

CANADA / JUDGMENT

R. v. Edwardsen

2019 BCCA 259

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 259 R. v. Edwardsen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Edwardsen,

2019 BCCA 259

Date: 20190716

Docket: CA45123

Between:

Regina

Respondent

And

David Harry Edwardsen

Appellant

Before:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Butler

On appeal from: orders of the Supreme Court of British Columbia, dated October 2, 2017; June 1, 2016; and September 6, 2017 (R. v. Edwardsen, 2017 BCSC 2237; 2016 BCSC 2721; and 2017 BCSC 1578, Terrace Docket 30870-2).

Counsel for the Appellant:

T. Arbogast

K. Kirkpatrick (Articled Student)

Counsel for the Respondent:

C.W. Greenwood

Place and Date of Hearing:

Vancouver, British Columbia

June 19, 2019

Place and Date of Judgment:

Vancouver, British Columbia

July 16, 2019

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Butler

Summary:

Mr. Edwardsen appeals his conviction for various firearms and drug offences on the basis that his waiver of his right to be present for the tendering of certain evidence on a voir dire did not extend to the tendering of that evidence directly at the trial proper. Accordingly, he submits his trial should be declared a nullity. He also appeals on the basis that the judge erred in his exercise of discretion regarding two matters at a Vukelich hearing. Held: appeal dismissed. Mr. Edwardsen waived his right to be present for the tendering of Constable Fulcher's evidence at trial. While the parties expected the admissibility of that evidence might be tested in a voir dire, they always contemplated that a voir dire might not be necessary. The judge did not commit an error in principle in his exercise of judicial discretion in determining whether to hold a voir dire. The judge exercised his discretion judicially in very difficult circumstances.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This is a conviction appeal raising two discrete issues as grounds of appeal. First, Mr. Edwardsen submits his trial should be declared a nullity because the evidence of an exhibits officer was tendered when he was absent for part of the trial "proper". He argues he waived his right to be present for the tendering of that evidence only during a voir dire determining

its admissibility and not during the trial proper. Second, he takes issue with two aspects of a Vukelich hearing alleging the judge erred (a) in respect of Mr. Edwardsen's standing to challenge the seizure of evidence at a property containing a marihuana grow operation with which he was associated; and (b) in the way the judge approached an issue to do with the use of a surveillance camera outside Mr. Edwardsen's residence. As a result, Mr. Edwardsen argues the judge erred in refusing to hold a voir dire to determine the admissibility of evidence seized at the grow operation and from his residence. Mr. Edwardsen submits this Court should set aside his conviction and order a new trial.

- [2] Mr. Edwardsen was charged on a 17-count indictment with a variety of drug and firearms offences arising from an undercover operation targeting him. The police seized drugs and firearms from three locations associated with Mr. Edwardsen: his residence at 604 Old Lakelse Lake Drive (the "Residence"), a property that contained a marihuana grow operation ("Plan 9106B"), and a shop Mr. Edwardsen rented at 4410 Bohler Road (the "Shop") (collectively referred to as the "three properties").
- [3] Over the course of a 14-month investigation, the police applied for and were granted 11 judicial authorizations. The police obtained five separate search warrants based on an original information to obtain ("ITO"), including warrants for each of the three properties.
- [4] Mr. Edwardsen filed multiple applications to challenge the warrants and the judge set aside time to hear each application. Mr. Edwardsen abandoned some applications, the judge ruled on others, and Mr. Edwardsen changed counsel twice during the trial, which resulted in significant delays.
- [5] Ultimately the trial on the merits led to convictions on 14 of 17 counts. Mr. Edwardsen was convicted of trafficking cocaine and marihuana as a result of sales to an undercover officer; possession of approximately 1.5 kilograms of cocaine and approximately 800 grams of marihuana for the purposes of trafficking in relation to drug exhibits seized from the Residence; firearms offences for illegal possession of firearms seized from the Residence, including two restricted firearms that were either loaded or found with readily accessible ammunition; production of marihuana and possession of marihuana in relation to the plant grow seized from Plan 9106B; and illegal possession of non-restricted firearms seized from the Shop. Mr. Edwardsen was acquitted of possessing two other firearms seized from the Shop and possessing a magazine with ammunition from one of the firearms.
- [6] I will refer to the history of the judicial authorizations and applications challenging them in more detail when considering the second ground of appeal.

Was the trial a nullity?

- [7] Mr. Edwardsen applied for and was granted permission to be absent from part of the trial. He contends that his waiver of his right to be present at trial was limited to a voir dire and to Constable Fulcher's, the exhibits officer, evidence tendered at that voir dire. He agrees though that his waiver extended to rolling the evidence over into trial if it was ruled

admissible. However, Cst. Fulcher's evidence was not ultimately tendered on the voir dire but was tendered at the trial proper after the judge ruled on its admissibility. Mr. Edwardsen says that receiving the evidence in this way went beyond the scope of his waiver; the evidence was received in his absence when he had a right to be present. He says that his then counsel's consent to receive that evidence at the trial proper was invalid because the consent was not his counsel's to give. He submits he did not waive his right to be present when that evidence was tendered and, accordingly, this Court should declare the trial a nullity.

- [8] The issue Mr. Edwardsen raises is whether his absence from the tendering of Cst. Fulcher's evidence at the trial proper went beyond the scope of his express waiver of his right to be present and, if so, whether his then counsel's consent to what occurred bound him. In my view, Mr. Edwardsen waived his right to be present for the tendering of Cst. Fulcher's evidence at trial. While the parties expected the admissibility of that evidence might be tested in a voir dire, they always contemplated that a voir dire might not be necessary and that, in any event, Cst. Fulcher's evidence would be given only once in the week of the anticipated voir dire.
- [9] Before turning to the circumstances giving rise to this issue, it is important to recognize certain principles that are not in dispute. First, the right of the accused to be present at trial is a fundamental right protected by s. 650 of the Criminal Code, R.S.C. 1985, c. C-46. Second, an accused can waive procedural rights for their benefit, as long as the waiver is informed, clear, and unequivocal: *R. v. Tran*, [1994] 2 S.C.R. 951 at 996-97. A person waiving a procedural right must be fully and properly informed of their rights in order for the waiver to be valid: *R. v. Bartle*, [1994] 3 S.C.R. 173 at 203-04. Third, a voir dire is part of the trial. For the purposes of s. 650 of the Code, there is no distinction between receiving evidence on a voir dire and receiving evidence at the trial proper. Mr. Edwardsen had the same right to be present for the evidence led on the voir dire as he had for any part of the trial.
- [10] Time was set aside in the week of May 31, 2016, for a week-long voluntariness voir dire. The day before the hearing started, defence counsel told the Crown that voluntariness would be admitted. On May 31, 2016, the judge asked how the parties would use the reserved court time. Defence counsel submitted that because of a prior ruling about a tracking warrant, approximately 20 further warrants were no longer in issue. What remained, on Mr. Edwardsen's instructions, was one issue relating to alleged "over-seizures" from the Residence. Counsel requested and was granted an adjournment to the following week to prepare and serve that application on the Crown. The parties agreed that if a voir dire was granted and ruled admissible, Cst. Fulcher's testimony on the voir dire would be admitted at trial without the need to repeat it.
- [11] The following statement by the Crown is material to what the parties contemplated at the time:

But, this is my understanding, is that Constable Fulcher's evidence will be led by the Crown as if it was -- I mean it will be within the voir dire, if the -- if the voir dire is granted, and the Crown will lead the evidence as if they were leading the evidence in the trial proper, such that Constable Fulcher will not have to return. And so the -- if the evidence is ruled admissible, that will form part of the trial proper. (T. Supp. at 446(43)-447(5))

- [12] The next day, June 1, 2016, Mr. Edwardsen formally applied for permission to be absent from court under s. 650(2) of the Code. Mr. Edwardsen was in court during the application in case there was "any necessity to specifically confirm his waiver": T. Supp. at 456(10-11). Defence counsel also confirmed that he had instructions with respect to admissions for the search of the Residence. The judge confirmed with defence counsel that if he were to grant the request there must be a clear waiver by Mr. Edwardsen that he had full knowledge of his right to be present and the effect of the waiver and that he was undertaking not to raise any permission granted as a ground of appeal. Defence counsel confirmed all three things, advised the judge that he discussed each of those waiver issues with Mr. Edwardsen, and offered to have Mr. Edwardsen confirm them in court. Defence counsel then agreed he would not raise an issue regarding the evidence on the voir dire being admitted at the trial proper by consent and that his client agreed with that. The trial judge asked defence counsel to confirm that "this is a waiver just for next week," and defence counsel stated, "that's correct": T. Supp. at 458(7-8).
- [13] The judge granted the application. He noted the fact that evidence on the voir dire was anticipated to be evidence on the trial. The judge addressed Mr. Edwardsen directly and confirmed that he requested a waiver to avoid losing substantial employment, he acknowledged his right to be present, he had received legal advice regarding his wish to be absent, and he would not raise any ground of appeal directly or indirectly that might flow from his absence. Finally, he confirmed that Mr. Edwardsen was not opposed to having some or all of the voir dire evidence admitted at trial and would agree to stay in touch with counsel, receive reports, and provide instructions as necessary. The judge allowed Mr. Edwardsen's application to be absent from the trial on those terms.
- [14] On June 2, 2016, the defence served a Charter notice on the Crown alleging a breach of s. 8 Charter rights for "over-seizure" of items not authorized under warrant and a failure to properly comply with the reporting requirements in s. 489.1 of the Code. Defence counsel advised that he would only be seeking a Charter remedy in relation to the Residence and the Shop but would be relying on the same breaches in relation to the three properties as part of his s. 24(2) submissions.
- [15] When the application for a voir dire on the admissibility of Cst. Fulcher's evidence was heard on June 8, 2016, defence submissions were limited to the alleged failure to comply with the reporting requirements--no submissions were made in support of the over-seizure allegation. Defence counsel told the judge that even if a voir dire was not granted, the defence would be in a position to proceed with Cst. Fulcher's evidence:

MR. SONG: My Lord, before I begin with reply, I just wanted to inform the court I had an opportunity to discuss how to proceed today with my -- with my friends and Mr. Westlake. I understand that, if Your Lordship does not grant permission to - or grant leave to proceed with the voir dire, my friends will be in a position to have Constable Fulcher give testimony as had been anticipated in any event given that his evidence would have gone into a voir dire, and Mr. Westlake had indicated that he's prepared to proceed in that fashion as well, but only with respect to Constable Fulcher.

THE COURT: And just briefly on that point, in case I forgot, Mr. Song, Mr. Walker, is that -- you just have the one witness?

MR. WALKER: Yeah, that's -- that's right, My Lord, that was the witness that was requested for the voir dire --

THE COURT: Yes.

MR. WALKER: -- as you may recall the idea is that the -- that witness be called fully in the voir dire --

THE COURT: Yes.

MR. WALKER: -- and evidence would become part of the trial proper.

THE COURT: Or, if not a voir dire, called fully on the trial obviously.

MR. WALKER: Yeah, that's right. (T. Supp. at 504(40)-505 (3), (12-27))

[16] Mr. Edwardsen was absent on this day of trial.

[17] Observing that defence counsel had not pursued the over-seizure argument, on June 9, 2016, the judge dismissed the defence application for a voir dire.

[18] Both sides contemplated that a voir dire might not be necessary to determine the admissibility of Cst. Fulcher's evidence. The Crown reminded the judge that when Mr. Edwardsen was excused from attending trial, it was anticipated that Cst. Fulcher's evidence on the voir dire would be rolled into the trial. While the evidence was now to be called on the trial proper, the substance of the evidence was the same as would have been led on the voir dire and no other witnesses would be called in Mr. Edwardsen's absence. The Crown, therefore, saw no difficulty in proceeding. The exchange between counsel and the judge demonstrates what the parties contemplated at the time:

MR. WALKER [Crown counsel]: As a preliminary issue, I just wanted to address for the record Mr. Edwardsen's nonattendance at this stage. Because a week ago you excused him from attending, and what was contemplated when you did that was - was potentially, or likely, a voir dire. And the evidence that was expected to be called in that voir dire was the evidence of Constable Fulcher relating to the seizure of exhibits from what the Crown alleges is Mr. Edwardsen's residence, 604 Old Lakelse Road.

The understanding of that evidence in the voir dire was that that evidence, if ruled admissible, would be rolled in, so to speak, into the trial proper, would form part of the evidence for the trial proper. The only difference we're now contemplating is that we are actually in the trial proper, but in substance, the evidence that would have been tendered in the voir dire is the same as the evidence that will be tendered in the trial.

And that was what was anticipated when Mr. Edwardsen was excused. We're not tendering other evidence this week that wasn't anticipated, and so on the basis of all of that, and Your Lordship's permitting him to be excused, from the Crown's perspective there's no difficulty in proceeding, because in substance what will be done now was exactly what was contemplated when he was excused. (T. at 1(36)-2(17))

[19] The trial judge then engaged defence counsel in the following colloquy:

THE COURT: Mr. Westlake, any difficulty? It was your client's --

MR. WESTLAKE [defence counsel]: No, I --

THE COURT: -- request that he be permitted to work. And my understanding from what we are -- I heard last week, and what Mr. Walker has just said, was he was well aware, and understood that any evidence that was admissible on the voir dire would be admissible on the trial despite his absence.

MR. WESTLAKE: I'm -- I'm in agreement with everything that Mr. Walker said, My Lord. (T. at 2(18-29))

[20] Then the judge gave his ruling:

THE COURT: All right. I think in the circumstances, and for the reasons I gave last week in permitting Mr. Edwardsen's absence, and the fact that the evidence that's anticipated to be heard today, and possibly tomorrow, will essentially be what was going to be heard in any event, and to which Mr. Edwardsen indicated his agreement with his absence, and in fact as I recall he also confirmed orally in court his understanding, and I think I put to him the criteria that were mentioned in -- was it Pazder was the case that provided the summary? I'm trying to recall now.

But essentially -- Mr. Song is nodding, so I take it was Pazder. So as a result of those circumstances, and given that it is not opposed by the Crown, and the defence essentially is the one who sought Mr. Edwardsen's absence, we will proceed today and tomorrow in Mr. Edwardsen's absence.

However, that is the only period of time from which Mr. Edwardsen is excused from his trial, and it will be anticipated that he will in fact be present for the remainder of the trial, which as I recall continues around June 27th, is that right? (T. at 2(30)-3(6))

- [21] Mr. Edwardsen submits he waived his right to be present for the tendering of Cst. Fulcher's evidence on a voir dire, if one was held, but not for the tendering of that evidence led only at the trial proper.
- [22] With respect, I am unable to give effect to that argument. The transcript is clear that the parties expected that a voir dire might not occur. Further, if a voir dire was held and the judge ruled the evidence admissible, then the parties anticipated that any evidence led on the voir dire, tendered in Mr. Edwardsen's absence, would become evidence at trial. The parties expressly contemplated that Cst. Fulcher would only give his evidence once and would not be recalled.
- [23] Mr. Edwardsen chose to limit the scope of his attack on the admissibility of Cst. Fulcher's evidence when the voir dire was argued. The judge declined to hold a voir dire to test the admissibility of the evidence based on its alleged failure to comply with reporting requirements. The defence did not contest the admissibility of the evidence on each of the grounds it had initially raised, including the over-seizure argument. The result was that the evidence that would otherwise have been led on the voir dire that, if admissible, would become evidence at trial was now admissible at the trial proper.
- [24] In my view, the evidence led at trial was no different from the evidence that would have been led on the voir dire. If anything, the evidence on a voir dire might have been more extensive in order to lay a foundation to challenge the admissibility of the evidence subject to the voir dire. In these circumstances, Mr. Edwardsen waived his procedural rights to be present when the evidence of Cst. Fulcher was tendered at the trial even though it was not tendered in the context of a voir dire.
- [25] Receiving Cst. Fulcher's evidence, for the first time, at the trial proper did not go beyond the scope of Mr. Edwardsen's waiver. Defence counsel was not purporting to waive any procedural rights that had not already been waived. There is nothing in the record to support an argument that defence counsel went beyond the scope of his instructions in any event. Notably, Mr. Edwardsen's experienced trial counsel did not raise this issue. It arose for the first time on appeal.
- [26] Finally, the Crown factum accurately sets out those factors establishing the existence and validity of Mr. Edwardsen's waiver:
- Mr. Edwardsen initiated the application to be absent for his own benefit to allow him to pursue gainful employment;
 - Mr. Edwardsen was aware that evidence was going to be called in his absence and that it would form part of the trial record;
 - Defence counsel described the application as a waiver;
 - Mr. Edwardsen appeared in person to confirm the waiver;

- Mr. Edwardsen agreed that he had legal advice, had full knowledge of his right to be present and the effect of his waiver;
- Mr. Edwardsen agreed to stay in touch with counsel, receive reports, and provide instructions; and
- Mr. Edwardsen undertook not to raise permission granted as a ground of appeal.

[27] I would not accede to this ground of appeal.

The Vukelich issues

- [28] The purpose of a Vukelich application is to determine if a voir dire is necessary to determine the admissibility of evidence. Mr. Edwardsen alleges errors in relation to two aspects of a Vukelich application with respect to multiple Charter applications. These applications were renewed by new counsel approximately one year after they were abandoned and after Mr. Westlake, who was counsel at that time, had been discharged. The errors are said to relate to an issue about whether Mr. Edwardsen had standing to challenge the seizure of evidence at Plan 9160B, the location of the grow operation, and the seizure of evidence at the Residence arising from an alleged breach of his reasonable expectation of privacy following police surveillance of the Residence.
- [29] Mr. Edwardsen concedes the judge did not err in many aspects of his ruling refusing a voir dire in respect of other matters on the grounds that the challenges had previously been abandoned and that new counsel was not, in the circumstances, entitled to a "do over" of matters already disposed of in the trial. Mr. Edwardsen, also, does not challenge the judge's finding of fact that his conduct of proceedings and his changes of counsel reflected a strategy of attempting to frustrate and delay a trial on the merits.
- [30] Again, these issues can only be fully appreciated when explained in the context in which they arose. And given the extent to which the issues on this appeal are informed by the trial judge's responsibility to manage a trial, which risked "going off the rails", it is helpful to understand the broad chronology involved in this matter.
- [31] The information was sworn September 19, 2012. A preliminary hearing was set for April 2013 but was adjourned when Mr. Edwardsen discharged his first counsel. After Mr. Edwardsen retained Mr. Westlake, the preliminary hearing was reset for April 2014. When the matter came on for a hearing, Mr. Edwardsen consented to committal without a hearing.
- [32] The trial was set to begin in March 2015. About seven weeks was reserved between March and October with the court sitting in one- or two-week blocks over that time. The parties anticipated only five days would be needed for the trial proper after pre-trial motions and Charter applications were completed.

- [33] During the pre-trial matters, which I discuss below, various applications were heard, others were abandoned, and time set aside for hearing applications was lost. As a result, the parties did not finish their pre-trial matters as planned and the trial went into 2016.
- [34] The trial proper began on June 10, 2016, when Cst. Fulcher provided his evidence-in-chief, which lasted two days. The trial then resumed on June 27, 2016, for his cross-examination.
- [35] On June 28, 2016, Mr. Westlake informed the judge that Mr. Edwardsen had lost confidence in him and he successfully applied to get himself and his co-counsel, Mr. Song, off the record. The judge adjourned the trial. On August 17, 2016, Mr. Silverman informed the court that Mr. Edwardsen had retained him. The judge further adjourned the trial to allow Mr. Silverman time to prepare. The next trial dates were set by agreement for January 9, 2017, and February 6, 2017, but Mr. Silverman reserved the right to make further pre-trial applications even though the trial proper had started.
- [36] Five days before trial was set to resume, Mr. Silverman successfully applied to get off the record. On the day trial was to resume, Mr. Edwardsen applied for an adjournment. The judge granted the adjournment to the week of February 6, 2017.
- [37] Mr. Edwardsen then retained Mr. Anderson who succeeded in adjourning the trial again for two weeks starting on June 12, 2017. The Crown received notice of further Charter applications on April 28, 2017. Mr. Anderson argued the Vukelich application in June 2017 without further adjournment.
- [38] I will return to the specifics of the Vukelich application shortly, but first I intend to summarize the applications that were brought, ruled on, or abandoned during the pre-trial stage when Mr. Westlake and Mr. Song represented Mr. Edwardsen. I will outline them for two reasons. First, they give context to the judge's conclusion that, in large measure, the Vukelich application Mr. Anderson brought was an attempt to "re-do" the trial and impermissibly start over. Second, they demonstrate that Mr. Edwardsen's initial approach reflected a deliberate defence strategy advanced on his behalf by senior and experienced counsel. These points inform the analysis of the issues on appeal because, ultimately, the judge's ruling on the Vukelich application involves an exercise of judicial discretion informed by his responsibility to manage the trial.
- [39] Mr. Edwardsen's first notice of challenge was to the general warrant and the warrant to search the Residence. He also gave notice of an application for disclosure of informant materials and source debriefing reports. The application for disclosure proceeded as scheduled. Mr. Edwardsen sought the materials for the sole purpose of assisting him in challenging the various judicial authorizations. Following submissions, the remaining six days of unused voir dire time in April 2015 were cancelled.

- [40] The defence then particularized its pre-trial Charter applications based on the use of "a single omnibus ITO which was supplemented as the investigation progressed." Mr. Edwardsen argued frailties in the ITO invalidated the general warrants and video surveillance warrants for the property at Plan 9106B as well as all of the end search warrants. This approach reflected a deliberate defence strategy to exclude critical evidence from the trial.
- [41] On May 1, 2015, the judge ordered disclosure of informant materials subject to Crown redactions. As a result, the five days set aside from May 4-8, 2015, were lost and the case was adjourned to the next sitting dates in July 2015.
- [42] On June 8, 2015, the Crown requested clarification of the challenges to the judicial authorizations and conceded that Mr. Edwardsen had standing to challenge all authorizations except those relating to Plan 9106B. The application for leave to cross-examine the affiant was scheduled for July 27, 2015. In accordance with the defence strategy, it was expected that the first voir dire would challenge the original judicial authorization of the tracking warrant.
- [43] On August 11, 2015, the judge dismissed a Basi application and the defence proceeded with an application for leave to cross-examine and its challenge to the first authorization.
- [44] On August 14, 2015, the trial judge allowed the application to cross-examine in part. Defence counsel contended he could not proceed with the cross-examination given the importance of the first ITO, which was "the building block or core" of every subsequent warrant and would inform everything that came after it. Defence counsel then gave notice of a s. 7 Charter application alleging Mr. Edwardsen's ability to make full answer and defence had been compromised.
- [45] Mr. Edwardsen's s. 7 Charter application was heard on October 5, 2015, alleging the Crown had not established privilege over withheld and redacted materials necessary to challenge the ITO. The application for further disclosure was dismissed.
- [46] On October 9, 2015, Mr. Edwardsen's Garofoli application continued and the affiant was cross-examined. On February 4, 2016, the day before argument on the warrant was scheduled to occur, Mr. Edwardsen applied to cross-examine sub-affiants. That application was later dismissed.
- [47] On April 4, 2016, the Crown asked defence counsel to identify what other voir dire issues could be dealt with on the next reserved days because one to two days would be sufficient to argue the validity of the tracking warrant. The Crown noted the defence had informed the court it would be challenging every authorization. The Crown suggested that if Mr. Edwardsen intended to challenge the authorizations and warrants in relation to Plan 9106B, the remaining court time should be used to argue standing. The Crown wrote to the defence again on April 24, 2016, and repeated this request.

- [48] On April 25, 2016, the Crown suggested that court time remaining after submissions on the tracking warrant be used to argue standing respecting Plan 9106B. Defence counsel opposed that suggestion because the ruling on the tracking warrant would affect everything after it and standing might not have to be argued at all. Following two days of argument, the remainder of the week was lost. After reserving, the judge upheld the validity of the tracking warrant.
- [49] As noted above, the week of May 31, 2016, was set aside for a voluntariness voir dire. Voluntariness was admitted the day before it was scheduled to start. The judge asked how the time would be used. Defence counsel informed the judge that some 20 further warrants "are no longer going to be an issue" because of his ruling on the tracking warrant. Defence counsel confirmed there were no Charter issues remaining except the issue of over-seizures from the Residence, which the warrant did not cover. This was the matter for which Mr. Edwardsen sought permission to be absent. As previously mentioned, the judge dismissed the application for a voir dire to determine the admissibility of Cst. Fulcher's evidence. Pre-trial and Charter applications were complete. The defence strategy to challenge the admissibility of evidence gathered under the judicial authorizations had played out to the full. The trial proper began.
- [50] It was at this point that the events described previously involving the changes in counsel began.
- [51] As will be recalled, on April 28, 2017, Mr. Anderson gave notice of his intention to bring further Charter applications, raising multiple issues challenging the admissibility of the evidence seized from the three properties. It is not contentious on appeal that these challenges put back in issue matters already decided or abandoned, and Mr. Edwardsen concedes that the judge did not err in refusing a voir dire in respect of all but the two matters raised on appeal relating to the Vukelich application. Nevertheless, it remains helpful to identify the range of matters put back in issue, which include those two matters.
- [52] With respect to Plan 9106B, Mr. Edwardsen sought to renew his challenge to the two general warrants and associated video warrants, as well as his challenge to the ultimate search warrant arguing:
- That he had standing to challenge the authorizations in relation to the property where the grow operation was located;
 - That the two general warrants issued by a Provincial Court Judge authorizing video surveillance and covert physical surveillance were invalid and the doctrine of severance could not assist the Crown;
 - That there was insufficient evidence in the ITO for the first general warrant to establish that an offence had been or was being committed;

- That there was insufficient evidence contained in the ITO for the second general warrant once evidence obtained from the first was excised;
- That the search warrant obtained for the property was invalid because after excisions were made there were no longer reasonable grounds to believe that evidence would be located at the property; and
- A police officer illegally seized a marihuana plant while on the property.

[53] With respect to the Residence, he argued:

- He should be granted leave to cross-examine the affiant;
- Installation of a camera on the front of the Residence was a search and all observations made by use of the camera should be excised;
- There was non-disclosure of the fact that surveillance observations were made by use of a video camera set up outside the property;
- Misrepresentation of surveillance reports;
- A surveillance officer trespassed on the property and performed an illegal perimeter search;
- The manner of the search was unreasonable because the police failed to knock and announce and failed to produce the warrant in compliance with s. 29 of the Code;
- The search was unlawful as a result of the presence of a conservation officer;
- There was an over-seizure of items at the Residence that were not named in the warrant;
- There was a warrantless search of cellular phones found at the Residence; and
- The search of outbuildings (locked trailers) on the property exceeded the authority of the warrant.

[54] The judge dismissed the application for a voir dire.

[55] After considering the merits of each of the proposed challenges and the application to cross-examine the affiant, the judge concluded Mr. Edwardsen failed to demonstrate a reasonable basis to hold a voir dire. In doing so, the judge adverted to the procedural history of the litigation, including delays, the dismissal of counsel, the fact that the trial proper had started, and that many positions now being advanced had been abandoned. He recognized his obligation to control proceedings in the interests of the effective and efficient operation of the justice system and his discretion to decline evidentiary hearings that would not assist a proper trial of the real issues. In all of the circumstances, he concluded that Mr. Edwardsen was not entitled to reconstruct the trial from the ground up or engage in a "re-do" of issues that were already determined before the trial proper began.

[56] As I have acknowledged, Mr. Edwardsen does not now say the judge erred in his ruling in respect of the majority of matters dealt with. His approach is now surgical, focusing on standing in respect of Plan 9106B and the challenge to the evidence seized at the Residence on the grounds related to the use of video surveillance of the Residence through the use of a camera installed outside the property. Importantly, the judge provided a series of alternative reasons why he rejected each of what was in substance multiple applications; each of his reasons was sufficient to dismiss each of the arguments raised, including the two matters advanced on appeal.

The standing issue

[57] The judge dismissed the application for standing to challenge the search and seizure at Plan 9106B. He did so for several alternative reasons. First, he observed that Mr. Edwardsen had not applied for standing when he had an opportunity to do so before the trial proper started and when the Crown urged him to do so. More critically, the judge found that Mr. Edwardsen had abandoned an application for standing. It was too late to inject this issue into the trial after evidence had been called. Retaining new counsel did not give him the right to start over.

[58] Alternatively, the judge dealt with the merits of the standing argument: 2017 BCSC 1578 at paras. 21-34. Standing was an issue because Mr. Edwardsen did not own the property at Plan 9106B. It was owned by his son. Hence, Mr. Edwardsen had to establish a reasonable expectation of privacy with respect to the property or the items seized. The judge set out the test in *R. v. Edwards*, [1996] 1 S.C.R. 128, and the factors to be assessed as set out in para. 45 of that decision. He applied those considerations to the facts before him. The critical question for the judge was whether, in all of the circumstances, a subjective expectation of privacy was objectively reasonable. The judge was prepared to assume that Mr. Edwardsen had a subjective expectation of privacy in the property because he possessed a key to it but found the subjective expectation was not objectively reasonable.

[59] On appeal, Mr. Edwardsen does not contend that the judge erred in his articulation of the Edwards test or in his application of the test to the evidence. Accordingly, it is not necessary to canvass the judge's reasoning in respect of those matters. Rather, the issue framed by Mr. Edwardsen is more nuanced. He says that after the *Vukelich* decision, the Supreme Court of Canada released *R. v. Jones*, 2017 SCC 60, which alters the judge's analysis because it entitles an accused to rely on a Crown theory as a basis to assert standing. Mr. Edwardsen submits that since the Crown asserted he had control of the property, he can rely on that theory, and as a result, at a minimum, he had standing and a voir dire should have been held. He also argues that he ought to be able to take advantage of a change in, or clarification of, the law to appeal the ruling even in light of the judge's finding that he abandoned the standing application.

- [60] I would not accede to this submission for a number of related reasons. First, the issue in Jones was whether an accused could rely on the Crown allegation that he was the author of certain text messages for the purpose of establishing his subjective expectation of privacy. The Court concluded that he could, because otherwise the accused would have been placed in an invidious position; to challenge the admissibility of the evidence at trial and to establish his subjective expectation of privacy in that evidence, the accused would have had to admit that he was the author of the text messages when that fact was an issue in the trial proper: Jones at para. 15. Jones also reiterated the established rule that whether an accused has an objectively reasonable expectation of privacy in the subject matter of a search has to be answered with respect to the totality of the circumstances in a particular case: at para 13.
- [61] In the instant case, the judge accepted that Mr. Edwardsen had a subjective expectation of privacy. He carefully examined all of the allegations of fact bearing on whether that subjective expectation was objectively reasonable. He concluded on all of the facts, including those the Crown alleged, that Mr. Edwardsen did not have an objectively reasonable expectation of privacy in Plan 9106B. The judge's assessment of standing is consistent with the principle enunciated in Jones. Moreover, the Crown theory was that Mr. Edwardsen legally possessed the grow operation based on his knowledge and control of it. This is a different issue from whether he had a reasonable expectation of privacy in the property itself.
- [62] Additionally, the issue of whether a voir dire should be held is not simply a question of standing. In these circumstances, Mr. Edwardsen was required to demonstrate a reasonable basis for holding a voir dire. The purpose of a Vukelich hearing is to screen out proposed pre-trial applications where a remedy cannot reasonably be granted. Accordingly, the judge was entitled to take into account the likelihood of a remedy being granted on the substance of the application regardless of standing.
- [63] The substantive issue involving Plan 9106B tied back to video surveillance a Provincial Court judge originally authorized. Under that authorization, video surveillance was conducted for eight days before it was recognized that a provincial court judge did not have jurisdiction to issue the authorization. That problem was subsequently addressed by an authorization a Superior Court judge issued. Thereafter, the defence did not rely on the improper authorization and made no attempt to lead any evidence derived from the Provincial Court authorization. As the judge noted:
- [17] Initially the police obtained from a Provincial Court Judge, General Warrant #1, to covertly enter Plan 9106B to conduct surveillance and to install a video camera on the property. However the police realized that General Warrant #1 was obtained under s. 487.01(1) of the Criminal Code and should have been obtained under s. 487.01(4) before a Superior Court Judge. As a result they subsequently obtained General Warrant #2 and General Video Warrant, both issued on July 27, 2012.

- [64] In case the judge was wrong on the standing issue, he went on to consider the merits of the substantive application. He reasoned:
- [39] The accused seeks to quash General Warrant #1 issued on April 24, 2012, and advances the following arguments: a) a Provincial Court Judge did not have the jurisdiction to issue the warrant; b) it was issued without regard to the wiretap provisions; and c) it was issued without reasonable and probable grounds. The accused argues that since one portion of the warrant was improperly issued the entire warrant ought to be quashed.
- [40] Notice of an intention to challenge this warrant was previously given and then abandoned. In fact, the argument proposed to be advanced now was identified in the notice dated April 23, 2015, at page 9. It was alleged that because the warrant was defective in relation to authorizing video surveillance, the entire warrant ought to be quashed.
- [41] Turning to the issues raised respecting General Warrant #1.
- [42] While section 487.01(1) of the Criminal Code authorizes a Provincial Court Judge to issue a general warrant, the Crown concedes that only a Superior Court Justice can issue a general video warrant under s. 487.01(4).
- [43] A judge who issues a general warrant authorizing video surveillance in circumstances where a person has a reasonable expectation of privacy must be satisfied that the affiant has demonstrated "investigative necessity". The affidavit sworn in support of this warrant did not address "investigative necessity."
- [44] In any event, the investigators did not use the video surveillance obtained as a result of the first general warrant because they recognized that the warrant was not properly obtained. Nor of course does the Crown seek to tender this evidence. As a result there is no evidence to exclude. In addition in subsequent applications for warrants the affiant disclosed what had transpired but did not rely on any of the video.
- [45] The notice to challenge this authorization on the above basis was given April 23, 2015. No particulars were provided hence the accused failed to articulate in that application a basis for entering into a voir dire.
- [46] Further, in respect of the issue concerning invalidity arising from an erroneous, severable video authorization, I noted that an invalid portion of a warrant does not mean the entire authorization should be quashed: *R. v. Whitaker*, 2008 BCCA 174.
- [65] Even assuming Mr. Edwardsen had standing, I cannot discern an error in principle in this exercise of judicial discretion in determining whether to hold a voir dire.

The Residence

- [66] The judge dealt with the issue of the merits of a voir dire regarding the warrantless video surveillance at the Residence:

- [49] On December 14, 2011 a video camera was installed to conduct surveillance of Mr. Edwardsen's residence. It was removed on September 19, 2012. The camera allowed investigators to conduct surveillance of the dwelling remotely.
- [50] A similar static camera was also directed at a property used by Mr. Edwardsen on River Drive.
- [51] The defence submits that since Cpl. Etele relied on such ongoing video surveillance in his applications for judicial authorizations, he was required to disclose that such was the manner in which he observed the properties. That is that he relied on video not personal observations at the location. They also submit that the police failed to obtain a judicial authorization to use such ongoing video surveillance.
- [52] The defence relies on *R. v. Wong*, 2017 BCSC 306, in which the court found that a camera focussed on the back yard of the accuseds' residence and which was recording 24 hours a day, 7 days a week, violated their s. 8 Charter rights. *Wong* is a recent case and has only been considered in *R. v. Piasecki*, 2017 ABQB 192 at paras. 57-58.
- [53] The ratio decidendi of *Wong* is based on the fact that the video camera was recording all the time and thereby creating a permanent record of the accuseds' movements (see paras. 38-41, 46 and 47). This interpretation is confirmed in *Piasecki*.
- [54] In the case at bar no recordings were made. As a result *Wong* is distinguishable on its facts. In my view a warrant was not required to conduct surveillance of 604 Old Lakelse Lake Drive and the River Drive property in the manner utilized here. The cameras were not located on the properties in question and provided a view the same as would be available to an officer conducting physical surveillance. There is no merit to this aspect of the Charter challenge.
- [67] Mr. Edwardsen contends the judge ought not to have treated issues related to the search of the Residence as already litigated and resolved or abandoned. He says that the issue should have been revisited on a voir dire for two reasons. First, the fact that a video camera had been used for surveillance of the Residence was not explicitly disclosed; the use of a camera had to be inferred from the disclosure that police observations did not occur at the Residence. Mr. Edwardsen suggests, therefore, that the issue was not properly crystallized until his new counsel made informational requests to the Crown.
- [68] Second, he suggests that the fact that a video camera was used but not disclosed gave rise to a previously unavailable and unknown argument that the ITO was misleading. This new argument, in turn, could lead to the exclusion of other information within the ITO by striking the ITO in its entirety.

- [69] Finally, he says that the decision in *R. v. Wong*, 2017 BCSC 306 [Wong] calls into question the reasoning of the judge who ought not to have made what was effectively a substantive decision on the merits of the argument in the absence of the development of a full factual matrix on a voir dire. In other words, the judge erred in principle by not treating the so-called Wong issue as a threshold issue.
- [70] The judge dealt with the argument that the ITO was misleading in connection with the application for leave to cross-examine the affiant:
- [96] In addition, notice of this application was previously given, pursued and allowed. Now, Mr. Edwardsen seeks to cross-examine the affiant on two further issues. The first issue arises from the recent trial decision in *Wong* rendered nearly five years after the application for the authorizations were made. The application for cross-examination turns on the defence's perceived importance of the *Wong* decision as it relates to the use of video surveillance. Following *Wong*, it could be argued that it might be important for an affiant to advise an authorizing justice whether or not the surveillance observations were made through the use of video. Prior to the *Wong* decision this year the technique used was lawful.
- [97] In any event, even if the affiant ought to have advised the authorizing justice that some surveillance observations were made with the aid of a video camera, and that this omission was a material omission, cross-examination could not assist the Court in determining whether the authorization should have been issued. Particularly since there is no basis to allege that the observations themselves ought to be called into question. Cross-examination that is merely a prelude to arguments that can be made based on the statements in an affidavit should not be permitted: *R. v. MacNeil*, 2013 BCCA 162 at para. 34. Even an omission determined to be material will not necessarily lead to cross-examination: *R. v. Edwardsen*, 2015 BCSC 1660 at para. 19.
- [103] If I am incorrect in these findings I would in any event exercise my discretion to deny the accused's application given his conduct in these proceedings to which I now turn.
- [71] With respect, the judge appears to have rejected an argument that any misleading omission in relation to the video camera would have supported an argument either that the authorization ought not to have been issued or that the observations themselves should be called into question. This is important because the ITO also contained information from three separate informants that Mr. Edwardsen was selling drugs from the Residence and from an undercover officer that he bought drugs from Mr. Edwardsen at the Residence. In these circumstances, even if there were frailties arising from the use of the video camera, there is no reasonable prospect that the result would be anything other than a severing of that material from the ITO. What would remain would be more than sufficient to justify the judicial authorization, and that certainly was the judge's view.
- [72] In any event, I do not think the judge fell into error by applying the wrong test to the so-called Wong issue. It is important to place this issue in context. A video camera was installed on a post outside Mr. Edwardsen's property. It provided a view of the property similar to a

view of a person standing outside the property. The camera was not recording and did not create a permanent electronic record, which might engage s. 487.01 of the Code. The situation in Wong was materially different because in that case such a record was created by covert 24-hour video surveillance. I think it is fair to say that until Wong was decided, nearly five years after the authorizations in this case were issued, the investigative technique used here was uncontroversial. The judge opined that notwithstanding the decision in Wong there was no reasonable prospect that the evidence would be excluded after a voir dire.

[73] In my opinion, the judge was entitled to ask as a threshold question whether, in light of Wong, there was sufficient merit to justify embarking on a voir dire to determine whether a warrant was required for the surveillance. He decided, based on an appreciation of the different facts involved in Wong, that there was no merit to the argument and a voir dire was not necessary. I do not think the judge dealt with the matter as anything other than a threshold merits determination, and by refusing leave to cross-examine the judge effectively exercised his discretion not to embark on developing evidence in a voir dire when there was no reasonable prospect that doing so would lay the foundation for a remedy affecting the admissibility of evidence at trial.

[74] I cannot discern an error in the judge's disposition of this aspect of the Vukelich application.

The judge's exercise of discretion

[75] Although Mr. Edwardsen's challenge on appeal to the result of the Vukelich hearing is surgical, it is important not to lose sight of the fact that the judge had to deal with a large number of complex issues in a complicated trial compounded by delay, changes of counsel, and attempts to reopen issues already decided or abandoned after the trial proper had started and evidence in relation to many of those matters was tendered. The application, as a whole, called on the judge to manage the trial and exercise a gatekeeping function to ensure a fair, efficient, and effective trial. That is what the judge did, and he did so in very difficult circumstances that manifested an attempt by Mr. Edwardsen to frustrate the orderly progress of a trial on the merits. In such circumstances, and in light of admonishments from the Supreme Court of Canada to address a culture of delay in the trial process, it behooves an appellate court to show deference to the trial management decisions of the judge in issue here. This is not a licence for trial judges' to commit errors of principle, but it does require respectful deference to the judicial exercise of discretion. In this case, the judge exercised his discretion judicially in very difficult circumstances.

[76] Some indication of the challenge the judge faced can be seen in the last section of his judgment. I will quote extensively because only by doing so can a proper appreciation of the issues the judge faced be realized:

- [104] The accused seeks to exclude evidence tendered during the search of Mr. Edwardsen's residence at 604 Old Lakelse Lake Drive. The evidence he seeks to exclude has already been tendered in the trial. The evidence was tendered, not without objection while senior, experienced counsel represented Mr. Edwardsen.
- [105] It is trite that "save in unusual and unforeseen circumstances", objections to the admissibility of evidence are to be taken before or when that evidence is tendered, not afterwards: *R. v. Jir*, 2010 BCCA 497 at para. 9.
- [106] Special circumstances do not include previously known yet unpursued Charter applications or a change in counsel: *Jir* at para. 9; *Kutynech* at 294; and *Bunbury*, 2005 YKTC 51 at paras. 11-14.
- [107] Mr. Edwardsen has not provided justification for now seeking to pursue Charter arguments which, for the most part, are arguments previously announced and then abandoned, nor has he established any special circumstances.
- [108] To permit the accused to now litigate the lawfulness of the seizure of evidence already tendered at trial would undermine the court process, be unfair to the Crown and contrary to the public interest in having the trial heard on its merits.
- [111] This matter was extensively case managed. It is the Court's duty to ensure that judicial resources are effectively utilized as part of its inherent jurisdiction to control the process. As noted by the court in *R. v. Singh*, 2015 ONSC 7092 at para. 14:

Further, and as noted above, the Court in *Pires* stated the following at para. 35:

35. The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

- [112] It was clear to all involved that the Charter applications were to proceed as pre-trial motions before the trial commenced. While the Court has the discretion to entertain Charter applications at this stage, in the context of this case, that is not a discretion that should be exercised in the accused's favour. This is because the way in which Mr. Edwardsen has conducted his litigation has resulted in the Court's resources not being well utilized.

...

- [116] In this case there are a number of reasons why this Court should not exercise its discretion to hear the Charter applications now:

- a) The applications now sought to be made were contemplated by former counsel but not pursued;

- b) The proceedings are already lengthy due primarily to the number of Charter-related applications;
- c) The accused was represented by two experienced criminal law lawyers during the previous Charter applications and the first days of trial, one of whom is a noted criminal law specialist with over 40 years of experience;
- d) The timing of applications by Mr. Edwardsen throughout have affected the efficiency of the process;
- e) The timing by Mr. Edwardsen's repeated terminations of counsel.

[120] The current applications of the accused could and should have been brought well in advance of the trial during the time that was set aside for the defence applications. Indeed, as is apparent from these reasons, many of the motions now sought to be brought were contemplated by former defence counsel but were abandoned. Substantial court time was set aside for the hearing of the extensive motions sought to be brought by former counsel. Most of the court time was not used because the accused was not ready to proceed with his applications and requested adjournments to prepare. Although Charter notice had been given, most of the applications brought were not contemplated in the notice, which also caused delay.

[121] As noted in *R. v. Bunbury*, new counsel is not in itself a reason to reengage in pre-trial applications. I will address this issue in more detail later in these reasons.

[122] Of broader concern is the history of this matter which reveals that Mr. Edwardsen has throughout taken steps to frustrate and delay the trial of this matter on the merits

[123] The retention of new counsel does not give Mr. Edwardsen a right to a "do over" and re-visit pre-trial motions that he elected not to pursue during the time set aside for such motions. Virtually all of Mr. Anderson's proposed motions were identified by previous counsel and counsel elected not to pursue them.

[132] Fair trial rights include a fair hearing of legitimate Charter issues raised and is part of an accused's right to make full answer and defence. However, the ability to litigate Charter issues is not unlimited. A trial judge is obliged to control the proceedings and to manage limited judicial resources. The responsibility of a trial judge to control the trial proceedings and to manage the proceedings to ensure that the trial concludes in a reasonable time is heightened following the *Jordan* and *Cody* decisions.

[136] In summary while the *Vukelich* threshold is low the applicant has failed to demonstrate a reasonable basis upon which the court can find a breach of the Charter. In addition, balancing the accused's right to a fair trial, against the public interest in managing criminal proceedings by avoiding lengthy and unnecessary applications where the remedy sought could not possibly be granted, in this instance, weighs heavily in favour of the public interest.

[77] I agree with the judge's commentary on the applicable principles, his assessment of the facts, and his application of those principles to the facts. The judge exercised his discretion judicially without legal error in difficult circumstances.

Disposition

[78] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Butler"

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