

CANADA / JUDGMENT

R. v. Eheler

2021 BCCA 316

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 316 R. v. Eheler

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Eheler,

2021 BCCA 316

Date: 20210827

Dockets: CA46583; CA46659

Docket: CA46583

Between:

Regina

Respondent

And

Clayton Archie Eheler

Appellant

- and -

Docket: CA46659

Between:

Regina

Respondent

And

Mathew Jordan Thiessen

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Griffin

On appeal from: An order of the Provincial Court of British Columbia, dated June 18, 2018 (conviction) (R. v. Eheler, 2018 BCPC 390, Chilliwack Docket 62444-1).

Counsel for the Appellant Clayton Archie Eheler (CA46583) (via videoconference):

M.A. Nathanson

Counsel for the Appellant Mathew Jordan Thiessen (CA46659) (via videoconference):

E. Purtzki

Counsel for the Respondent (CA46583 and CA46659) (via videoconference):

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

June 24-25, 2021

Place and Date of Judgment:

Vancouver, British Columbia

August 27, 2021

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Griffin

Summary:

Appeals from conviction for possessing cocaine for the purpose of trafficking. The appellants submit the trial judge erred by dismissing their application for a stay of proceedings for unreasonable delay brought pursuant to ss. 11(b) and 24(1) of the Charter. They seek a stay of proceedings. In the alternative, the appellants seek a new trial because the judge did not release reasons for judgment until more than three years after ruling they had no standing to challenge the search warrant that led to the discovery of the drugs. Applying the framework set out in *R. v. Teskey*, 2007 SCC 25, and the factors considered therein, the appellants argue that a reasonable person would apprehend that the reasons constitute an after-the-fact justification for the result rather than an articulation of the reasoning that led to it. They submit that the reasons must be disregarded. In the absence of reasons and an opportunity for meaningful appellate review of the correctness of the standing ruling, the appellants submit that a new trial must follow. Held: Appeals allowed; new trial ordered. The judge did not err by concluding that the appellants' right to be tried within a reasonable time had not been breached. A reasonable person would, however, apprehend that the reasons in support of the standing ruling do not reflect the reasoning process that led to the pronouncement of judgment three years earlier.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellants, Clayton Archie Eheler ("Eheler") and Mathew Jordan Thiessen ("Thiessen"), were convicted following a trial in the Provincial Court of British Columbia of possessing cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. A third accused, Raymond Morrissey ("Morrissey") was acquitted. The case against the appellants turned largely on the admissibility of the fruits of a search warrant executed on an apartment. The appellants were present in the apartment when the police entered the unit to conduct the search.
- [2] Two issues lie at the heart of these appeals from conviction.
- [3] First, the appellants say the trial judge erred by failing to conclude that their right to be tried within a reasonable time was infringed. They submit the judge erred in concluding that the delay was justified by the complexity of the case. In addition, they submit that the judge, in his alternative analysis, erred in allocating portions of the delay to discrete, exceptional events--the sum total of which brought the net delay just below the 18-month presumptive ceiling for provincial court trials.
- [4] Second, the appellants say a three-year delay in the delivery of reasons for judgment explaining why they had been denied standing to challenge the search warrant, and the context in which those reasons were eventually prepared and delivered, collectively give rise to a reasonable apprehension that the reasons constitute an after-the-fact justification of the ruling rather than an articulation of the reasoning that actually led to the result. In the absence of the requisite link between the pronouncement of judgment and the reasons explaining the result, the appellants say the presumption of judicial integrity is displaced

and that the standing ruling should not be considered on appeal. In the alternative, the appellants challenge the correctness of the standing ruling.

- [5] The first issue turns on the application of the framework set out in *R. v. Jordan*, 2016 SCC 27, for the evaluation of unreasonable delay claims brought pursuant to s. 11(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Success on this ground of appeal would result in a judicial stay of proceedings under s. 24(1) of the Charter.
- [6] The second issue has two prongs. The first turns on the application of the analytical framework set out in *R. v. Teskey*, 2007 SCC 25, and whether the factors addressed therein support a conclusion that the requisite link between the decision and the reasons eventually offered in support of it has been lost. The second, which the appellants say arises only if they are unsuccessful in persuading us to disregard the reasons, turns on whether the standing ruling can be sustained in light of the subsequent decision in *R. v. Jones*, 2017 SCC 60. In brief, the appellants submit that the effect of *Jones* is to permit them to rely on the theory of the Crown—including that they exercised control over the drugs—as a basis to assert standing. The appellants submit that the standing ruling cannot survive the change in law brought about by *Jones*. They say that success on either issue would necessarily lead to an order for a new trial.
- [7] For reasons I will develop, I cannot give effect to the appellants' contention that the judge erred by failing to direct a stay of proceedings for unreasonable delay.
- [8] I am, however, satisfied on the totality of the circumstances that a reasonable person would apprehend that the reasons are an after-the-fact justification for the standing ruling rather than an articulation of the reasoning that led to the decision. In the result, these appeals must be addressed on the footing that no reasons have been supplied for the ruling that denied the appellants standing to challenge the search warrant. In my view, the absence of reasons forecloses meaningful appellate review of a central ground of appeal. I would not accept the invitation of the Crown to decide, in the absence of reasons, whether there is any reasonable basis upon which standing could have been granted, or any reasonable basis upon which the warrant could have been set aside had standing been granted to the appellants. In the result, I would order a new trial.

II. Background

- [9] In light of the disposition I am proposing, I will set out the background in relatively brief compass. Additional facts necessary to put the two grounds of appeal in context will be provided as part of my analysis of those grounds.

- [10] A drug investigation targeting the appellants and Morrissey began in October 2014. The investigation, initiated following the receipt of informant information, focused on surveillance of the appellants and, eventually, on the activities taking place in Suite 401 of an apartment building located in Chilliwack, British Columbia.
- [11] The police were given access to the apartment building by the building manager. With the building manager's permission, investigators were able to watch CCTV footage of activities taking place within the building from a secure utility room. They were also given access to FOB records by the building manager. Combining the CCTV footage and the FOB records, the police were able to determine when the appellants and Morrissey entered and left the building, who accompanied them, what they were doing, and, generally speaking, where they went within the building.
- [12] A search warrant was executed on Suite 401 on November 26, 2014. The judge found that the appellants were in the suite when the police conducted a "hard entry" to execute the warrant. Eheler jumped from the balcony of the suite to the balcony of the suite below. He was arrested there in possession of a key to Suite 401. A substantial quantity of cash and cocaine, along with items used to weigh, cut and package drugs for sale, were found in the kitchen where Thiessen was arrested. A set of keys that included a key to Suite 401 and a FOB that opened the lobby doors of the apartment building was seized from the kitchen countertop.
- [13] The Crown conceded that Morrissey, who rented Suite 401, had standing to challenge the search warrant. Relying on the framework set out in *R. v. Edwards*, [1996] 1 S.C.R. 128, the Crown took the position that neither appellant had standing to challenge the warrant. Further, the Crown argued that none of the accused had a reasonable expectation of privacy in the common areas of the apartment building or in the CCTV footage and FOB records associated with the building.
- [14] A lengthy voir dire ensued in which the appellants sought to establish standing to challenge the search warrant, and all three accused sought to establish that they had a reasonable expectation of privacy in the common areas of the apartment building and in the CCTV footage and FOB records obtained by the police without warrant.
- [15] Counsel for Eheler conceded at trial that if Eheler was found not to have a reasonable expectation of privacy in Suite 401, it would necessarily follow that he could not have a reasonable expectation of privacy in the common areas of the apartment building or standing to insert an infringement of his informational privacy interests flowing from the search and seizure of the CCTV footage and FOB records. Thiessen did not advance a contrary position and the judge considered them to be identically situated on this issue.

- [16] On October 23, 2017, the judge ruled that: (1) neither appellant had an expectation of privacy in Suite 401; and (2) none of the accused had an expectation of privacy in the common areas of the apartment building or with respect to the CCTV footage and FOB records. The pronouncement of judgment on these issues was unaccompanied by reasons. The judge said that reasons would follow.
- [17] Reasons for judgment on the standing ruling were not delivered until October 27, 2020, more than three years after the date upon which the ruling was pronounced (*R. v. Eheler* (27 October 2020), Chilliwack 62444-1 (B.C.P.C.) (the "Ruling on the Standing Voir Dire")). When reasons for judgment were delivered, the judge was aware that appeals had been launched, and that the standing ruling and absence of reasons for that ruling were important issues on appeal.
- [18] On October 26, 2017, following a Vukelich hearing (*R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave to appeal ref'd (1997), [1996] S.C.C.A. No. 461), the judge dismissed Morrissey's application for a voir dire challenging the warranted search of the apartment. In brief oral reasons for judgment, the judge held that the issues Morrissey sought to raise would not result in a finding that there was an insufficient basis upon which the warrant could have issued (*R. v. Eheler, Morrissey and Thiessen* (26 October 2017), Chilliwack 62444-1 (B.C.P.C.)).
- [19] On June 18, 2018, the judge convicted the appellants for reasons indexed as 2018 BCPC 390. He relied on the fruits of the warranted search, the information obtained by the police from surveillance conducted from inside the apartment building, and the unwarranted searches of the CCTV footage and FOB records to conclude that the essential elements of the offence of constructive or joint possession--knowledge, consent and an ability to exercise some measure of control over the drugs--had been established beyond a reasonable doubt.
- [20] The judge acquitted Morrissey who was out of the province when the warrant was executed. The judge had a reasonable doubt about whether Morrissey knew drugs were being kept in his apartment before he left British Columbia on November 20, 2014, six days before the warranted search took place.
- [21] By prior agreement, the unreasonable delay application of the appellants was argued post-verdict on October 23-24, 2018. In oral reasons for judgment (indexed as 2019 BCPC 59) the application of the appellants for a stay of proceedings for unreasonable delay was dismissed.

III. Grounds of Appeal

1. Unreasonable Delay

(a) Overview of the Proceedings

- [22] The Information was sworn on December 1, 2015.

- [23] First appearances were made and disclosure was given on dates in December 2015, January 2016 and on February 2, 2016. On the last-mentioned date, disclosure was made to counsel who was then acting for both Thiessen and Morrissey.
- [24] The matter was again in court on February 23, March 15, April 12, April 26, May 17 and May 31, 2016.
- [25] On February 23, 2016, the Crown took the position that counsel then representing both Thiessen and Morrissey (not Thiessen's counsel on appeal) could not act for both accused and that one of them would need to be represented by different counsel before the arraignment could proceed. On March 15, 2016, the conflict had not yet been resolved. In any event, Eheler advised that he was not yet ready to make his election that day.
- [26] At the appearance on April 12, 2016, the Crown and Eheler were prepared to proceed with the arraignment hearing, but the same counsel was still acting for both Thiessen and Morrissey. The obvious conflict was not resolved until May 17, 2016, when all three accused, now separately represented, elected trial by a provincial court judge and advised that they would be bringing Charter applications to challenge the search warrant. Unfortunately, the elections were not properly noted on the record of proceedings and a further appearance was required on May 31, 2016, to rectify this error.
- [27] On June 8, 2016, the following dates were confirmed: December 22-23, 28-30, 2016, for the search warrant voir dire; January 26, 2017, for judgment on the proposed challenge to the warrant; and January 30-31 and February 1, 2017, for the trial.
- [28] The Supreme Court of Canada released its decision in *Jordan* on July 8, 2016.
- [29] In late November and early December 2016, defence counsel gave notice that the issues on the voir dire would be expanded to include, among other things, a constitutional challenge to the warrantless search and seizure of the CCTV footage and FOB records of the apartment building. As previously noted, this evidence was included in the Information to Obtain ("ITO") the search warrant for Suite 401.
- [30] It was not until December 13, 2016, that defence counsel gave notice to the Crown of the three police officers they would require for the expanded voir dire. On December 15 and 16, 2016, the Crown advised that only one of the three police officers requested by the defence would be available.
- [31] On December 20, 2016, the three accused joined in what was acknowledged to be a defence application to adjourn the commencement of the voir dire to January 26, 2017. The Crown took no position on the application, but noted that the police witnesses could have been produced had timely notice been given by the defence. Defence counsel declined to use the available time in December to cross-examine the one officer who was available. Counsel for Morrissey advised the court that he was "fairly certain" the voir dire would be completed by February 1, 2017--the last of the dates that had been set aside in June 2016. The judge reluctantly agreed to the adjournment and directed the parties to look for continuation dates

if the four remaining scheduled dates (January 26, 30-31, and February 1, 2017) would be an insufficient allotment of time to complete the voir dire.

- [32] On January 17, 2017, Crown counsel wrote to defence counsel asking them to provide their available dates for trial because the voir dire that had been scheduled to occur in December 2016 was now going to take place on days set aside for the trial. Thiessen's counsel did not respond. Eheler's counsel did not want to set any dates, taking the position that it was "prudent to wait to see which issues arise before setting new trial dates, as we'll have a better estimate of how many additional dates will be required."
- [33] The voir dire commenced on January 26, 2017. On February 1, 2017 (the last of the scheduled dates) the voir dire was nowhere near completion. Thirteen additional days of court time were set aside that day for the continuation of the voir dire and the completion of the trial: September 5-8, 11, 14, 19-21, and October 23-26, 2017.
- [34] Significantly, absent deductions of time due to waiver, defence delay or exceptional circumstances, the 18-month Jordan ceiling would be reached on June 1, 2017.
- [35] On the unreasonable delay application, the Crown filed correspondence sent to the defence and the Judicial Case Manager ("JCM") on February 2, 2017, documenting steps it had taken to mitigate delay caused by the adjournment. That correspondence establishes that there were earlier available court dates on which the Crown would make itself available for the continuation: February 15-17, March 2 and 29, April 25-26, June 13-16, 19-21, July 24-27, August 3, September 12-13, 25-28, October 2-3 and 12-13. On each of these dates, one or more of the three defence counsel were unavailable.
- [36] Counsel for Eheler objected at the time to the Crown sending this letter to the JCM without the consent of the defence and suggested that the letter was incomplete because it did not set out the dates upon which the Crown was unavailable.
- [37] By letter dated February 17, 2017, the Crown advised counsel for Eheler that JCMs had adopted a post-Jordan practice of documenting the availability of counsel on dates offered by the court. The Crown reminded counsel for Eheler that, in the presence of all parties, he offered to send the letter documenting the availability of the parties on dates offered by the court. In addition, the Crown reminded counsel for Eheler that he had: offered to make arrangements to have any of his conflicting court commitments reassigned to a different Crown to make himself available on dates offered by the court; offered to reschedule his vacation where it conflicted with dates offered by the court; and advised that he would require Crown witnesses to reschedule their vacation time if it conflicted with available court dates.
- [38] The evidence on the voir dire completed on September 6, 2017. Submissions began on September 7 and did not complete until September 14. The judge advised counsel that, in light of the evidence adduced and amount of material filed on the voir dire, he would not be in a position to provide a ruling by the next scheduled block of time--September 19-21, 2017.

- [39] On October 1, 2017, the Crown wrote to the JCM advising that: (1) Eheler wanted to reopen the voir dire to make further submissions; and (2) counsel wanted to schedule eight additional days for continuation. The Crown advised the JCM of his understanding that counsel would forward their available dates shortly if they had not already done so. Further, the Crown again advised that he did not want to be the cause of any delay and would try to have his files reassigned and reschedule planned vacation to resolve any conflict that arose between his calendar and available court dates.
- [40] On October 5, 2017, Eheler's counsel wrote the JCM advising that he had not agreed to provide his available dates without the Crown providing his available dates. He asked that the matter be addressed in court on the next appearance.
- [41] On October 11, 2017, the parties appeared before the judge and made further brief submissions on the voir dire. The judge asked whether a "completely articulated set of reasons" was required or whether the ruling on the voir dire could be pronounced on October 23 with reasons to follow. The judge added that it was not his preference to pronounce judgment with reasons to follow "because it raises a whole host of potential problems", but advised counsel that he would probably not have the reasons done by October 23. Counsel for Eheler said it would be difficult for the defence to proceed without the benefit of the reasons. The Crown took the position that reasons on the voir dire would not be required on October 23, but counsel would need to know by then if any s. 8 Charter breach had been identified to move to the next stage, including whether the ruling could lead to the excision of information from the ITO. Counsel for Thiessen was content to proceed in the manner suggested by the Crown. The judge advised that he would pronounce his ruling on October 23 "without necessarily fully articulated reasons."
- [42] The judge then raised the issue of scheduling, noting "we obviously have some challenges [moving] forward." The judge had been advised that, given the availability of counsel and court dates, the parties were targeting August and September 2018 for the eight additional continuation days they were seeking. The judge told counsel that this was "not acceptable". He said that one option was to press the "judicial nuclear button" and simply direct that the trial proceed on the first available dates. He said he preferred not to make this order and asked counsel to look at their calendars, reschedule other matters if need be, and come up with earlier continuation dates.
- [43] Also on October 11, 2017, the Crown sought judicial assistance in eliciting from defence counsel their position on admissions that would shorten the trial. Draft admissions had been sent to defence counsel for their consideration on August 13, 2017. Defence counsel had not yet responded to the Crown on this issue. The Crown said that with admissions the trial might be completed in three days. Counsel for Eheler advised the court that he was prepared to entertain admissions. It is unclear from the record whether counsel for Eheler had overlooked the fact that draft admissions had been sent to him two months earlier, or whether he was awaiting information from the Crown identifying the witnesses who would not be needed if the admissions were made. Counsel for Eheler again raised an objection to

the defence being required to provide its available dates without the Crown being required to do the same. On this point, it must be recalled that the Crown had already committed to making himself and the prosecution's witnesses available on dates the court could provide. The judge made his expectations clear that all counsel would work with the JCM to provide their availability and secure earlier dates for the continuation of the trial.

[44] On October 23, 2017, the judge pronounced his ruling on the voir dire:

Mr. Morrissey has standing to challenge the warrant in unit 401. That's never been in issue. With respect to Mr. Eheler and Mr. Thiessen, my ruling is that they have no expectation of privacy in unit 401 and with respect to all of the accused, my ruling is that no one has an expectation of privacy in the common areas or with respect to the building video or fob records.

As I said, there'll be reasons to follow subsequently.

[45] Morrissey's challenge to the warranted search of Suite 401 was argued on October 24-25, 2017. In oral reasons for judgment delivered on October 26, 2017, following a Vukelich hearing, the judge declined to hold a voir dire. He concluded that on the basis of the arguments advanced by Morrissey, there was no reasonable prospect a conclusion would be reached that there was insufficient evidence upon which the warrant could have issued.

[46] The parties worked with the JCM to reschedule continuation dates. Crown counsel made it clear that both he and the Crown witnesses would make themselves available on all dates that could be offered by the court. On October 25, 2017, the following continuation dates were confirmed: February 20-23, 26-28 and March 1, 2018.

[47] On February 20, 2018--the first of the continuation dates--Morrissey brought a without notice application for the exclusion of evidence under ss. 8 and 24(2) of the Charter on grounds that the warranted search was conducted in an unreasonable manner because it consisted of an unannounced "hard entry" into the premises: see *R. v. Cornell*, 2010 SCC 31. The judge directed that the trial would proceed, Morrissey would give proper notice of the Cornell application and that it would be dealt with at a later date.

[48] On February 21, 2018, Eheler raised a concern that the Crown had just provided him with previously undisclosed photographs.

[49] On February 22, 2018, Eheler applied for a mistrial on the basis of material non-disclosure.

[50] On February 23, 2018, the mistrial application was dismissed. The judge found that the photographs in issue had previously been disclosed, but in a different format. In analysing the issue of case complexity on his s. 11(b) ruling, the judge attributed this oversight to the considerable volume of disclosure that had been made--over 18,000 pages.

[51] The trial continued on February 26-28 and March 1, 2018. The evidence concluded March 1.

[52] On March 1, 6, and 15-16, 2018, the court heard Morrissey's Cornell application. It was dismissed in reasons for judgment given on April 10, 2018.

- [53] On April 10-12, 2018, counsel made closing submissions.
- [54] As noted earlier, reasons for judgment convicting the appellants were delivered on June 18, 2018.
- [55] By way of summary, on June 8, 2016, eight days were set aside for pre-trial applications and the trial, with one day reserved for the delivery of judgment on the voir dire. This allotment of time reflected the good faith efforts of counsel to estimate the time requirements of the case before the scope of the voir dire was expanded to include the difficult and still-evolving issue of territorial and informational privacy interests in the common areas of apartment buildings. As matters turned out, the standing application, for which five days of court time had initially been set aside, took all or parts of 10 court days to finish. Pre-trial applications and the trial ended up consuming 24 court days.
- (b) The Section 11(b) Ruling
- [56] The total delay from the swearing of the Information to the conclusion of the trial was 30 months and 17 days.
- [57] The judge subtracted one month which he attributed to the defence adjournment application made on December 20, 2016. The appellants take no issue with this deduction on appeal.
- [58] The judge found that none of the rest of the delay was defence-caused delay, and that none of the defence applications were frivolous.
- [59] The judge concluded that the Jordan presumptive ceilings include judicial reserve time. The judge did not have the benefit of the decision in *R. v. K.G.K.*, 2020 SCC 7, when he ruled on the unreasonable delay application. In *K.G.K.*, the Court held that the presumptive ceilings established in *Jordan* do not encompass verdict deliberation time: at paras. 3, 23-24.
- [60] The judge found that the time required to complete the case was justified by its particular complexity. He concluded that some of the hallmarks of a particularly complex case were present. Among other things, he noted the volume of disclosure, the number and type of the pre-trial applications that had been made, the number of witnesses that would have been called without admissions, the need for judicial reserve time and, "[m]ost significantly", the involvement of multiple accused and the complex logistics associated with coordinating calendars for continuation dates. On this latter issue, the judge noted, "there is no question that proceeding jointly against all accused was in the interest[s] of justice."
- [61] In the alternative, the judge would have allocated periods of time to discrete, exceptional events that could not be reasonably foreseen or remedied by the Crown. He said this:

[118] Although I have found that the case is a particularly complex case, I would also find that there existed discrete events. Reminding myself that exceptional circumstances are defined as those that lie outside the Crown's control in that (1) they are reasonably unforeseen and reasonably unavoidable; (2) the Crown could not reasonably remedy the delays emanating from those circumstances and need not meet a further hurdle of being rare or entirely uncommon. These discrete events are as follows:

[1.] The additional time required for all accused to retain counsel, properly enter an election and set trial dates - April 12 to June 6, 2016, one month 25 days.

[2.] The additional time required to complete the first search voir dire February 1, 2017 to October 26, 2017, nine months.

[3.] The additional time required to complete the trial - March 1, 2018 to April 12, 2018, one month 12 days.

[119] The total time subtracted for discrete events, 12 months seven days. Subtracting this time would leave a net delay of 17 months 10 days.

(c) The Positions of the Parties

[62] The appellants attack the judge's conclusion that the case was particularly complex, arguing that it rests on unreasonable findings. More pointedly, the appellants submit that the complexity assessment undertaken by the judge reflects extricable error in principle because the judge employed a quantitative rather than a qualitative approach to his analysis. The appellants rely on *R. v. Cody*, 2017 SCC 31 at para. 64, and *R. v. Roberts*, 2020 BCCA 307 at paras. 85-96, in support of this position.

[63] In addition, Eheler challenges the correctness of the judge's decision to allocate the first two time periods identified above to discrete, exceptional events. Thiessen only challenges the correctness of the judge's decision to allocate the second time period identified above to discrete, exceptional events.

[64] The Crown submits that two months should be subtracted for verdict deliberation time, bringing the net delay to 28 ½ months. I do not understand this to be a contested point on appeal.

[65] On the issue of case complexity, the Crown emphasizes that determining whether the complexity of a case is sufficient to justify the delay in bringing it to conclusion is one best suited to the expertise and advantaged position of the trial judge and attracts a deferential standard of review: *Jordan* at paras. 77-79; *R. v. Virk*, 2021 BCCA 58 at paras. 22-24; *Roberts* at paras. 82-84. The Crown submits that the judge's complexity analysis was not driven by a quantitative assessment of the amount of disclosure or the number of witnesses that might have been called without admissions, but by the time requirements of the application for standing and the need to accommodate the calendars of three defence counsel when it unexpectedly became necessary to secure continuation dates.

[66] Should it be necessary to support the result on the basis of the judge's alternative analysis, the Crown submits it had no ability to resolve the conflict issue that delayed the arraignment of the appellants, no control over the Charter applications brought by the appellants, the sufficiency of the notice they gave, or the defence decision to expand the scope of those applications on the eve of the first scheduled dates. The Crown submits that despite the parties' initial good faith time estimates, the length of time required for the main Charter motion could not be foreseen and the resultant delay was beyond its ability to control or remedy, except for the steps taken by Crown counsel to secure the earliest possible continuation dates. In these circumstances, the Crown submits the judge properly allocated to discrete, exceptional events 12 months and seven days, leaving a net delay of a little over 16 months, well below the 18-month presumptive Jordan ceiling.

[67] In the further alternative, and in support of the result, the Crown submits that at least the same period of time as was allocated by the judge to discrete, exceptional events could have been allocated to defence delay as a consequence of the December 20, 2016 application to adjourn the voir dire. The Crown emphasizes that the late notice given by the defence caused this adjournment: Jordan at para. 32. With the eleventh hour expansion of the scope of the Charter motion, there was no chance that the voir dire would be completed by February 1, 2017, and no chance that the trial would end before the presumptive ceiling was reached because--despite the efforts of Crown counsel to mitigate the impact of the adjournment--defence counsel were not available for continuation dates until September 2017.

(d) Analysis

[68] I do not consider it to be necessary to rehearse the now familiar legal framework for assessing delay set out in Jordan and Cody.

[69] The standard of review applicable to the essential components of s. 11(b) rulings was addressed by this Court in Virk:

[23] That standard will vary depending on the nature of the error identified, recognizing that there are different steps in the analysis:

1. Findings of underlying facts--who did what, when and the context surrounding those events;
2. Attribution of responsibility--who or what caused the delay, including discretionary decisions such as whether conduct was legitimate, whether a case was complex, or whether there was reasonable reliance on the law as it stood pre-Jordan;
3. Allocation of periods of delay--categorizing periods of delay as either defence delay or as an exceptional circumstance; and
4. The ultimate decision of whether to impose a stay for unreasonable delay.

[24] Underlying findings of fact and attribution of responsibility are reviewed on a deferential standard of palpable and overriding error. Discretionary decisions are reviewed on a deferential standard and will be interfered with only if there has been a misdirection in law, a palpable or overriding error of fact, or a clearly wrong decision that resulted in an injustice: *R. v. Roberts*, 2020 BCCA 307 at paras. 82-84; *K.G.K.* at para. 81. The allocation of periods of delay is reviewed on a standard of correctness. The ultimate decision of a judge to impose a judicial stay for unreasonable delay is a question of law and is likewise subject to a correctness standard: *Yusuf* [2021 SCC 2] approving *Pauls* [2020 ONCA 220] at para. 40; *Millar* [2019 BCCA 298] at para. 88.

See also *R. v. Kanda*, 2021 BCCA 267 at paras. 45-46.

[70] I am not persuaded that the judge erred in principle in assessing the complexity of the case, and I am not prepared to interfere with his conclusion that the time the case took to complete was justified in the circumstances.

[71] While the judge mentioned the volume of disclosure and the number of witnesses that would be required absent admissions, he was entitled to take these factors into account: *Jordan* at para. 77. These considerations were not, in any event, the primary drivers of the judge's analysis. The judge was clear that the most significant factor in his complexity analysis was the need to accommodate defence calendar conflicts when it became apparent that continuation dates would be required given the nature of the issues being litigated on the voir dire. As noted in *Jordan*, proceeding jointly against multiple accused may have an impact on the complexity of the proceeding, so long as it is in the interests of justice for the Crown to so proceed: at para. 77. The judge found it to be unquestionable that proceeding jointly against all three accused was in the interests of justice. He then asked whether the joint proceeding affected the complexity of the trial. He concluded that it did. He said that complexity arising from the joint proceeding "was manifest from the beginning to the end of the trial." In light of the history of this proceeding as set out above, I see no basis upon which we could properly interfere with this finding.

[72] But I need not rest my conclusion on the trial judge's assessment of the complexity of this proceeding and justifiable impact he found it had on the time required to complete the trial. In my view, the appellants have not demonstrated that the judge erred in a material way in allocating the time periods he did to discrete, exceptional events. Had it been necessary to do so, I would have upheld the result on the judge's alternative reasoning.

[73] As the Court noted in *Jordan*:

[73] Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected -- even where the parties have made a good faith effort to establish realistic time estimates -- then it is likely the delay was unavoidable

and may therefore amount to an exceptional circumstance.

- [74] Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.
- [74] The judge found the delay between April 12, 2016, when Eheler was prepared to make his election, and June 6, 2016, when he considered the trial dates to be confirmed--a period of one month and 25 days--to be the product of a discrete, exceptional event that could not reasonably have been avoided or remedied by the Crown. While the Crown and Eheler were ready to proceed with the arraignment on April 12, 2016, this could not occur until the conflict arising from counsel's joint representation of Thiessen and Morrissey was resolved. It is beyond dispute that delay caused by a co-accused can be considered an exceptional circumstance: see, for example, *R. v. Rai*, 2019 BCCA 377 at para. 162. I see no error in the judge's decision to allocate most of this time to a discrete, exceptional event that could neither be foreseen nor remedied by the Crown.
- [75] It is, however, unclear to me why delay allocated to this discrete, exceptional event went beyond May 31, 2016, by which time the conflict had been resolved and the elections had been made and recorded. In the court below, the Crown sought the deduction of one month and 19 days (from April 12, 2016, to May 31, 2016) for this discrete, exceptional event.
- [76] For the reasons that follow, any uncertainty about why the judge deducted the period of time between May 31, 2016, and June 6, 2016, is not material to the analysis or to my proposed disposition of this ground of appeal. In my view, and for reasons set out more fully below, the judge was correct to allocate the additional time required to complete the voir dire--eight months and 25 days between February 1, 2017, and October 26, 2017--to a discrete, exceptional event; namely, the failure of the parties to accurately estimate the time required to litigate the appellants' privacy expectations in Suite 401 and in the common areas of the apartment building. It is uncontested that the judge ought to have deducted a two-month period for judicial reserve time in addition to the one-month period he found to have been waived by the defence. By my calculations, the total net delay, deducting 49 days between April 12, 2016, and May 31, 2016, and taking into account additional deductions that are either unopposed or, in my view, correctly made by the judge, is approximately 17 months (30 months, 17 days, less one month waived by the defence, less two months of judicial reserve time, less approximately nine months, less 49 days). Adding six days to the overall period of delay would still bring the total net delay under the 18-month presumptive ceiling.

- [77] When the original trial dates were fixed on June 8, 2016, the parties represented to the judge that eight days ending on February 1, 2017, would be a sufficient allotment of time for the voir dire and the trial. After these dates had been fixed, the defence gave late notice of their intention to expand the scope of the voir dire to include the privacy interests of the three accused in the common areas of the apartment building and in the CCTV footage and FOB records kept by the management of the building. The original allotment of time proved to be inadequate for the expanded Charter motion. When it became apparent that continuation dates would be required, the Crown made reasonable efforts to respond to this reality--unanticipated when the original dates were fixed--by confirming his own availability and the availability of the prosecution's witnesses on the earliest dates the court could make available. Earlier dates available to the court and the Crown could not be accommodated due to the conflicting schedules of defence counsel. In the result, 13 additional days were set aside in the anticipation that the trial would complete, not on February 1, 2017, as originally expected, but on October 26, 2017.
- [78] Against this background, I see no error in the decision of the judge to deduct approximately nine months from the overall delay. The expansion of the voir dire after the original dates had been set, and less than a month before it was scheduled to commence, was not something the Crown could anticipate or reasonably respond to in the available time. Indeed, the judge concluded that the Crown could not reasonably remedy the delay that inevitably followed this turn of events.
- [79] The expansion of the voir dire and the defence adjournment request that followed had a cascading impact on the completion of a trial that had been scheduled in blocks of time. The December 2016 adjournment pushed the voir dire into the block of time reserved for the trial. Time set aside for the completion of the trial in October 2017 ended up being devoted to Morrissey's challenge to the admissibility of evidence obtained through the warranted search of Suite 401. Time set aside in October 2017 to complete the trial by March 1, 2018, was partially devoted to Morrissey's without notice Cornell application and to Eheler's mistrial application. In these circumstances, it may have been open to the judge to deduct from the overall delay additional time that flowed from the persistent failure of the parties to realistically estimate the time requirements of the case (see *R. v. Pugh*, 2021 BCCA 293). The point was not, however, pressed by the Crown in oral argument and it is unnecessary in this case to comment further on the methodology employed by the trial judge.
- [80] In light of the conclusion I have reached on this issue, it is also unnecessary for me to address the Crown's further alternative argument that the judge should have found at least the same period of delay to be caused by the defence.
- [81] For the foregoing reasons, I would not give effect to this ground of appeal.

2. The Teskey Ground

(a) Background

- [82] The decision on standing was pronounced on October 23, 2017, with reasons to follow.
- [83] The trial judge said nothing further about the availability of the reasons in support of the standing ruling until April 12, 2018—one of the dates on which counsel made closing submissions on the trial proper. On that date, the judge acknowledged that "counsel will be wanting, with respect to the standing, a decision on -- or a written decision on the standing issue, and I'm working on that."
- [84] The appellants filed their notices of appeal from conviction in December 2019 (Eheler) and January 2020 (Thiessen). The appellants alleged that the trial judge erred by denying them standing to challenge the search warrant.
- [85] The appellants seek to adduce new evidence on appeal that puts in context the circumstances in which reasons for judgment on the standing ruling were eventually produced. The Crown agrees that the proposed new evidence should be received for the purpose of assessing whether the appellants have displaced the presumption of integrity that the reasons given by the judge truly reflect the reasoning process that led to his decision. Consistent with the position of the parties, and following the Court's usual practice, we received this new evidence but reserved on whether it should be admitted on appeal.
- [86] The new evidence establishes that on September 10, 2020, the Crown wrote to the Office of the Chief Judge of the Provincial Court of British Columbia advising that the correctness of the judge's standing ruling was at issue on appeal, but that no reasons for judgment had been given. The Crown sought assistance in obtaining the reasons or redirecting the inquiry as appropriate.
- [87] By letter dated September 16, 2020, the Crown was informed by a Legal Officer of the Court that the trial judge had confirmed that "no written reasons are on file for this ruling." The Crown was subsequently advised that further requests for information should be directed to the Court Registry where the trial took place.
- [88] On October 8, 2020, Eheler was released on bail pending appeal. In reasons for judgment indexed as 2020 BCCA 280 (Chambers), a justice of this Court found that the strength of the ground of appeal flowing from the absence of reasons for the standing ruling weighed heavily in favour of reviewability and a release order pending the determination of the appeal. It was common ground on appeal that the judgment admitting Eheler to bail pending appeal, which was posted on the Court's website, garnered some media attention. To be clear, our colleague's assessment of the strength of the appeal on the application for bail has played no role in the disposition I am proposing. I mention these events because they are relied on by the appellants as part of the context that ought to inform resolution of whether a reasonable person would consider that the necessary link between the result and the reasons offered in support of it has been broken.

- [89] By letter dated October 14, 2020, the Crown wrote to the manager of the Chilliwack Court Registry advising that the appellants were appealing their convictions and alleging that the trial judge erred in denying their standing application. The Crown further advised that the appellants were raising the failure of the trial judge to provide reasons for the standing ruling as a new ground of appeal. The Crown asked whether reasons for the standing ruling existed and, if not, whether reasons would be provided before the hearing of the appeals.
- [90] On October 28, 2020, the judge's written reasons for judgment on the standing ruling were provided to counsel.
- [91] The reasons for judgment include an explanation for the delay and a summary of the steps taken by the judge to prepare the reasons so long after the fact:
- [7] On October 23, 2017 I ruled that Mr. Morrissey had a reasonable expectation of privacy in Unit 401 as conceded by the Crown; Mr. Eheler and Mr. Thiessen had not established a reasonable expectation of privacy in relation to Unit 401; and none of the accused had established a reasonable expectation of privacy to the common areas of the building including the parkade or in the CCTV footage and FOB activity records. On that date, I indicated that reasons for my decision would follow. It has come to my attention that I have not provided those reasons. To all concerned, I apologize for my oversight.
- [10] In preparing these reasons, I have reviewed the written submissions of counsel, transcripts of the oral submissions of counsel, transcripts of the evidence on the voir dire and the applicable authorities put before me during the course of submissions.
- (b) The Teskey Framework
- [92] Application of the framework developed in Teskey guides the resolution of the first prong of the appellants' second ground of appeal. The essentials of that framework, and the unusual context in which it was applied in Teskey, were summarized in *R. v. Sundman*, 2021 BCCA 53 (appeal as of right to the S.C.C., [2021] S.C.C.A. No. 49):
- [74] In Teskey, the Court provided an analytical framework for determining the circumstances in which delay in the delivery of written reasons for judgment may be found to rebut the presumption of integrity that those reasons accurately reflect the basis upon which the result was reached. Where the delay breaks the necessary link between the result and the reasoning that led to it, the reasons provide no opportunity for meaningful appellate review and should not be considered. As the mere pronouncement of judgment will not pass the sufficiency of reasons test set out in Sheppard [2002 SCC 26], a new trial will be required in these circumstances. The framework to be applied was set out by Justice Charron, writing for the majority (at paras. 18-21):

18 Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In

other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. It is most important in a criminal case to guard against any result-driven consideration of the evidence because the accused is presumed innocent and entitled to the benefit of any reasonable doubt. A reasonable doubt is not always obvious. Its presence may be far more subtle and only discernible through the eyes of the person who keeps an open mind. It is in this sense that the trial judge who appears to have already committed to a verdict of guilt before completing the necessary analysis of the evidence may cause a reasonable person to apprehend that he or she has not kept an open mind. Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.

19 I am not suggesting that the necessary link between the verdict and the reasons that led to it will be broken whenever there is a delay in rendering reasons after the announcement of the verdict. Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality. Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.

20

The judge's impartiality is essential to achieve trial fairness.

21 As reiterated in *S. (R.D.)* [[1997] 3 S.C.R. 484], fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer. Even though there is a presumption that judges will carry out the duties they have sworn to uphold, the presumption can be displaced. The onus is therefore on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to it.

[75] Teskey was an unusual case. The evidence was complex, entirely circumstantial, and contained contradictions on the crucial issue of identity. The delay between the announcement of the verdicts and the issuance of reasons for judgment was 11 months. As noted by Charron J., among the factors that combined to rebut the presumption of integrity were that the judge: acknowledged having difficulty reaching a verdict in the months following the completion of the evidence; expressed a willingness to reconsider the verdicts immediately after they were pronounced, leaving an impression that the deliberative process was ongoing; delivered written reasons for judgment after the notice of appeal had been filed and addressed in the reasons issues relating to the grounds of appeal; and, referred in the reasons to events that occurred after the pronouncement of the verdicts. All of these factors contributed to an apprehension that the written reasons reflected after-the-fact justification for the verdicts rather than an articulation of the reasoning that

led to those verdicts. In ordering a new trial, Charron J. was clear, however, that if delay in the delivery of post-verdict reasons was the only factor at play, appellate intervention would not have been shown to be justified.

- [93] The principles set out in *Teskey* were also applied in *R. v. Port Chevrolet Oldsmobile Ltd.*, 2009 BCCA 357 at para. 58, and *R. v. Cunningham*, 2011 ONCA 543.
- [94] *Teskey* makes clear that "[t]he onus is on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to it": at para. 21. As Justice Doherty noted in *Cunningham*, because the inquiry takes account of the perceptions of a reasonable observer, it will generally not be necessary for a reviewing court to engage in the "impossible task" of deciding whether reasons for judgment actually reflect the reasoning path of the judge that led to the result: at para. 35.
- [95] At issue in *Teskey* was delay in the release of reasons for judgment for the verdict. Here, the delay concerns the release of reasons for judgment on a pivotal pre-trial ruling. I see no reason to distinguish between these two situations and, in my view, the *Teskey* framework applies to both. This is consistent with the view taken in *Cunningham* (at para. 53) and with the approach implicitly taken by this Court in *Port Chevrolet Oldsmobile Ltd.* (at paras. 60-61).
- [96] There is no closed list of factors that guide a *Teskey* analysis. The inquiry is case specific: *Cunningham* at para. 15.
- [97] The majority in *Teskey* considered the collective impact of the following factors in determining that the presumption of integrity had been rebutted in that case: the pronouncement of judgment was a bare one, unaccompanied by any explanation of the underlying reasoning; the length of the delay between the pronouncement of judgment and the release of reasons; evidence that the reasons were prepared long after judgment had been pronounced; the judge's difficulty in reaching a decision and obvious uncertainty about the correctness of the result; the complex and circumstantial nature of the evidence and the factual findings that had to be made before the decision was reached; the reasons were delivered after the appeal had been launched; whether the reasons appear to have been crafted to answer points in the appeal; and the failure of the judge to respond to repeated requests from counsel to give reasons. The majority was clear in *Teskey* that the delay in issuing reasons, standing alone, would not have been sufficient to rebut the presumption of judicial integrity: at para. 23.
- (c) The Positions of the Parties
- [98] In support of their position that the judge's reasons for judgment on the standing ruling should not be considered on appeal, the appellants rely primarily on the length of the delay, the context in which reasons were released (including the existence of an appeal from

conviction seeking relief on Teskey grounds), and the judge's acknowledgement that he constructed the reasons more than three years after the fact following a review of the written and oral submissions of counsel and the evidence called on the voir dire. In these circumstances, the appellants argue that the presumption of judicial integrity has been displaced by cogent evidence demonstrating that the reasons for judgment on the standing ruling are entirely the product of after-the-fact reasoning. In the absence of the requisite link between the decision and the reasons that led to it, the appellants submit that the reasons must be disregarded and a new trial ordered.

- [99] Should the Court have regard to the judge's reasons on the standing ruling, the appellants argue that the ruling is wrong. They submit that the ruling has been overtaken by the decision in *Jones*. They say *Jones* permits an accused to rely on a theory to be asserted by the Crown (including that they had control of the property sufficient to make out the offence of possession) to establish an expectation of privacy in the place searched and standing to challenge the admissibility of the evidence thereby obtained. The judge did not have the benefit of *Jones* when judgment was pronounced on October 23, 2017. The decision in *Jones* was released on December 8, 2017. The appellants did not apply to the judge to reopen the voir dire on grounds that *Jones* materially changed the legal landscape in the determination of standing. The Crown does not, however, oppose the issue being raised for the first time on appeal.
- [100] In support of its position that the judge's reasons for judgment should be considered on appeal, the Crown argues that the decision on standing, as it relates to the proposed challenge to the search of Suite 401, followed a straightforward application of the *Edwards* framework to uncontested facts. The Crown submits that where the result turns on the application of settled legal principles to uncontested facts, the risk that reasons delivered long after the fact do not reflect the reasoning process when the result was pronounced is significantly reduced: *Cunningham* at para. 49. The Crown distinguishes *Teskey*, citing the unusual constellation of features that were present in that case and are absent in this one. Finally, the Crown submits that there is nothing in the reasons that would cause a reasonable person to apprehend that they were crafted to answer points raised on appeal. In these circumstances, the Crown says the appellants have failed to displace the presumption of judicial integrity and that the reasons offered in support of the standing ruling can be relied on as reflecting the reasoning path underlying the result announced three years earlier.
- [101] The Crown submits that *Jones* has no impact on the resolution of the standing issue. The Crown says *Jones* stands for the more limited proposition that an accused may rely on the theory of the Crown to establish a subjective expectation of privacy: at paras. 16-19. In this case, the Crown conceded, and the judge accepted, that the appellants had a subjective expectation of privacy in Suite 401. The application for standing proceeded on this footing. The Crown says *R. v. Edwardsen*, 2019 BCCA 259 at paras. 58-61, leave to appeal ref'd (2020), [2019] S.C.C.A. No. 337, is dispositive of this issue. Further, the Crown submits that in

circumstances where Jones is engaged, it does not create an automatic rule of standing in territorial privacy cases. Rather, the judge is still required to have regard to the totality of the circumstances in determining whether an accused has an objectively reasonable expectation of privacy in the subject matter of the search: *Edwardsen* at para. 60; *R. v. Greer*, 2020 ONCA 795 at para. 85; *R. v. Labelle*, 2019 ONCA 557 at para. 31. On this point, the Crown submits that an accused may have legal possession of a substance in a place where they do not have a reasonable expectation of privacy: *Edwardsen* at para. 61; *Greer* at paras. 86-88.

[102] In the alternative, the Crown submits that even if this Court determines to disregard the reasons given in support of the standing ruling, we should conclude that the denial of standing was inevitable and uphold the result. In the further alternative, the Crown submits that even if standing was granted, the appellants' challenge to the search warrant would not have succeeded. The Crown points to the dismissal of *Morrissey's* application to challenge the search warrant in support of this submission. The Crown's alternative positions invite this Court to act as the court of first instance in determining both standing and, if necessary, the validity of the warrant.

(d) Analysis

[103] I begin my analysis with two preliminary points.

[104] As in *Teskey*, the case at bar is not about the sufficiency of the judge's reasons. It is common ground that if the reasons are appropriately considered, they are more than sufficient to meet the standard set out in *R. v. Sheppard*, 2002 SCC 26.

[105] Second, the analysis required under this ground of appeal focuses on whether the totality of circumstances would cause a reasonable person to apprehend that the rationale underlying the result was formed after the decision was pronounced, and that the reasons are, even subconsciously, the product of a judicial mind committed to justifying that result. These concerns will be heightened when the passage of time between the pronouncement of judgment and the delivery of reasons is substantial, and the judge is aware that an appeal has been launched when reasons are issued: see *Teskey* at para. 18. To be clear, neither appellant suggests that the judge consciously engaged in any sort of *ex post facto* justification of the result or put himself in the appellate arena by constructing reasons to ward off a potential ground of appeal. In short, the concern is with the appearance of justice and the appellants have framed this ground of appeal accordingly.

[106] With these two preliminary observations in mind, I turn to consider the application of *Teskey* principles to the case at bar. I emphasize that no one factor is determinative and that a *Teskey* analysis requires consideration of the totality of the circumstances.

[107] First, the bare pronouncement of the result on October 23, 2017, does not permit insight into the judge's associated reasoning.

- [108] Second, while recognizing that it is not determinative on its own, the length of time between the pronouncement of judgment and the delivery of reasons in this case weighs heavily in the analysis. The requisite link between the result and the reasons for the result becomes more tenuous with the passage of time: Cunningham at para. 37. While I accept that the delay in this case is the product of oversight and not attributable to the uncertainties that plagued the trial judge in Teskey, I am not aware of any other case where the delay between the two events has exceeded three years. I note that the 11-month delay in Teskey was characterized as being "inordinate". The delay in this case by far exceeds the 18-month delay in Port Chevrolet Oldsmobile Ltd. and the 25-month delay in Cunningham.
- [109] Third, I infer from all the circumstances that the reasons on standing were prepared after the pronouncement of the decision. There is very little to support the notion that the reasons had been prepared before the appeals were launched. Indeed, the weight of the evidence is to the contrary. For example, the reasons refer to the acquittal of Morrissey--an event that obviously post-dates the pronouncement of judgment on the standing application. More importantly, the judge was explicit in his October 2020 reasons in support of the standing ruling about the steps he was required to take "[i]n preparing [the] reasons."
- [110] Fourth, the context in which the reasons were delivered strongly suggests that the requisite link between the decision and the reasons that led to it is not present in this case. The workload managed by provincial court judges makes it difficult to imagine that any judge could remember the reasoning that led to a result pronounced three years earlier. The judge did not suggest otherwise. Rather, he candidly acknowledged that he was obliged to reread the submissions and the record of the proceedings to prepare his reasons.
- [111] Fifth, the trial judge's knowledge that the appellants had appealed the standing ruling and were alleging that a new trial should be ordered in light of his failure to provide reasons explaining the result is also an important factor in determining whether a reasonable observer would see the necessary link between the decision and the reasons: Teskey at para. 18; Cunningham at para. 45. The release of reasons long after the pronouncement of judgment while an appeal addressing the correctness of those reasons is pending may give rise to a reasonable apprehension that the judge is, at least subconsciously, advocating a particular result rather than articulating the reasons that led him or her to the decision: Teskey at para. 18; Cunningham at paras. 47-48. The new evidence establishes that before the reasons were composed the judge had become aware that the standing ruling and the absence of reasons in support of it were live issues on appeal.
- [112] Finally, the nature of the issues a judge is required to resolve to come to a decision is a factor in a case of this kind. Where the result turns on the application of legal principles to facts that are not in dispute, the risk that reasons delivered after the fact do not reflect a reasoning process operative at the time the decision was pronounced is significantly attenuated: Cunningham at paras. 48-49. The Crown places heavy reliance on this factor. It submits that facts relevant to the determination of whether the appellants had standing to assert a reasonable expectation of privacy in Suite 401 were not in dispute. It says this factor

distinguishes Teskey and Cunningham from the case at bar and makes it more like Port Chevrolet Oldsmobile Ltd., where the relevant facts were a "matter of record." In Port Chevrolet Oldsmobile Ltd., this Court concluded that the requisite link between the decision and the reasons was intact: at paras. 60-61.

- [113] While I agree with the Crown that the case is, in this respect, unlike Teskey and Cunningham, the judge was required to draw inferences from uncontested facts to decide the standing issue, particularly on the related questions of whether the appellants exercised control over Suite 401 and had the ability to regulate access to that property: Ruling on the Standing Voir Dire at paras. 29-34, 38-41.
- [114] In my view, these factors, when taken together, rebut the presumption that the reasons truly reflected the reasoning process that led to the judge's decision to deny the appellants standing to challenge the admissibility of evidence obtained in the warranted search of Suite 401. In the result, I would disregard the reasons offered in support of the standing ruling. In the absence of reasons, there is no meaningful opportunity for appellate review of the correctness of that ruling.
- [115] What remains is to consider the Crown's position that if the reasons are disregarded, we should embark on our own analysis and conclude that a decision denying the appellants standing was inevitable or, alternatively, that even if the appellants had been granted standing to challenge the search warrant, the challenge--like the one sought to be mounted by Morrissey--would not have succeeded. In essence, the Crown asks us to step away from our traditional role as a reviewing court and decide these issues as a court of first instance.
- [116] I do not think we should accept the Crown's invitation to do so. In my view, this Court is ill-suited to the fact-intensive and context-specific task the Crown would have us embark on. The evidence on the voir dire was lengthy. Although many of the background facts relevant to standing were uncontested, the inferences to be drawn from those facts on issues relating to the appellants' control of and ability to regulate access to Suite 401 were very much in issue. Nor are we in a position, without knowing the basis upon which the appellants intended to challenge the warrant, to conclude they would inevitably have failed to establish at least their entitlement to an evidentiary hearing for the purposes of challenging its validity had standing been granted.
- [117] In light of my conclusion on this point, I consider it unnecessary for us to address the positions of the parties on whether Jones could have any impact on the appellants' standing to challenge the search warrant.

IV. Disposition

- [118] For the foregoing reasons, I would admit the new evidence tendered by the appellants, allow the appeals, quash the convictions and order a new trial.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Griffin"

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