2025 ONCA 781

COURT

Court of Appeal for Ontario

DECIDED

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Fairburn, J. Michal; Miller, Bradley; Dawe, Jonathan

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Breton, 2025 ONCA 781

DATE: 20251117

DOCKET: COA-23-CR-1103

Fairburn A.C.J.O., Miller and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Marcel Breton

Appellant

Michael A. Johnston, for the appellant

Allyson Ratsoy and Genevieve McInnes, for the respondent

Heard: March 25, 2025

On appeal from the forfeiture order of Justice F. Bruce Fitzpatrick of the Superior Court of Justice, dated September 26, 2023, with reasons reported at 2023 ONSC 5429.

Fairburn A.C.J.O.:

I. Overview [1] Police seized over \$1.2 million in cash secreted around the appellant's house and garage, including \$1,235,620 found inside a Rubbermaid tub buried under the dirt floor of the garage. There were numerous other items seized, including drugs, drug paraphernalia, motorized vehicles and the like. This appeal concerns only the cash found secreted in the garage.

- [2] The appellant was charged with possession of the proceeds of crime and various other offences. At trial, he successfully challenged the search warrant under which the seizures were made, a challenge brought pursuant to s. 8 of the Canadian Charter of Rights and Freedoms. The trial judge excluded all of the evidence under s. 24(2) of the Charter. The exclusion of the evidence resulted in the Crown calling no evidence and, as a corollary, acquittals being entered.
- [3] This left the question of what to do with the cash – should it be returned to the appellant or forfeited to the Crown? The Crown brought an application for an order under s. 490(9) of the Criminal Code, R.S.C. 1985, c. C-46. Although the Crown originally sought the forfeiture of almost all seized items, in the end, the Crown focused on the seized cash. The appellant countered with an application to have the evidence excluded from the forfeiture proceeding. This time the trial judge[1] denied the s. 24(2) application, declining to exclude the cash and evidence surrounding its seizure from the forfeiture proceeding. He ultimately ordered that the cash found in and under the garage be forfeited to the Crown.
- [4] In this court, the appellant argues that:
 - (1) because he was acquitted of all criminal charges, issue estoppel precluded the trial judge from finding that his possession of the cash was unlawful and, therefore, forfeitable to the Crown under s. 490(9) of the Criminal Code;
 - (2) issue estoppel precluded the trial judge from conducting a fresh s. 24(2) analysis; and

- (3) in the alternative, the trial judge erred in concluding the evidence was admissible on the fresh s. 24(2) analysis.
- [5] I would dismiss the appeal. As I will explain: (1) even though the appellant was acquitted, issue estoppel did not preclude the trial judge from finding that the appellant's possession of the cash was unlawful; (2) issue estoppel did not preclude the trial judge from conducting a fresh s. 24(2) analysis; and (3) the trial judge's s. 24(2) analysis is error-free and entitled to deference.

II. Background A. The search warrants [6] On December 1, 2009, police executed a search warrant at the appellant's rural residence on the outskirts of Thunder Bay. They had a s. 487 Criminal Code warrant to search the property for a handgun, ammunition, spent casings, a firearms licence and firearms registration. The evidence seized under the first warrant included:

- Bundles of cash totalling \$15,000 located in the floor heating ducts of the living room area of the residence on the property.
- Over \$1.2 million in cash found buried in a Rubbermaid tub under a dirt floor in a building on the property the police described as a "garage". There were 30 bricks of cash, further divided into sub-bundles. The bundles were marked "5" and "10" and mostly corresponded to being exactly \$5,000 and \$10,000.
- Approximately \$32,000 in cash stored elsewhere in the garage.

[7] The next day, the police sought and received another search warrant, again pursuant to s. 487 of the Criminal Code. About three months later, they sought and received a "special search warrant" issued pursuant to s. 462.32(1) of the Criminal Code, specifically directed at vehicles, boats, motors, snow machines and the like.

[8] The appellant was charged with various offences, including possession of the proceeds of crime contrary to ss. 354(1)(a) and 355(a) of the Criminal Code.

B. The criminal proceedings [9] In 2014, the appellant was convicted on all charges. He successfully appealed and this court returned the matter to be retried: *R. v. Breton*, 2018 ONCA 753, 366 C.C.C. (3d) 281.

[10] The retrial proceeded as a blended voir dire. The appellant argued that the searches of his residence violated his Charter rights and that the evidence obtained should therefore be excluded pursuant to s. 24(2) of the Charter.

[11] The trial judge dealt with this Charter application in two separate decisions.

[12] The first decision considered whether the searches of the appellant's residence infringed his s. 8 Charter rights: *R. v. Breton*, 2021 ONSC 7312. The trial judge concluded that the first warrant was partially invalid, and that it should not have allowed a search of the outbuildings and attached shed of the property. Specifically, he found that while there were sufficient grounds for the search warrant to have issued for the home, there were

insufficient grounds to support the authorization to search the outbuildings, one of which is where the Rubbermaid full of cash was found. Therefore, the trial judge concluded that any evidence seized from the outbuildings on December 1, 2009 was done without the lawful authority granted by the first warrant.

- [13] The trial judge also concluded that the manner of the search conducted on December 1, 2009 was unreasonable and that, among other things, the police appeared to have a predisposition to search the appellant's property for drugs and the proceeds of crime, when in fact they were only authorized to search for firearms.
- [14] Finally, the trial judge concluded that the second warrant was not lawfully obtained, because of issues in the process by which it was submitted to a Justice of the Peace. Therefore, all items seized pursuant to the second warrant were deemed to be seized on a warrantless basis. As for the special search warrant, the Crown ultimately conceded that, given the findings regarding the first two warrants, the special warrant could not have issued.
- [15] The second decision considered whether the unlawfully obtained evidence should be excluded pursuant to s. 24(2) of the Charter: *R. v. Breton*, 2022 ONSC 1762. Applying the test set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the trial judge concluded that the seriousness of the Charter-infringing state conduct and the impact of the breach on the appellant's Charter-protected interests pulled strongly toward exclusion. On the third branch of the Grant test, the trial judge found that the seizures constituted reliable, physical evidence that was critical to the Crown's case on very serious charges. He noted the defence concession, with which he agreed, that this militated toward inclusion.
- [16] Even so, when balancing all the factors together, the trial judge concluded that the admission of the evidence in the criminal trial would bring the administration of justice into disrepute. Accordingly, he excluded all of the evidence pursuant to s. 24(2) of the Charter.
- [17] Following the decision on the voir dire excluding all evidence obtained under the warrants, the Crown called no evidence, and the trial judge found the appellant not guilty on all charges.

C. The forfeiture application [18] Following the acquittals, the Crown brought applications to have all items seized pursuant to the warrants forfeited pursuant to ss. 462.43 and 490(9) of the Criminal Code.[2] At the same time, the appellant brought an application for the return of all items seized (at least those that are lawful to possess) pursuant to ss. 462.43(1)(c)(i) and 490(9) of the Criminal Code.[3]

- [19] Between the time the Crown filed its forfeiture application and the time it was heard, the Crown reduced its forfeiture request to the cash seized exclusively under the first warrant, which was issued under s. 487 of the Criminal Code. Therefore, by the time of the application, the items in dispute were substantially narrowed, with only the cash found in the house and the cash found in and under the garage remaining in dispute. Accordingly, the matter proceeded to a full hearing only on the basis of a Crown application for forfeiture

under s. 490(9).[4]

- [20] In response to the Crown's narrowed application for forfeiture, the appellant brought a s. 24(2) Charter application, seeking to exclude evidence from the forfeiture proceedings. As the trial judge described it, the appellant countered the forfeiture application "by applying to have the physical property, the subsequent opinion evidence regarding it and an agreed statement of facts concerning it, excluded from the hearing".
- [21] The trial judge addressed the forfeiture application in three different decisions.
- [22] First, the trial judge addressed a defence application to summarily dismiss the Crown's forfeiture application pursuant to rr. 6 and 34.02 of the Criminal Proceedings Rules for the Superior Court of Justice (Ontario) on the basis that the application had no reasonable prospect of success: *R. v. Breton*, 2022 ONSC 5065. The appellant argued that there was no evidence available to support forfeiture as that evidence had already been excluded under s. 24(2) of the Charter, and issue estoppel precluded a fresh s. 24(2) analysis. The trial judge dismissed this application, concluding that the forfeiture application was "not frivolous and vexatious despite it being novel." The matter then went into case management to try to narrow the scope of the proceedings to the key issues in dispute.
- [23] Second, the trial judge addressed the defence application to exclude the unlawfully seized evidence and its derivatives from the forfeiture proceedings under s. 24(2) of the Charter: *R. v. Breton*, 2023 ONSC 2035. The trial judge noted that Grant directs the trier of fact to consider "all the circumstances" when balancing the interests of the accused and society, and that these interests are different when the question of an accused's guilt or innocence is "off the table" and the accused's liberty is not at stake. Therefore, the trial judge concluded that a decision rendered during a criminal trial, one that results in the exclusion of evidence, does not necessarily require the same result at a forfeiture hearing, citing *Vellone c. R.*, 2020 QCCA 665, leave to appeal refused, [2020] S.C.C.A. No. 237. Contrary to the holding reached at trial, the trial judge was not satisfied that the admission of the evidence in the forfeiture proceeding would bring the administration of justice into disrepute. Accordingly, he denied the s. 24(2) application.
- [24] Finally, the trial judge issued a decision addressing the merits of the Crown's forfeiture application: *R. v. Breton*, 2023 ONSC 5429. As already noted, although the Crown's original forfeiture application was broad, aimed at many of the things seized under warrant, by the time the forfeiture proceeding went ahead, the Crown had significantly narrowed the application, seeking only forfeiture of the seized cash.
- [25] Although I will return to s. 490(9) of the Criminal Code in more detail later in these reasons, in short, it allows a judge (or justice) to order that seized property be forfeited to the Crown if it was seized from a person who possessed it unlawfully and the "lawful owner or person who is lawfully entitled to possession is not known". The appellant admitted that he was in possession of all of the seized cash. The main issue therefore was whether he was in "unlawful" possession. The trial judge concluded that the Crown had proven beyond a

reasonable doubt that the appellant did not lawfully possess the cash found in and under the garage. In reaching this conclusion, the trial judge observed that:

- The appellant admitted he was in possession of the cash.
- The appellant's fingerprints were found on a plastic bag that contained some of the cash found in the buried Rubbermaid tub, indicating that the appellant was aware of the buried cash as he had touched some of it at least once.
- It is unusual for an average person to have such a large amount of money buried in tubs underneath their property.
- The appellant did not report any income to the Canada Revenue Agency for the years 2001 to 2008.
- The way the money was packaged, buried in a tub and bundled was consistent with the cash being proceeds of crime according to expert evidence.
- By far the most common type of bill found in the bundles was \$20, which was the most common denomination associated with the drug trade according to expert evidence.
- Two bricks of cash found in the tub contained approximately \$60,000 and \$40,000 respectively, which was consistent with the price of 1 kg of cocaine in 2009.
- The cash was found in the presence of drugs and drug paraphernalia in the vicinity of the garage.

[26] The trial judge also rejected the appellant's alternative theories for why he might have been in possession of the cash lawfully – for example, that he won it in a legal lottery or casino or earned it through the operation of a vehicle repair business. The trial judge therefore ordered forfeiture of the cash found in the garage as follows:

An Order shall be issued against Marcel Breton for forfeiture of the properties set out below to His Majesty the King in Right of Canada to be disposed of by the Minister of Public Works and Government Services pursuant to s. 490(9) C.C.:

- a. \$9,750 CAD from inside a suitcase in two bundles, located in the heated portion of the garage;
- b. \$15,780 CAD in two bundles from under a drawer on top of the desk in the heated portion of the garage;
- c. \$1,750 CAD from a toolbox located in the heated portion of the garage;
- d. \$4,800 CAD in two flat bundles from a shelf in the cold garage, near where the Camaro was located; and
- e. Rubbermaid tub, buried in the dirt floor of the cold garage, together with \$1,235,620.00 in Canadian currency and \$100.00 in US currency that was found therein[.]

[27] However, the trial judge had a reasonable doubt about whether the \$15,000 found inside the vents of the appellant's house was proceeds of crime, because it was not bundled in consistent denominations like the cash found in the garage. He ordered that the \$15,000 be returned to the appellant, and he noted that the Crown was not objecting to returning to the appellant a small amount of cash found on the appellant's person.

III. Analysis [28] The appellant raises three issues on appeal:

A. In light of his acquittal, did issue estoppel preclude the trial judge from finding that the appellant's possession of the cash was unlawful?

B. Did issue estoppel preclude the trial judge from conducting a fresh s. 24(2) analysis?

C. In the alternative, did the trial judge err in his fresh s. 24(2) analysis?

[29] At the hearing of this appeal, counsel for the appellant clarified his position. At the forfeiture hearing, the appellant framed the issue as whether the trial judge was estopped from coming to a different s. 24(2) conclusion than the one reached at trial, because the trial judge had already made a s. 24(2) finding with respect to the evidence in question at trial. On appeal, the appellant's position morphed significantly, largely focusing for the first time on whether the entry of acquittals in this case estopped the trial judge at the forfeiture hearing from finding that the cash was unlawfully possessed.

[30] In advancing this substantially new position on appeal, the appellant spent little time on the second issue listed above, but did not specifically abandon it.

[31] The appellant argues that if the first issue above, the impact of the acquittals on the ability of the trial judge to find that the cash was unlawfully possessed, is viewed as a new issue on appeal, the test for raising a new issue is met. That test involves looking into whether the evidentiary record is sufficient to permit this court to "fully, effectively, and fairly determine the issue", whether the failure to raise the issue resulted from a tactical decision and whether refusing to grant leave to raise a new issue could result in a miscarriage of justice: *R. v. Greer*, 2020 ONCA 795, 397 C.C.C. (3d) 40, at para. 91.

[32] I will spend little time discussing whether this new argument should be entertained on appeal as the Crown does not oppose the appellant raising it for the first time now.

[33] In the unusual circumstances here, there is no harm in considering the appellant's newly formed position on appeal. The record is clearly sufficient to address the argument now, especially given that issue estoppel was raised below, albeit in a different manner. Further, I see no tactical reason for failing to raise the argument at trial that is now raised on appeal. While I see no risk of a miscarriage of justice in this case, in the circumstances here, and especially given the absence of any objection by the Crown, that should not foreclose us from considering the issue now.

[34] As for the second issue that was not pressed in oral argument, that being whether the original s. 24(2) trial ruling precluded a different ruling at the forfeiture proceeding, I will still address it. The fact is that the first and second issues enjoy a great deal of overlap and, therefore, despite not having been seriously advanced in oral submissions, I will address the second argument for the sake of completeness.

A. Despite the appellant's acquittal, it was open to the trial judge to find that the appellant was in unlawful possession of the cash i. Parties' positions

[35] The appellant was acquitted of all counts he faced, including the counts relating to possession of the proceeds of crime. He argues that these acquittals barred the trial judge on the forfeiture application from concluding that the cash located in and under the garage was unlawfully possessed. As the appellant points out, there are not different types of acquittals, and all are "equivalent to a finding of innocence": *Grdic v. The Queen*, [1985] 1 S.C.R. 810, at p. 825. Accordingly, the appellant argues that the issue of whether he was in unlawful possession of proceeds of crime was finally determined by his acquittal, and the Crown is estopped from contradicting that finding in the forfeiture proceedings.

[36] The Crown argues that the appellant's acquittal does not bar the Crown from seeking forfeiture of the seized funds in this case, because the trial judge made no findings of fact about whether the appellant possessed the seized funds unlawfully. Further, because no findings of fact were made at trial, the appellant cannot demonstrate that the route to his acquittal would necessarily have involved factual findings that would bar the Crown from seeking forfeiture of the funds. This is because the offence at issue – possession of the proceeds of crime – requires the Crown to prove a series of elements. If the charge had been considered on the merits, rather than disposed of by a Charter application, there would have been a variety of routes to the appellant's acquittal. Therefore, because there was more than one logical explanation for the acquittal, it did not depend on resolving the issue of lawful possession in the appellant's favour and issue estoppel does not apply: *R. v. Punko*, 2012 SCC 39, [2012] 2 S.C.R. 396, at paras. 7-8.

ii. Law of issue estoppel following an acquittal

[37] Issue estoppel is one branch of *res judicata*, which is a doctrine that prevents unfair relitigation of matters that have already been decided: *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at paras. 14-16. In the context of criminal cases, it "prevent[s] the Crown from relitigating an issue that has been determined in the accused's favour in a prior criminal proceeding, whether on the basis of a positive finding or reasonable doubt": *Mahalingan*, at para. 31. Issue estoppel serves the goals of (1) fairness to the accused, who should not have to confront issues already decided in their favour; (2) integrity and coherence of the criminal law; and (3) judicial finality and economy: *Mahalingan*, at paras. 2, 38.

[38] Issue estoppel has three core requirements:

(1) that the same question has been decided;

- (2) that the judicial decision which is said to create the estoppel was final; and
 - (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies: *Mahalingan*, at para. 49.
- [39] To satisfy the first requirement, an accused must show that the question “was or must necessarily have been resolved on the merits in the accused’s favour in the earlier proceeding”: *Mahalingan*, at para. 52. The question will be whether the finding said to be in favour of the accused is one that is “logically necessary” to the acquittal, to be determined by reference to the essential elements of the verdict: *Mahalingan*, at para. 53. In a multi-issue jury trial where there are no reasons, it will sometimes be harder to rely on issue estoppel because it will not always be clear which issues were decided in favour of the accused: *Mahalingan*, at para. 54; *Punko*, at para. 22.
- [40] In *Punko*, the Supreme Court applied the test from *Mahalingan* in the context of a multi-issue jury trial. The issue was whether the Crown was estopped from proving that a chapter of the Hells Angels was a criminal organization because the issue was decided adversely to the Crown in a prior jury trial. At the first jury trial, the appellants were acquitted of counts allegedly committed for the benefit of, or at the direction of, a criminal organization. The Supreme Court concluded that issue estoppel did not apply and that it was open to the Crown to seek to prove the criminal organization issue at the second trial. This is because where there is more than one logical explanation for a verdict, and if one of these explanations does not depend on the relevant issue having been resolved in favour of the accused, the verdict cannot be relied upon in support of issue estoppel: *Punko*, at para. 8.

iii. Application

- [41] In my view, issue estoppel did not preclude the Crown from arguing at the forfeiture hearing that the cash the appellant possessed was obtained unlawfully, for two reasons:
- (1) A finding about whether the seized cash was obtained unlawfully was not logically necessary to the appellant’s acquittal.
 - (2) Regardless, the trial judge cannot have made any findings about the cash found in and under the garage, since it was not in evidence.
- [42] We need to start by grounding ourselves in why the appellant was acquitted across the board. Here, the trial judge did not provide reasons explaining why he entertained a reasonable doubt as to one or more of the elements of the offence. Rather, following the exclusion of the evidence under s. 24(2), and the Crown opting to call no evidence, acquittals were necessarily entered. This is reflected in the trial judge’s brief endorsement offering his sole explanation for acquitting the appellant: “As [Crown] calls no evidence, I find Marcel Breton not guilty”. That is it.

- [43] The appellant argues that Grdic governs this appeal. He contends that the verdict of not guilty is tantamount to a “declaration of innocence” for all purposes: *R. v. Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.), at p. 371. Leaning on Grdic, the appellant maintains that it makes no difference whether the appellant was acquitted as a result of a Charter application or whether he was acquitted after a full review of the evidence, given that Grdic, at p. 825, makes clear that an “acquittal is the equivalent to a finding of innocence”. And if he has been found innocent, he cannot have been unlawfully in possession of the disputed cash.
- [44] I do not read Grdic in the same way as the appellant. In my view, it does not stand for the proposition advanced by the appellant.
- [45] Indeed, the suggestion that the fact of an acquittal precludes any issue raised in a previous trial from being dealt with at a subsequent proceeding has been referred to as a “misreading” of Grdic: Mahalingan, at para. 22. It is only those issues that were specifically decided in the accused’s favour during the first trial, either by way of a factual finding or a reasonable doubt, that become the subject of issue estoppel at the subsequent proceeding. As the majority in Mahalingan found, whether the Crown was estopped from relitigating an issue is dependent, not on the fact of the acquittal, but on “whether the issue in question has been decided in the accused’s favour in a previous proceeding”: at para. 21. To proceed otherwise is to conflate the concept of double jeopardy on the ultimate verdict (not in issue here), with the central concern behind issue estoppel, which is to preclude the litigation of issues that have been specifically resolved in reaching a verdict: Mahalingan, at para. 21.
- [46] Therefore, not every issue at a trial that results in an acquittal will be estopped at a subsequent proceeding. Only those issues that were “expressly resolved or, given how the case was argued, had to be resolved for there to be an acquittal” are estopped from reconsideration: Mahalingan, at para. 23. This is to be decided on the whole of the record. The whole of the record here demonstrates that no estoppel on the issue of whether the seized cash was obtained unlawfully arises from the acquittal.
- [47] First, I agree with the Crown that a finding about whether the seized cash was obtained unlawfully was not logically necessary to the appellant’s acquittal. Therefore, the trial judge was not bound by issue estoppel on this point, and it was open to him to conclude that the cash found in and under the garage was the proceeds of crime, satisfying the requirement in s. 490(9) that “possession of it by the person from whom it was seized is unlawful”.
- [48] The appellant was charged with and acquitted of possession of the proceeds of crime under ss. 354(1)(a) and 355(a) of the Criminal Code. This offence can be broken down into at least three elements: the property must have been obtained or derived from the commission of an indictable offence in Canada, the property was in the accused’s possession, and the accused must have known the property was unlawfully obtained: *R. v. Farnsworth*, 2017 ABCA 358, 356 C.C.C. (3d) 255, at paras. 32-36.

- [49] Failure to prove any of these elements beyond a reasonable doubt would result in an acquittal. We simply cannot conclude that any one of these issues was “logically necessary” to the acquittal. For example, if the trial judge were convinced that the seized cash was proceeds of crime but was not satisfied either that the appellant was in possession of it or that he had knowledge of its origins, this would have resulted in an acquittal. As the trial judge provided no reasons other than a brief endorsement on the indictment noting that the Crown had called no evidence, it cannot be said which issue or issues were resolved for purposes of arriving at the acquittal. This is not unlike a jury verdict where the basis of the acquittal is not explained, and all we know is that the trier of fact had a reasonable doubt about something, more than one thing or possibly everything.
- [50] I recognize that in a situation where the Crown calls no evidence, we might conclude that the trial judge must have had a reasonable doubt about every element of the offence. Having been presented with zero evidence, how could the trial judge have been convinced of anything beyond a reasonable doubt? But it does not follow that issue estoppel should apply in these circumstances. Issue estoppel in the criminal context is necessarily narrow: Mahalingan, at para. 1; Punko, at para. 7. It only applies to findings that are logically necessary to a verdict: Mahalingan, at para. 53. In a multi-issue jury trial, “it will be rare for an acquittal to ground issue estoppel, because such an acquittal will often have more than one possible basis”: Punko, at para. 22; Mahalingan, at paras. 24, 54. In my view, this case is analogous to a multi-issue jury trial, in the sense that there is more than one possible basis for the acquittal and there are no reasons explaining what the basis is.
- [51] Second, regardless of what we can logically infer from the verdict of acquittal, in my view the trial judge cannot have made any finding with respect to the seized cash at the criminal trial because the seized cash was not before him, having been excluded as inadmissible under s. 24(2).
- [52] To understand what the appellant was acquitted of, we must look to the indictment. The indictment does not specify the seized cash from in and under the garage. It simply alleges that the appellant was in possession of “proceeds of property of a value exceeding five thousand dollars” in general terms:

Marcel Donald BRETON, on or about the 1st day of December in the year 2009 at the Township of Gorham, in the said Region, unlawfully did have in his possession proceeds of property of a value exceeding five thousand dollars, knowing that all or part of the currency was obtained or derived directly or indirectly from the commission in Canada of an offence punishable by indictment, contrary to Section 354(1)(a) of the Criminal Code thereby committing an offence under Section 355(a) of the Criminal Code. [Emphasis added.]

- [53] Even though the trial judge surely had a reasonable doubt about whether the appellant possessed proceeds “of a value exceeding five thousand dollars” given that the Crown called no evidence, it does not follow that the trial judge had a reasonable doubt about whether the seized cash was the proceeds of crime. Quite simply, that cash was not in evidence at the

trial at the point that the decision to acquit was made and so the trial judge cannot have made any findings about its status, either explicitly or on the basis of reasonable doubt, one way or the other.

- [54] In my view, this conclusion is entirely consistent with the goals of issue estoppel, as set out in Mahalingan, at para. 38.
- [55] First, there is no unfairness to the appellant because the issue of whether he unlawfully possessed the cash in and under the garage was not determined at his trial because it was not litigated in light of the exclusion of the evidence – including the cash itself – pursuant to s. 24(2).
- [56] Second, this result does not undermine the integrity or coherence of the criminal process, because the appellant's acquittal of possession of the proceeds of crime did not entail or depend on a finding that the seized cash was not the proceeds of crime.
- [57] Finally, and for the same reasons, this conclusion does not undermine the institutional values of finality and judicial economy. While these values are of course essential to preserving the public's confidence in the administration of justice, and relitigation is barred in order to preserve these values, there was no original litigation on the core issue in this case that resulted in findings upon which issue estoppel could rest.

B. It was open to the trial judge to conduct a fresh s. 24(2) analysis i. Parties' positions

- [58] The appellant also argues that the ruling on the admissibility of the cash was fundamental and identical to his acquittal on the charge of possession of the proceeds of crime, and therefore issue estoppel should have prevented the Crown from relitigating the s. 24(2) issue.
- [59] The Crown responds that issue estoppel did not preclude the trial judge from conducting a fresh s. 24(2) analysis because the requirements from Mahalingan are not met: the question of whether the admission of evidence would bring the administration of justice into disrepute varies between different proceedings with different functions, so issue estoppel does not apply since the issue is not the same.
- [60] In my view, a s. 24(2) analysis looks very different in the context of a forfeiture proceeding as compared to a criminal trial, and issue estoppel therefore did not preclude the trial judge from reaching a different conclusion in his s. 24(2) analysis in the forfeiture proceeding. This is because the first requirement from Mahalingan – that “the same” question has been decided – is not met.

ii. Forfeiture applications under s. 490(9) of the Criminal Code

- [61] Section 489.1(1) of the Criminal Code requires that where “anything” is seized under a warrant issued under the Criminal Code, a peace officer shall, as soon as practicable, comply with paragraphs (a) or (b).[5] Section 489.1(1)(a) pertains to the return of the thing seized if it is not required for an investigation or a proceeding. Section 489.1(1)(b) pertains to those situations where the thing seized is to be detained, in which case a report must be brought before a justice so that the thing can be “dealt with in accordance with subsection 490(1)”. [6] At that point, the seized property becomes subject to judicial supervision under s. 490: *R. v. Garcia-Machado*, 2015 ONCA 569, 126 O.R. (3d) 737, at paras. 14-16.
- [62] Section 490 of the Criminal Code is a lengthy and complex, some might even say unnecessarily complex, statutory scheme designed to address the supervision, return and disposition of seized items: *R. v. Backhouse* (2005), 194 C.C.C. (3d) 1 (Ont. C.A.), at para. 112. The s. 490 scheme aims to ensure that seized items are returned to their lawful owners or someone lawfully entitled to their possession when their continued detention is no longer required for the purposes of an investigation or court proceedings. It seeks to strike “a balance between the societal interest in the investigation of crime on the one hand, and the property and privacy interests of individuals from whom the things were seized on the other”: *R. v. Hollaman*, 2025 BCCA 315, at para. 97.
- [63] Section 490(9) granted the jurisdiction for the trial judge to entertain the application in this case. To better understand the provision, it is helpful to place it within its broader context.
- [64] Sections 490(1) to (3.1) are the statutory provisions required to detain seized items for various periods of time. Section 490(4) requires that anything detained be forwarded to the court in which the accused will be tried once he or she is ordered to stand trial. Sections 490(5) to (8) govern applications for the disposition or return of things detained once they are no longer required or time periods have expired. Then, s. 490(9), which sits at the centre of this appeal, provides the statutory scheme for the disposal of things seized when applications are made for the return or disposal of those items. Section 490(9.1) provides for an exception to the operation of s. 490(9), an exception that is not operative in this case.
- [65] The balance of the provisions, ss. 490(10) to (18), govern applications for the return of things seized from those claiming to be their lawful owners, how detention is dealt with pending appeal, the retention of copies, access to things seized and notice and rights of appeal from decisions rendered pursuant to s. 490, including s. 490(9).
- [66] Section 490(17) allows for an appeal as of right to this court from an order made pursuant to s. 490(9) when the order has been made by a judge of a superior court of criminal jurisdiction. It is from s. 490(17) that we draw our jurisdiction on this appeal.
- [67] To bring this all together, following the execution of the first warrant, under which the cash in and under the garage was found, the police made a s. 489.1(1)(b) report to a justice. Once the trial was over and, therefore, the periods for detention expired, the Crown brought an application for a forfeiture order under s. 490(9).

- [68] The salient portion of s. 490(9) requires that upon being satisfied that certain time periods have expired, which is not in dispute in this case, a judge or justice before whom an application is made is to do one of three things:
- (1) If the property was seized from someone who possessed it lawfully, the judge or justice shall order it returned to that person (see s. 490(9)(c)).
 - (2) If the property was seized from someone who possessed it unlawfully and the lawful owner is known, the judge or justice shall order it returned to the lawful owner (see s. 490(9)(d)).
 - (3) If the property was seized from someone who possessed it unlawfully or if it was seized when it was not in the possession of anyone and the lawful owner is not known, the judge or justice may order it “forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law” (see s. 490(9)).
- [69] It is the third option that is relevant to this appeal. It encapsulates the ability of a judge or justice exercising their jurisdiction under s. 490(9) to order the thing(s) forfeited to the Crown to be “disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law”, where the “possession of it by the person from whom it was seized is unlawful”. Here, there is no dispute that the appellant was in possession of the cash found in and under the garage. The sole question is whether his possession of it was unlawful and, more specifically, whether, in answering that question, the trial judge could take into account the evidence excluded from the trial pursuant to s. 24(2).
- [70] As in all applications of this nature, the Crown bore the onus of proving the appellant’s possession was unlawful on the criminal standard of proof beyond a reasonable doubt: *R. v. Mac* (1995), 97 C.C.C. (3d) 115 (Ont. C.A.), at pp. 124-25; *R. v. West* (2005), 77 O.R. (3d) 185 (C.A.), at paras. 19, 27.
- iii. Section 24(2) in the context of a s. 490(9) forfeiture application
- [71] In my view, issue estoppel did not preclude the trial judge from conducting a fresh s. 24(2) application for purposes of the forfeiture proceeding.
- [72] To explain why this is so, I start with a reminder that all s. 24(2) Charter inquiries must stay true to the content of that provision, specifically that where a court has concluded that evidence was obtained in a manner infringing or denying a Charter right, the evidence shall be excluded “if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute” (emphasis added).
- [73] In accordance with the wording of s. 24(2) emphasized above, we must keep in mind all of the circumstances when determining whether issue estoppel applies, as well as the proceedings in which the evidence is sought to be adduced. As for the latter, and to be sure, this was not a criminal trial. It was a forfeiture proceeding, and the circumstances engaged at a forfeiture proceeding are fundamentally different from those a criminal trial.

- [74] The purpose of a criminal trial is to determine whether an accused is guilty of an alleged crime. This is often referred to as the truth-seeking function of the criminal trial: *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 54; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 95. As noted in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 605, we must accept that the “purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent”. The stakes are high at a criminal trial, where the accused stands at risk of losing their liberty through imprisonment, having a criminal record imposed on them and becoming subject to the stigma that goes along with those consequences.
- [75] In contrast, a forfeiture proceeding does not carry the same risk. By saying that, I do not intend to minimize the serious implications that can flow from such a proceeding. Yet, at its very core, a s. 490(9) forfeiture proceeding is directed at returning seized items to their lawful owners once those items are no longer required for an investigation or court proceeding: *Backhouse*, at para. 112; *R. v. Floward Enterprises Ltd. (H. Williams and Co.)*, 2017 ONCA 448, 413 D.L.R. (4th) 645, at para. 31; *Hollaman*, at paras. 97-98.
- [76] The contrast between these types of proceedings, criminal trials and forfeiture proceedings, was pointed out by the Québec Court of Appeal in *Vellone*, at paras. 41 and 55, and I agree entirely. While *Vellone* is about a forfeiture proceeding under s. 16 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, much of the analysis applies equally to a forfeiture proceeding under s. 490(9) of the Criminal Code because both provisions provide a process for the disposition of property rather than the determination of an accused’s criminal liability.
- [77] In the context of the forfeiture proceeding, as explained by the trial judge, the s. 24(2) analysis looked very different as compared to the criminal trial. While the first two prongs of *Grant*, namely the seriousness of the Charter-infringing state conduct and its impact on the Charter-protected interests of the appellant, remained static, the same could not be said for the third criterion, that being society’s interest in the adjudication of the case on its merits, or for the balancing of the three criteria together: *Grant*, at para. 71.
- [78] This is so for three reasons.
- [79] First, the stakes of a s. 490(9) application are different. In a criminal trial, liberty is at stake. In a s. 490(9) application, property is at stake. Where liberty is at stake, the importance of the court dissociating itself from state misconduct and the impact of such misconduct on the accused can be heightened. As the Supreme Court observed in *Grant*, “while the public has a heightened interest in seeing a determination on the merits when the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high”: at para. 84. In a s. 490(9) hearing, the need for the court to dissociate itself from state misconduct must be evaluated in light of the absence of any penal stakes for an accused person. Given the appellant’s liberty is not at risk on the forfeiture application, the third *Grant* factor is assessed

differently.

- [80] Second, there is a procedural problem that arises when an applicant seeks exclusion under s. 24(2) of the very property (along with information about that property) that they are asking be returned to them. This is the relief the appellant sought below. If this relief had been granted and the seized property itself had been excluded from the forfeiture hearing, it would have been impossible for the trial judge to carry out the purpose of s. 490(9) and decide where the seized property should go. This would frustrate the entire purpose of s. 490 and must be part of the relevant circumstances considered under s. 24(2). By contrast, where evidence is excluded in a criminal trial, the truth-seeking function may be hampered and the Crown's case may be weakened, but the trial can still proceed.
- [81] Finally, seized property cannot stay in limbo forever. At the end of the day, it must either be returned to the person from whom it was seized, given to another lawful owner, or forfeited to the Crown. As the trial judge noted, there is a “practical reality” that evidence has been seized and is held by the state. Unlike in a criminal trial, where the question is whether the evidence will be admitted or not, the question on a forfeiture application is what should become of the evidence. That question should not be left unresolved to infinity. Indeed, s. 490 contemplates that it will not sit forever. Doing nothing is not an option.

iv. Conclusion

- [82] These differences all affect the operation of the third Grant factor and the final balancing. They are part of the circumstances that must be considered in deciding whether admission of evidence will bring the administration of justice into disrepute. Therefore, the issue before the trial judge in the second s. 24(2) application was different from the issue before him at the first one. For this reason, the first criterion from Mahalingan – that the same question has previously been decided – is not met. Issue estoppel therefore did not preclude the trial judge from conducting a fresh s. 24(2) analysis and coming to a different conclusion.

C. The trial judge's fresh s. 24(2) analysis contains no errors [83] In the alternative, the appellant argues that even if the trial judge was not bound by his prior s. 24(2) ruling, the new s. 24(2) analysis in the forfeiture proceeding should have yielded the same result. He argues that the state's Charter-infringing conduct is fixed, and the fact that he had already received some benefit from s. 24(2) in the criminal proceeding is irrelevant.

- [84] The Crown responds that a criminal trial and a forfeiture proceeding have different purposes. At a forfeiture hearing, there are no criminal consequences and no potential loss of liberty. The trial judge was therefore not bound to reach the same conclusion on s. 24(2) at the forfeiture hearing as he had at the trial.
- [85] For the reasons explained above, I agree with the Crown that a s. 24(2) analysis in the context of a forfeiture proceeding is different from a s. 24(2) analysis in the context of a criminal trial. Specifically, the third factor and the final balancing operate differently in the

context of a forfeiture proceeding where the liberty of an accused person is not at stake and given the practical reality that some decision must be made about what to do with the seized items. Therefore, I see no error in the trial judge's s. 24(2) analysis in the forfeiture proceeding.

- [86] Absent any error in principle, any palpable and overriding factual error, or an unreasonable determination, the trial judge's decision not to exclude the evidence is entitled to deference: *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 64; *Grant*, at para. 86. I agree with the trial judge that the admission of the cash and its derivative evidence in the forfeiture proceeding would not bring the administration of justice into disrepute. In relation to the Rubbermaid container alone, there was over \$1.2 million buried under a dirt garage floor. In my view, and as the trial judge explained, the third *Grant* criterion, as applied in the context of a forfeiture hearing where well over one million dollars was found in circumstances that any reasonable person would question, pushed very strongly against exclusion. I would defer to the trial judge on this point and simply observe that, in fact and on balance, excluding the cash from the forfeiture proceeding could have brought the administration of justice into disrepute.

IV. Disposition [87] For these reasons I would dismiss the appeal.

Released: "November 17, 2025 J.M.F."

"Fairburn A.C.J.O."

"I agree. B.W. Miller J.A."

"I agree. J. Dawe J.A."

- [1] As Fitzpatrick J. presided over the trial and the forfeiture hearing, I refer to him as the trial judge throughout these reasons.
- [2] The Crown's application for forfeiture under s. 490(9) was brought pursuant to s. 490(6).
- [3] The appellant's application to return property under s. 490(9) was brought pursuant to s. 490(7).
- [4] As the s. 490 statutory scheme governs the forfeiture of all property seized pursuant to s. 487 search warrants, the narrowing of the application to the cash seized pursuant to s. 487 meant that the s. 462.43 application, which pertains to the "disposal of property seized or dealt with under special warrants", was rendered moot. Accordingly, despite the reference to both ss. 462.43 and 490(9) in the reasons on the forfeiture application, s. 490 of the Criminal Code exclusively governed.
- [5] This must also be done where exigent circumstances pursuant to s. 487.11 are operative or things in plain view are seized pursuant to s. 489, "or otherwise in the execution of duties under [the Criminal Code] or any other Act of Parliament".

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- [6] Although s. 489.1(1)(b) also allows the actual thing to be brought before a justice, for all intents and purposes, that is rarely done. The fact is that a report is made to the justice that includes reference to the thing(s) seized.
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