

CANADA / JUDGMENT

R. v. Brown

2019 BCCA 346

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 346 R. v. Brown

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Brown,

2019 BCCA 346

Date: 20191003

Dockets: CA45668; CA45669

Between:

Regina

Respondent

And

Wayne Douglas Brown

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.4(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of any information that could identify the complainant or a witness. This publication ban applies indefinitely unless otherwise ordered.

Section 16(4) Sex Offender Information and Registration Act: This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

On appeal from: Orders of the Provincial Court of British Columbia, dated June 11, 2018 (conviction) and October 4, 2018 (sentence) (R. v. Brown, Vernon Dockets 51340-2-C and 52194-1).

Oral Reasons for Judgment

Counsel for the Appellant:

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Place and Date of Hearing:

Kamloops, British Columbia

October 2, 2019

Place and Date of Judgment:

Kamloops, British Columbia

October 3, 2019

Summary:

Mr. Brown appeals his convictions for various internet-based sexual offences involving minors in the Philippines. He specifically challenges the validity of the search warrant used to seize his personal devices and the admission of that evidence pursuant to s. 24(2) of the Charter. Held: Appeal dismissed. In view of the totality of the information, the trial judge did not err in finding that the warrant was validly issued. Nor did she err in applying the Grant factors and admitting the evidence.

[1] BENNETT J.A.: On September 21, 2016, the Vernon RCMP received a report from the British Columbia Integrated Child Exploitation Unit (originally prepared by the National Centre for Missing and Exploited Children), documenting information received from Facebook that a user, Wayne Douglas, was engaged in sexually explicit chats on the Internet with teenaged girls from the Philippines. As a result of social media and computer-related inquiries, police concluded that Wayne Douglas was the appellant, Wayne Douglas Brown.

[2] Mr. Brown was convicted on two informations (51340-2-C and 52194-1) of three counts of what is colloquially known as child luring, one count of possession of child pornography, one count of arranging to have illicit sexual activity with a minor, and one count of counselling a person to perform illegal sexual activities. He appeals those convictions.

[3] For the reasons that follow, I would dismiss the appeal.

Procedural Background

[4] The police conducted a search of Mr. Brown's residence and seized a laptop computer. Three charges were laid in information 51340-2-C: two counts of child luring and one count of possession of child pornography. An additional search of the seized computer produced more evidence and further charges were laid in information 52194-1. The trial judge considered the Charter challenges raised during the trial on information 51340-2-C, and ruled the evidence admissible. Admissions of fact were prepared, and the trial judge convicted on those counts. By agreement, the admissibility ruling in 51340-2-C was applied at the trial of information 52194-1, preserving a right of appeal, and convictions were entered on three of the counts in that information. Both trials were before the same judge. The judge sentenced Mr. Brown on all counts during one sentencing hearing. The appeals of all convictions from both trials were heard together.

[5] The facts underlying the convictions are set out in the reasons for sentencing dated October 4, 2018 at paras. 4-30:

[4] Wayne Brown employed the social media platform Facebook Messenger to make contact with AB, a 16 year old girl in the Philippines and engaged in sexually explicit conversations with her. At first the offender asked AB to send him naked pictures of herself. She complied by sending him pictures exposing her breasts, this was captured on Facebook Messenger. In response Wayne Brown told her he "wants to suck them" and he wants to have sex with her when he travels to the Philippines in October 2016. It is admitted that Wayne Brown had connections to the Philippines and travelled there regularly. Wayne Brown also sent her photos of his penis.

Count 2 - between 9th July 2016 and 27th July 2016 did communicate with IM a person under 16 years, for the purpose of facilitating the commission of an offence, contrary to section 172.1(1)(a) ("internet luring of IM").

[5] Wayne Brown used the social media platform Facebook Messenger to make contact with IM, a 14 year old girl in the Philippines and engaged in sexually explicit conversation with her. He asked to "see her little titties." Next Wayne Brown asked her to send him naked pictures of herself and to appear naked on camera for him. He offered to send her money for a phone to facilitate her doing so. No evidence was tendered that IM actually sent any pictures to him, however the offence of luring is made out by the preparatory communications.

- [6] Wayne Brown portrayed himself as being in a romantic relationship with IM, he told her he loved her. Wayne Brown told IM that he was happy to have a 14 year old girlfriend, and planned to visit her in the Philippines in October. Wayne Brown told IM he loved her because she is "open and honest, and allows him to talk about sex, and will allow him to fuck her when he comes there". Wayne Brown asks IM whether her parents will allow her to stay with him when he visits.
- [7] This offence is aggravated because he was planning on going to the Philippines and visiting IM while there. Evidence established that Wayne Brown travelled to the Philippines regularly, had a house and a wife there. Crown submitted and I accept these communications constitute preparation for sexual tourism.

Count 3 - between 1st July 2016 and 27th September 2016 did possess child pornography, contrary to section 163.1(4) (possession of child porn)

- [8] It was admitted that Wayne Brown possessed all of the material filed in exhibit 3 and that all the chat logs and images fit the definition of child pornography. Exhibit 3 is a 3 inch thick binder containing more than 400 pages of internet chat logs, Skype chat logs and Facebook messages between Wayne Brown and various young victims. It was also admitted that all of the materials and images contained on a flash drive filed as exhibit 2 in this matter met the definition of child pornography and were possessed by Wayne Brown within the date range although some of the materials were created prior to that date range. The images on the flash drive were essentially homemade selfies of teenage Filipina girls (under 18 years old) showing their breasts or vaginas. None of the written works or images contained any overt violence although these offences are inherently violent when one considers the young age of the victims and their inability to consent.
- [9] The written works were not only possessed by but were actually mostly authored by Wayne Brown. These chats logs are all sexually explicit internet conversations wherein Wayne Brown convinced the young victims to send him naked pictures of themselves, offered to send them pictures of his penis, urged the victims to sexually touch themselves, their minor friends, their younger siblings or their mothers; in some cases Wayne Brown urged the guardians to sexually touch or sexually interfere with their daughters, all of which was done for the promise of financial payment by Wayne Brown.
- [10] In the chat logs Wayne Brown directed the specifics of exactly what he wanted the victims to do and directed them how to do it while he watched, or listened. He offered to pay them for compliance but refused to pay until he was satisfied that they delivered or performed to his satisfaction.
- [11] In addition to the victims IM, AB, CC, JA, AT which are identified in the specific counts, the binder of materials also revealed several other additional young female Filipina victims.

- [12] The universal theme in all the chats was that Wayne Brown offered to send money to poor Filipina teenagers or their caregivers or in exchange for the girls providing naked photos or engaging in sex acts. Many of these victims expressed that they needed the money for food, school registration, school uniforms or medicine.
- [13] As Wayne Brown very crudely put it in one conversation with an unidentified teenager he was trying to entice, he offered her "Money for Pussy?" That particular unidentified teenager declined Wayne Brown's offer.
- [14] The Crown filed within exhibit 3 a summary of 28 Western Union money transfers made between June 2012 and September 2016 by Wayne Brown to the victims, caregivers or relatives of the victims as payment for their compliance with his requests. Crown Counsel submitted that the sums paid by Wayne Brown to the victims were paltry by Canadian standards but would represent significant sums of money in the hands of poor victims located in a third world country like the Philippines. This characterization was unchallenged by defence and I accept it.
- [15] The full chat logs are all referred to in exhibit 3 in graphic and disturbing detail. The chat logs are more than 400 pages long and the chats spanned the years 2012 to 2016. I will not repeat all the details, however I will refer to a sample of the chat logs with one victim, ES, in order to succinctly illustrate the nature and tone of the chats:

"Honey I am not sending money until I get naked photos and hear from you."

ES apparently complies and sent the requested pictures, since Wayne Brown comments on them approvingly.

Wayne Brown then asks ES to masturbate with her sister, offering to send money if she does. Wayne Brown instructs ES that if her sister is unwilling she should find another young girl to do it with.

"I had a 16 year old who masturbated with three girls for me...I didn't even give money to the other girls, only her"

" ... But you are my gf now hun... I don't chat her any more but I can go back to her if you don't please me"

"Try to find a poor girl who doesn't need much money, one that like sex, I will give her a little money if she masturbate you."

52194-1

count 4 - from 3rd March 2015 to 2nd June 2016, did by means of telecommunication make an arrangement with a person to commit a sexual offence against a child under 16 years contrary to section 172.2(1)(b), (making an arrangement with KA re daughter JA).

- [16] Wayne Brown engaged in sexually explicit conversation via Skype with KA, who is the mother of the young victim JA. Wayne Brown offered to pay KA if she will arrange for him to see JA's "young tits". The mother tells Wayne Brown she needs money for food and offers to the offender that she will perform lewd acts instead, sacrificing her own dignity in place of her daughter's. The mother offers that she will masturbate on camera for him instead of her daughter doing it. Wayne Brown refuses KA's offer insisting that he wants to see "young tits".
- [17] Wayne Brown goes further by giving KA grooming advice imploring KA to masturbate in front of her daughter and to teach the daughter how to masturbate. Wayne Brown also asks KA for JA and her 11 year old sister to masturbate each other for him on video camera. KA repeatedly asks Wayne Brown for money for food. Wayne Brown offers to pay to for seeing the mother and daughter naked on camera performing sex acts on each other.
- [18] Wayne Brown goes even further and asks KA if he can have sex with JA when he comes to the Philippines. She agrees. However Wayne Brown insists that JA must stay a virgin for him.
- [19] When KA expresses concern for her daughter and concern about going to jail Wayne Brown reassures her there is no reason to worry because he will not post it online and no one will find out. Wayne Brown's attitude is clearly callous and arrogant.
- [20] As the chat logs bear out, KA eventually accedes to Wayne Brown's repeated requests and does indeed bring her daughter JA online in front of Wayne Brown to perform for Wayne Brown. It is noteworthy that Wayne Brown discusses the payment for these sex acts with KA in front of JA, and the sum agreed to amounts to approximately \$37 CDN I am told. Once JA and KA are online together Wayne Brown takes over and explicitly directs JA to undress, to show him her breasts, to open her legs, to show her vagina, insisting that he needs a clearer view of JA's intimate regions and directing her precisely how to do it. Wayne Brown also requests JA touch her mother while he watches.
- [21] Afterward Wayne Brown wants to know whether the daughter enjoyed it and requests future similar episodes. When KA asks for more money Wayne Brown responds by telling her that he had to drop other girls because they were getting too greedy.
- [22] Wayne Brown also asks KA to find him other young girls who would be willing to watch him masturbate and ejaculate online. He asks KA to find other young virgins who are willing to perform for him online.
- [23] I find that the facts of this offence are highly aggravated because Wayne Brown offends against young vulnerable victims in the third world by preying upon the financial desperation of their mother. These offences illustrate that Wayne Brown is not simply observing passively - he initiates and specifically directs the lewd acts he wants the mother to do to the daughter and vice versa. He is cavalier, in his attitude and callous.

Count 6 - from the 20th of September to 26th of September 2016, did by means of telecommunication, communicate with person under 18 (CC) for the purpose of facilitating commission of a sexual offence with respect to that person contrary to section 172.1(1)(a) (internet luring of CC 16 year old).

[24] Wayne Brown contacts 16 year old CC another Filipina teenager by Facebook Messenger. CC refers to Wayne Brown as Daddy throughout the chats. Wayne Brown asks CC to masturbate for him in exchange for money. The chat logs reveal multiple sessions of online masturbation by CC or online mutual masturbation. Wayne Brown tells her that wants her to perform oral sex on him and that he cannot wait until he comes to the Philippines so that he can have sex with her; he wants her to stay a virgin for him until he gets there. He describes that the first time she has sex it will hurt, but that this will prove that she is a virgin. She has an upcoming birthday and she asks him for money for a dress but she also asks him for money for her parents and for money for medicine for her sister who is in the hospital. He asks her to send naked pictures to him, which she does but he directs her to take more explicit pictures.

[25] Wayne Brown tells CC that several of his friends, all in their 60's are coming over to visit him. Wayne Brown wants to show them a picture of his new girlfriend. He specifically directs what she is to wear and how she is to pose in the pictures so that it is clear she is masturbating herself. Finally he approves the pictures she has sent and asks her if he can show her pictures to his friends. CC responds that it's up to you. When CC asks him if his friends also have 16 year old girlfriends too he responds by saying that "that doesn't work in Canada", illustrating clearly he knows that what he is doing is wrong.

count 7 - from the 1st July 2012 to the 21st May 2015, did unlawfully counsel HT to commit the indictable offences of sexual interference and invitation to sexual touching which offence was committed contrary to section 464 (counselling HT to commit offences against daughter AT).

[26] Wayne Brown befriended HT, who is AT's mother in 2012 and began counselling HT to commit offences against AT and between them. At first he seems to counsel HT to masturbate her daughter AT but then at one point seems to change his mind.

[27] Although some of the text messages are somewhat disjointed it appears that at times is talking to HT and at times is talking to AT. At times Wayne Brown seems to engage in money for sex acts with the mother and then turns to the daughter, asking her to masturbate.

[28] In 2015 Wayne Brown continues the discussion with AT directly. Wayne Brown asks to see her breasts and explicitly directs her to touch herself. He tells AT "I want to see inside your pussy honey". The victim responds "u see it daddy". Wayne Brown responds by saying "fuck it honey, and "I want to fuck your pussy honey".

[29] Wayne Brown also urges AT to bring her younger sister into the offending.

Wayne Brown: In four years she will be masturbating too

AT: My little sister not do that yet

Wayne Brown: when she is 12 maybe do it. .. like you did

- [30] Wayne Brown tells AT he will give her money for a phone but the phone must have video capacity, not just still pictures, because he wants to see videos. AT asks Wayne Brown for money for food and medicine in exchange for explicit images or watching her masturbate online.
- [6] The issues on appeal relate solely to the Charter issues, specifically the validity of the warrant to search Mr. Brown's residence and the admission of evidence pursuant to s. 24(2) of the Charter.

Facts in Relation to the Charter Issues

- [7] On September 27, 2016, four police officers attended Mr. Brown's home located at 2700 24th Street in Vernon, B.C. (the "Residence"). They first spoke to Mr. Brown's roommate, Lana Woods, and his landlord, Art Robatzek. They learned that there was one other roommate, "Wes", living in the Residence. The three each had their own locking bedroom while the common areas were shared. The officers also learned that Mr. Brown had a computer in his room with internet access. They had not connected the IP address to the Residence.
- [8] Lana Woods said that she was the only one home, and that Mr. Brown was probably at the A&W meeting friends. Mr. Brown was about 67 years old at the time.
- [9] All of the officers went to the A&W to execute the arrest of Mr. Brown. No officers stayed at the Residence.
- [10] After the arrest, two officers re-attended the Residence. Lana Woods let the officers in and they subsequently conducted a warrantless sweep search, which included entering Mr. Brown's unlocked bedroom. They identified a tablet and a computer but did not seize them. The officers claimed that they conducted the "sweep search" to ensure that evidence was not being destroyed and for officer safety.
- [11] Despite the fact that they had left the Residence unguarded while they arrested Mr. Brown, the officers were of the view that Ms. Woods could have been lying about whether anyone else was in the premises, friends of Mr. Brown could have gone to the Residence after his arrest, or Wes or someone else could have been in the house or returned. Those factors, from their perspective, put the evidence at risk.
- [12] The sweep was also conducted to ensure no one was in the Residence as they planned to have officers stationed there while a search warrant was being prepared. Accordingly, in their view, it was justified on the basis of "officer safety".

- [13] The police ultimately obtained a search warrant for the Residence and seized, among other things, electronic devices containing sexually explicit material. This material led to the charges against Mr. Brown.

Voir Dire Rulings

- [14] The trial judge concluded that the warrantless sweep search was unreasonable on the basis that although the officers had subjective grounds to perform the search, the grounds were not supported on an objective basis.
- [15] Mr. Brown conceded that there was no evidence seized as a result of the search, and that the information gained from the search was not relied on to issue the search warrant.
- [16] The search warrant was challenged but the trial judge concluded that it was validly issued.
- [17] The trial judge further concluded that despite the warrantless sweep search, the evidence obtained as a result of the execution of the search warrant was admissible pursuant to s. 24(2) of the Charter.

Issues on Appeal

- [18] Mr. Brown raises two issues on appeal. First, he submits that there was no basis to issue the search warrant as reasonable grounds did not exist to conclude that evidence would be found at the Residence. Second, he submits that the evidence should have been excluded pursuant to s. 24(2) of the Charter.

Discussion

Validity of the search warrant

- [19] Mr. Brown submits that there was insufficient evidence to believe that a search of his Residence would reveal evidence of the offence.
- [20] When a trial judge reviews the validity of a search warrant, the test is whether the warrant could have issued, not whether the trial judge would have issued it. The totality of the information is assessed to determine if there are reasonable grounds; it is not examined on a piecemeal basis. As noted in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 167, "reasonable grounds is the point at which credibly-based probability replaces suspicion". See also *R. v. Liu*, 2014 BCCA 166 at para. 37.
- [21] As noted in *R. v. Vickerson*, 2018 BCCA 39 at para. 65:
- [65] The test on the review of the issuance of an ITO is well established: The question for the reviewing judge is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge": *R. v. Vu*, 2013 SCC 60 at para. 16

- [22] The trial judge referred to the test that she was required to apply when reviewing an ITO and assessing the validity of the search warrant.
- [23] In this case, Mr. Brown concedes that there were reasonable grounds to believe that he had committed an offence.
- [24] The ITO contained the following information linking Mr. Brown to the offences: he lived at 2700 24th Street, Vernon, B.C. with shared access to the home and a private bedroom in the northwest corner of the house; he was recently in Calgary and IP addresses used in the offences had been located in Calgary and Vernon; he owned a laptop and it was located in his bedroom; he had access to Wi-Fi in his bedroom; he was married to a 22-year-old woman in the Philippines and spent half a year in that country; and he was planning on travelling to the Philippines soon for the purpose of sexually contacting a child.
- [25] Mr. Brown argues that the presence of a laptop is a neutral factor as many people own laptops. He also submits that the IP address was not directly connected to his residential address. The difficulty with this submission is that the evidence in the ITO is not considered on a piece by piece basis, but rather in its totality.
- [26] The trial judge's reasoning for upholding the validity of the warrant is found in her reasons dated January 11, 2018, at paras. 6-14:
- [6] These are important distinctions because in an internet luring and child pornography case, one of this nature, the factual context is that it was -- the offences are usually committed via the internet and behind closed doors under the cloud of secrecy.
- [7] Getting back to the reasonable grounds test just to review quickly. Reasonable grounds, there needs to be reasonable grounds that an offence was committed. And that was certainly established in this case. That the location to be searched for is a place which clearly it was in this case. The next part is that the items sought will provide evidence of the commission of the offence. I note that the phrase will provide evidence of the commission of the offence is quite broadly worded. I pause to note that in terms of items to be searched for, the police are not limited to the actual subject matter of the offence. In this particular case the police would not and should not have been limited to seizing the actual images and the actual data solely, but as it is quite logical and straightforward that they should also be entitled, if they can pass the test, to seize other evidence that would substantiate the other elements of the offence. In this particular case, the items to be searched for --I will try and summarize: Computers, data, storage devices, images, chat logs, and then documents to establish proof of residency, internet, and travel issues. The question is was it reasonable to expect to find these items in this particular place? In other words, was it reasonable to seek to find these items in the accused's residence and that -- and that these items would provide evidence in relation to the offences?

- [8] I find in all of the circumstances that the issuing justice could indeed have answered both of these questions in the affirmative. The reasons for that conclusion are as follows: This was a digital investigation. The offences occurred via computer and via the internet. Data is stored electronically and even if the data is deleted, records of the use of the computer and the metadata remain. The victims in this case -- the two named victims were in the Philippines. The investigation showed, in summary form, the accused enticing two victims in the Philippines, seeking images from them and then going on to encourage the commission of a sexual assault in the future. There were plans made to visit both the victims in the Philippines in October. I note that this matched the alleged travel pattern of the accused. Of course, we know from the evidence heard earlier that the young victim, A.B., actually sent images and that the young victim, I.M., did not send images.
- [9] The offensive activity was conducted using two Facebook accounts and two Facebook user IDs, both of which were associated back to the accused. There were four IP addresses involved; two of those in Calgary and two of them were in Vernon. The accused had ties to both Calgary and Vernon. The accused spent six months -- the accused's pattern was to spend six months in Vernon and six months in the Philippines. The accused had a 22 year old wife in the Philippines. In the chat logs there was reference to the wife being in the Philippines.
- [10] The accused recently visited family in Calgary. When the accused was arrested and his B.C. ID identification was found it confirmed his address on his B.C. ID to be that of 2700 - 24th Avenue in Vernon. The accused was arrested and when he was arrested he was in possession of a phone, but he was not in possession of a laptop or other computer. As of the date of the arrest, it was confirmed by his roommate that the accused had a private bedroom in that residence and that private bedroom had internet access, both wired and wireless. It was confirmed on the date of the arrest and prior to the search warrant that the accused had a laptop and that the accused uses it, in the present tense, to talk to his young wife in the Philippines. The offences that are alleged to have occurred, occurred using a computer. I take judicial notice of the fact that a laptop is a mobile piece of equipment and that a laptop is usually internet accessible.
- [11] In all of the circumstances I conclude that it was entirely reasonable for the inference to be drawn that computers, storage devices and the like would be found in the accused's residence and that those items would afford evidence of the commission of the offence.
- [12] With respect to the accused's argument that because the police did not know the IP address -- the particular location of the IP address where the offence occurred that this led to insufficient grounds. I agree with the Crown's characterization that this confuses the issue. It is not necessary for the offences to have been committed from this location, from the accused's residence. All that is required is the reasonableness of the belief that evidence of the offences would be found at the accused's residence.
- [13] This was not a fishing expedition. The standard of credibly-based probability is met.

[14] Again, in summary, the police knew the offences were committed by computer, they knew the accused had a laptop in the residence, they knew he had internet in the residence, they knew that he used the computer regularly to talk to his wife in the Philippines. The inference that was drawn that the laptop would be found where the accused lived was entirely reasonable. I pause to note that in the circumstances even less is required. It just needs to be a possibility. The test that I have to apply is could the justice have drawn the conclusion and in my evaluation that standard is met. The authorizing justice could very well have drawn that conclusion, therefore, in all of the circumstances I conclude that there was no s. 8 breach and the warrant is valid.

[Emphasis in original.]

[27] In my view, the trial judge's conclusion is correct in law and completely supported by the evidence.

Section 24(2)

[28] Mr. Brown sought to exclude all of the evidence seized from the execution of the search warrant as a result of the warrantless sweep search of the Residence prior to obtaining the search warrant. The evidence included all of the evidence obtained from the laptop and tablet as well as the physical documents and materials obtained from the Residence.

[29] The trial judge considered whether there was a nexus between the breach and the seizure that would engage the *R. v. Grant*, 2009 SCC 32 analysis under s. 24(2) of the Charter. She concluded that while there was no causal nexus, when considering the entire chain of events, there was indeed a temporal and contextual nexus. She accordingly concluded that there was a sufficient nexus between the sweep search and the evidence to engage the *Grant* analysis under s. 24(2) of the Charter.

[30] Applying the framework in *Grant*, the trial judge concluded that the search was at a low to moderate level of seriousness as she found that the police had subjective grounds for the search, there was little impact on Mr. Brown, and society's interest in adjudicating the offences on the merits was high.

[31] A trial judge's weighing of these factors attracts a deferential standard, as noted in *Grant*:

[85] To review, the three lines of inquiry identified above -- the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and the societal interest in an adjudication on the merits -- reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the reputation of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by Charter breach would bring the administration of justice into disrepute.

- [86] In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the Stillman self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.
- [127] The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.
- [Emphasis added.]
- [32] Similarly, a trial judge's findings of fact and inferences of fact invite considerable deference. As stated by Madam Justice D. Smith in *R. v. Storry*, 2018 BCCA 483 at para. 47:
- [47] The standard of review of a trial judge's findings and inferences of fact is one of considerable deference. Unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable, and sufficiently material to have affected the result, this Court may not intervene. Stated otherwise, absent palpable and overriding error, findings and inferences of fact are to be accorded deference on appeal: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 4 and 6; and *R. v. Fan*, 2017 BCCA 99 at para. 47.
- [33] Mr. Brown says the trial judge erred in concluding that the breach was not a serious breach and that it had little impact on him.
- [34] The first question turns on whether the trial judge's conclusion that the police had subjective grounds to conduct the search was reasonable or supported by the evidence or whether she committed a palpable and overriding error in making that finding.
- [35] Mr. Brown argues that Constable Scott routinely conducted sweep searches, and that his explanation that the search was undertaken to preserve evidence and for officer safety was not believable. He submits that the trial judge's conclusion is unreasonable. While Constable Scott did not testify that he routinely conducted sweep searches, Mr. Brown submits that this is the inference that should be drawn from his evidence. In particular, he points to the following passages in the transcript:

Q Has there been a time in your experience where a person was arrested, and you knew that a search warrant was going to be applied after, but you decided not to clear the residence for security?

A In that type of situation, it may be where the officers had to - or were involved in the investigation and were in the location, anyways, prior to the application of the search warrant or before they knew that that was going to be applied for, and then backed out. So they are already aware that there is no dangers inside. That could possibly be a situation where they didn't have to go in, explicitly, for those officer safety purposes. They were there, anyways, concluding an investigation. Or if it's an area where you just -- you can see that there's -- there is no risk, where it's an open area on a property, or something to that effect, where you can visually identify there is no officer safety risk. And I am -- speaking hypothetically in this case, Your Honour.

Q In your mind, at that time, was there any test that you had to meet before you were satisfied that you had the authority to do the clearance search?

A The fact that we didn't know what the risk was in the house, in terms of it's a large, five-bedroom house, multiple storeys, with a basement. We don't know how many other people are in that house with -- with Ms. Wood or behind Mr. Brown's door, or whether he resided with anybody. Just the -- the list of unknowns. I would want to make sure for myself that we know there is no potential for any risk there to our officers outside.

[Emphasis added]

[36] The trial judge reasoned as follows on March 13, 2018:

[16] In the present case the seriousness of the breach is attenuated by several factors. The police already had the grounds to obtain the search warrant and were in the process of working on drafting it. The police officers subjectively believed, although their subjective belief was not objectively reasonable, they had exigent circumstances which would have justified the entry. The police conduct therefore did not show a wilful disregard for the accused rights. By contrast the evidence established that the police action in sweeping the residence was, at least subjectively, motivated by the desire to ensure no persons were inside the residence that could destroy evidence or harm the police who would be waiting outside until the search warrant arrived.

...

[18] When the officers entered, they cleared the residence room by room. They acted promptly, and the police testified that they only looked in places which would be large enough to hide persons. They did not search for evidence of the offences and did not seize anything. The accused was already arrested so he was not directly or personally impacted by the entry.

[19] Defence argued that the police were disingenuous in their motives because they reported back to Cst. Lecky who was drafting the ITO that during the sweep they had confirmed the laptop was in the accused's room. However the Crown is quite correct that the police were

obliged to have disclosed this information to Cst. Lecky in order for her to make full fair and frank disclosure in the ITO she was in the process of drafting. Defence suggested that Cst. Scott made it appear that sweep searches were routine, however this is a mischaracterization of his evidence. Cst. Scott's evidence was that he was concerned about both officer safety and the destruction of evidence in this case and there were a lot of unknown factors in relation to this particular residence.

...

- [21] In all the circumstances of the present case, I conclude that the breach was at the low to moderate level on the seriousness continuum.
- [37] In addition, her analysis in concluding that there were subjective grounds in relation to whether the warrantless search was reasonable also sheds light on her conclusion found in her reasons for judgment on November 29, 2017 at paras. 40-42:
- [40] When he was arrested, Mr. Brown was not found carrying a laptop. Following the arrest of the accused, two of the police officers drove immediately back to the residence in order to secure the residence. The police officers expressed their subjective concern that they wanted to prevent the destruction of evidence and they also expressed some concern of officer safety pending the arrival of the warrant.
- [41] In terms of preventing the destruction of evidence, the witnesses illustrated that the accused was arrested in a public setting outside the A&W basically in plain view of members of the public and in plain view of some of his associates who he had been with having coffee inside the restaurant. Police believed there was a risk that someone could have seen him being arrested or learned that he was arrested and either destroyed the evidence themselves or somehow relayed a message to a party who may be inside the residence in order to encourage them to destroy evidence inside the residence.
- [42] With respect to the physical layout of the residence, the police had some concerns about officer safety. They did not know for certain whether anyone else was inside the residence and they testified that, in general terms, they always worry whether someone inside the residence might have a weapon and might intend to harm police officers who would need to be standing watch outside to await the arrival of the search warrant that had not yet been applied for.
- [38] In my view, the conclusion and inferences drawn by the trial judge are amply supported by the evidence and, as such, there is no reasonable basis upon which this Court can interfere. I would not interfere with her conclusion that the breach was at a low to moderate level of seriousness.

- [39] Mr. Brown also submits that the judge erred in concluding that the impact on his Charter protected interests was fleeting in nature. He says that the trial judge failed to give sufficient weight to the fact that his home was being invaded by the police without a warrant. He references *R. v. Paterson*, 2017 SCC 15 at para. 46 to emphasize his point:
- [46] ... The presumptive unreasonableness of warrantless searches, and the high privacy interest attaching to a person's residence have long been fundamental to our understanding of the proper relationship between citizen and state. And, longstanding judgments of this Court -- *Grant* 1993, *Silveira* and *Feeney* -- have, in considering the exigency of circumstances prompting warrantless entry, required the Crown to show urgency, particularly in the context of the search of a residence. As the Court observed in *Silveira*, at para. 140, "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house.'" Similarly, at para. 41, *La Forest J.* (in dissent, but not on this point) reiterated the high value which the law places upon the security of a home from state intrusion. It is, he said, a "bulwark for the protection of the individual against the state [which] affords the individual a measure of privacy and tranquillity against the overwhelming power of the state".
- [40] In *Grant*, the Court summarized this aspect of the framework at paras. 76-78:
- [76] This inquiry focusses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.
- [77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the Charter include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) -- all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.
- [78] Similarly, an 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.

- [41] The trial judge was alive to the high level of privacy expected in a person's home (Reasons for Judgment dated March 13, 2018 at para. 15) and stated that the warrantless search was presumptively a serious breach. She set out her findings of fact and analysis at paras. 22-23:
- [22] In evaluating the extent to which the breach undermined the accused's Charter rights, I consider the following facts are relevant. The area searched was the accused's residence however the residence was a rooming house which meant that several people shared the common area and the accused had a private lockable bedroom, but which was unlocked at the time of police entry. The accused's expectation of privacy was somewhat reduced in the common areas of the rooming house, and arguably slightly reduced in his own bedroom since it was unlocked. The police already knew based on witness interviews conducted prior to the entry that they could expect to find the electronic devices in the accused's room.
- [23] The search was not as intrusive as a pat down search, personal search, a bodily substances search or a strip search. The accused was not present at the time of entry so there was no direct interference with his liberty. The sweep search was conducted fairly promptly and was limited to searching for persons, not search or seizure of evidence. I conclude therefore that the breach was somewhat fleeting in nature.
- [42] Her findings correctly apply the reasoning in Grant. When one considers that the search, as found by the judge, was perfunctory, quick, non-intrusive and lacked interference with human dignity -- all of which is supported by the evidence -- it cannot be said that she erred in her conclusion on this factor.
- [43] In summary, I conclude that the trial judge did not err in finding that the search warrant was valid. Nor did she err in her analysis of the Grant factors and admitting the evidence.
- [44] Therefore, I would dismiss the appeal.
- [45] HARRIS J.A.: I agree.
- [46] GOEPEL J.A.: I agree.
- [47] BENNETT J.A.: The appeal is dismissed.

"The Honourable Madam Justice Bennett"

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