

CANADA / JUDGMENT

R. v. Hollaman

2025 BCCA 315

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 315 R. v. Hollaman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hollaman,

2025 BCCA 315

Date: 20250911

Docket: CA49770

Between:

Rex

Respondent

And

Kyle Hollaman

Appellant

Before:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Riley

The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated

July 5, 2023 (conviction) (R. v. Hollaman, 2023 BCSC 1612,

Kelowna Docket 91727A).

Counsel for the Appellant:

W.E. Jessop

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Counsel for the Respondent:

J.R. Lawn

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Place and Date of Hearing:

Vancouver, British Columbia

May 28, 2025

Place and Date of Judgment:

Vancouver, British Columbia

September 11, 2025

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice MacNaughton

Summary:

Mr. Hollaman appeals his convictions on drug and weapons offences, arguing that: (i) the trial judge erred in permitting the Crown to call rebuttal evidence and refusing to allow the defence to call evidence in surrebuttal; and (ii) the trial judge erred in failing to find a breach of his s. 8 Charter rights arising from police non-compliance with the Criminal Code provisions governing the handling of things seized in the execution of a search warrant.

HELD: Appeal dismissed. The trial judge did not commit any reviewable error in exercising his discretion to permit the Crown to call rebuttal evidence, or in declining to allow the defence to call further evidence in surrebuttal. Although the trial judge erred in failing to find a violation of Mr. Hollaman's s. 8 Charter rights in connection with the unlawful over-holding of seized things contrary to s. 490 of the Criminal Code, the admission of the evidence would not bring the administration of justice into disrepute under s. 24(2) of the Charter.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

- [1] The appellant Mr. Hollaman appeals his convictions for unlawful possession of various controlled substances for the purpose of trafficking and unlawful possession of a taser. The charges arose from a police search of a residence on Valley Road in Kelowna, British Columbia (the "Residence"), pursuant to a search warrant. The unlawfully possessed items were located in the master bedroom, adjoining closet, and ensuite bathroom. Mr. Hollaman was one of five individuals present in that part of the house when the police executed the warrant. He was also listed as one of two tenants on the lease, and multiple documents in his name, or otherwise circumstantially linked to him, were found in the master bedroom.
- [2] Mr. Hollaman's arguments on appeal fall into two broad categories. One category pertains to the admissibility of the seized evidence under 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 [Charter]. The trial judge found that Mr. Hollaman's s. 8 Charter right to be secure from unreasonable search and seizure was violated by the failure of the police to provide a copy of the warrant to the person in ostensible control of the Residence as required under what was then s. 487.1(7) of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code]. However, the judge ultimately declined to exclude the evidence under s. 24(2) of the Charter. While Mr. Hollaman does not challenge that ruling directly, he argues that the trial judge failed to find an additional breach of s. 8 in connection with the police failure to adhere to the procedure for administration of seized property under s. 490 of the Criminal Code. Mr. Hollaman asserts that, in light of this additional Charter violation, admission of the evidence would bring the administration of justice into disrepute.
- [3] The other category of arguments pertains to the trial judge's rulings on rebuttal and surrebuttal evidence. In the rebuttal ruling, the trial judge permitted the Crown to call evidence from two police officers to the effect that the second person listed on the tenancy agreement, Mr. Kirbyson, was experiencing homelessness and did not live in the Residence. Mr. Hollaman argues on appeal that the trial judge erred in allowing the Crown to unfairly split its case. Mr. Hollaman further submits that the resulting prejudice to his defence was compounded by the trial judge's refusal to allow surrebuttal evidence from Mr. Grant, one of the other men found in the Residence during the police search, from whom the defence sought to adduce evidence that Mr. Kirbyson was living in the Residence at the time of the search.

Facts

- [4] In written admissions, it was agreed that members of the Royal Canadian Mounted Police ("RCMP") Kelowna Drug Section commenced a drug investigation focusing on a specific residence on Valley Road in Kelowna.

- [5] In the course of the investigation, the RCMP observed Mr. Hollaman's vehicle parked outside the Residence on five separate dates between 10 December and 19 December 2018. On three of these dates, the police saw the vehicle leave with Mr. Hollaman at the wheel.
- [6] On 19 December 2018, a member of the investigative team obtained a warrant authorizing the search of the Residence for evidence of offences under the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [7] The police executed the warrant shortly before 9:00 p.m. on 19 December 2018. The front door was unlocked and the police entered without incident. The officers announced their presence and purpose. They came upon five individuals in the area of the master bedroom. Four of them, Mr. Fletcher, Mr. Robinson, Mr. Lipsack, and Mr. Grant, were either in the master bedroom or on an adjoining balcony. The fifth person was Mr. Hollaman, who emerged from the ensuite bathroom into the master bedroom about 30 seconds after the police gained entry.
- [8] Mr. Hollaman was arrested at the scene and taken to the police station. The other four men were detained, identified, and photographed at the scene.
- [9] In the ensuing search, the police found the following evidence in various locations within the master bedroom, adjoining closet, and ensuite bathroom:
- i. Drugs: Throughout the master bedroom and ensuite bathroom, the police located and seized quantities of methamphetamine (49.3 grams in total), powder cocaine (25.8 grams in total), crack cocaine (13.1 grams), fentanyl pills (284 pills), and a mixture of fentanyl and heroin (7.5 grams). A substantial proportion of these drugs were located within a locked safe in a cabinet drawer in the ensuite bathroom. The police were able to open the safe using a key attached to a lanyard located in the master bedroom.
 - ii. Cash: The police located and seized a total of \$8,000 in Canadian cash inside the safe, a further \$112 in U.S. cash in a cabinet drawer in the ensuite bathroom, and \$300 Canadian cash on Mr. Hollaman's person.
 - iii. Taser: The police located and seized a taser from a cabinet drawer in the ensuite bathroom.
 - iv. Documents: On top of and next to an ottoman in the master bedroom, the police located several notepads containing handwritten entries which the Crown alleged to be related to drug trafficking, and other notations which the Crown alleged to be consistent with work in the tiling trade. The police also found multiple documents bearing Mr. Hollaman's name in various locations throughout the master bedroom and adjoining closet. These included business cards and an invoice for Mr. Hollaman's tiling business, a pawnbroker receipt, a vehicle repair receipt, a vehicle insurance document, and the aforementioned tenancy agreement for the Residence, listing Mr. Hollaman and Mr. Kirbyson as the two tenants.

- [10] It was admitted at trial that a number of the handwritten phrases in the notebooks found in the master bedroom were slang terms for drugs. It was further admitted that the quantities, values, and variety of drugs seized from the master bedroom and ensuite bathroom were "consistent only with" possession for the purposes of trafficking, as opposed to personal use.

Trial Proceedings

Charter Applications

- [11] Mr. Hollaman was tried by a Supreme Court judge sitting without a jury. At the outset of the trial, Mr. Hollaman advanced a number of applications for relief based on alleged violations of his right to be secure from unreasonable search and seizure as guaranteed by s. 8 of the Charter. The trial judge dealt with Mr. Hollaman's Charter applications in a series of voir dieres, resulting in five separate rulings. Only three of these rulings are relevant to Mr. Hollaman's grounds of appeal.

Ruling No. 2: Execution of Warrant (2022 BCSC 2322) and Ruling No. 4: Admissibility of Evidence (2022 BCSC 2323)

- [12] In Charter Rulings No. 2 and No. 4, the trial judge dealt with Mr. Hollaman's arguments concerning the manner of execution of the search warrant. As described in further detail below, one of Mr. Hollaman's two arguments under this heading found favour with the trial judge (Charter Ruling No. 2), but the judge ultimately declined to exclude the evidence under s. 24(2) of the Charter (Charter Ruling No. 4). Although Mr. Hollaman has not directly challenged these rulings on appeal, he argues that the trial judge erred in failing to exclude the evidence based on multiple violations of his s. 8 Charter rights. Accordingly, both the nature of the Charter infringement as found by the trial judge, and the judge's reasons for declining to exclude the evidence under s. 24(2) of the Charter are relevant to the issues raised on appeal.
- [13] Mr. Hollaman's first argument concerning the manner of execution of the warrant was that the police failed to bring a copy of the search warrant with them to the Residence, and failed to produce it upon request as required under s. 29 of the Criminal Code. The trial judge rejected these allegations, finding as a fact that the police had at least one and probably multiple copies of the warrant with them when they executed the warrant, that none of the occupants asked to see it, and that one of the police officers left a copy of the warrant on the refrigerator in the kitchen at the conclusion of the search: Charter Ruling No. 2 at paras. 13-24.
- [14] Mr. Hollaman's second argument under this heading was that the police failed to provide a copy of the warrant to a person in ostensible control of the premises as required under what was then s. 478.1(7) of the Criminal Code.[1] The trial judge accepted the Crown's concession that the police breached this statutory requirement, by failing to formally present the warrant to a person in apparent control of the premises: Charter Ruling No. 2 at para. 30.

- [15] The trial judge went on to find that, although the failure to comply with s. 487.1(7) resulted in a violation of Mr. Hollaman's s. 8 Charter rights, admission of the evidence would not bring the administration of justice into disrepute under s. 24(2) of the Charter. In reaching this conclusion, the trial judge considered the three lines of inquiry set out in *R. v. Grant*, 2009 SCC 32: Charter Ruling No. 4 at paras. 8-24.
- [16] Under the first line of inquiry, the judge found that the Charter-infringing conduct was on the low end of the spectrum of seriousness. The judge accepted Mr. Hollaman's submission that there was "no good reason" why the police could not have specifically brought the warrant to the attention of a party in control of the premises, presumably Mr. Hollaman: Charter Ruling No. 4 at para. 10. However, the trial judge found that the failure to do so was in the nature of an "oversight", and not the product of a deliberate decision of the police not to take a copy of the warrant to the scene: Charter Ruling No. 4 at para. 11. On this basis, the trial judge found this case distinguishable from *R. v. Bohn*, 2000 BCCA 239, in which a breach of s. 29 of the Criminal Code was found to be a serious Charter violation, warranting exclusion of the evidence under s. 24(2): Charter Ruling No. 4 at para. 12.
- [17] Turning to the second line of inquiry, the trial judge stated that, as a matter of principle, the expectation of privacy in a person's residence is "extremely high", and the search of a private residence is "by its nature highly intrusive": Charter Ruling No. 4 at para. 18. However, the judge also reasoned that the failure to comply with s. 487.1(7) did not render the search warrantless, and if the search warrant had been issued under the conventional process in s. 487 rather than the s. 487.1 telewarrant process, "there would have been no Charter breach even though the police conduct would have been identical": Charter Ruling No. 4 at para. 18. [2] Further, this was not a situation where the occupants of the premises asked to see a copy of the warrant and the police refused to provide it. For all of these reasons, the trial judge found that the Charter infringement was somewhat "technical in nature", such that this line of inquiry "militate[d] against exclusion [of the evidence]": Charter Ruling No. 4 at para. 18.
- [18] Under the third line of inquiry, the trial judge took into account that the evidence seized in the search was "real" and "reliable": Charter Ruling No. 4 at para. 21. The judge found it relevant that the evidence included significant quantities of drugs, and reasoned that the "tragic impacts of the opioid crisis" constitute a compelling societal interest in admitting evidence that would assist in "finding the truth on the facts of this case": Charter Ruling No. 4 at para. 21. However, the judge was also cognizant that the seriousness of the charges could "cut both ways". On the one hand, society had an interest in seeing serious drug charges determined on their merits, whereas on the other, the public expects that the more serious the charges, the more rigorous and exacting the police should be in complying with their Charter obligations: Charter Ruling No. 4 at para. 22.
- [19] The trial judge completed his analysis by weighing up all three lines of inquiry (Charter Ruling No. 4 at para. 23):

In this case, while the breach itself was serious in that it was not trifling, a valid warrant had nonetheless been issued. The failure to provide a copy of the warrant was inadvertent in circumstances whereby had the warrant been obtained in another way there would have been no obligation absent a request. The charges in this case are serious and society's interest in finding the truth when there are significant amounts of fentanyl involved is of serious concern.

[20] The trial judge was not satisfied that admission of the evidence would bring the administration of justice into disrepute within the meaning of s. 24(2) of the Charter, and he therefore dismissed Mr. Hollaman's application: Charter Ruling No. 4 at para. 24.

Charter Ruling No. 5: Non-Compliance with s. 490 of the Criminal Code (2023 BCSC 1610)

[21] Charter Ruling No. 5 dealt with Mr. Hollaman's argument that the police breached his s. 8 rights by failing to comply with s. 490 of the Criminal Code, which sets out the process for administering things seized in connection with a criminal investigation.

[22] Mr. Hollaman's contention was that the police failed to comply with the s. 490 regime by: (i) failing to obtain a timely order for further detention of the seized items under s. 490(2), (ii) failing to obtain an order for further detention upon the expiry of the initial s. 490(2) order, (iii) failing to take steps to return seized property after the expiry of the lawful periods of detention, and (iv) turning over the seized cash to the Civil Forfeiture Office ("CFO") without a s. 490 order authorizing them to do so.

[23] The following additional facts are relevant to the trial judge's ruling on this application.

[24] On 20 December 2018, Cst. Martin submitted a Report to Justice under ss. 487.1 and 489(1) of the Criminal Code, and an associated application for detention of the seized items under s. 490(1)(b).

[25] On 21 December 2018, a judicial justice granted an initial detention order, authorizing detention of the seized things for up to three months from the date of seizure, unless criminal proceedings were instituted in the interim.

[26] The initial detention order expired on 21 March 2019. By that time, no charges had been laid, and the police had not commenced an application for further detention under s. 490(2) of the Criminal Code. The responsible officer, Cst. Martin, testified on the voir dire that the Langley Drug Section had a practice of listing upcoming s. 490 deadlines on a whiteboard, but the deadline for this investigation was missed. As soon as he realized the oversight, he took steps to seek an extension. The trial judge accepted that the initial three-month deadline was missed due to "inadvertence": Charter Ruling No. 5 at para. 31.

[27] On 3 June 2019, Cst. Martin applied for further detention of the seized items under s. 490(9.1) of the Criminal Code, on notice to Mr. Hollaman.

- [28] The application was heard by Provincial Court Judge Tam on 24 June 2019. Relying on Cst. Martin's affidavit, Crown counsel submitted that further detention was in the interests of justice because the investigation was nearly complete, a Report to Crown Counsel was being prepared, and a decision on charge approval was forthcoming. Mr. Hollaman appeared on his own behalf to oppose the police application. He argued that the police missed the deadline and should not be given any extension. He also claimed that the bulk of the seized cash consisted of funds from his business and that he needed the funds to pay employees, purchase supplies, and cover living expenses.
- [29] Judge Tam granted an order under s. 490(9.1) of the Criminal Code authorizing further detention of the seized items until 31 July 2019. The judge told Mr. Hollaman that if charges were not laid by that time, he could apply for return of the seized money.
- [30] After the hearing, Cst. Martin told Mr. Hollaman that he had referred the seized cash to the CFO. Cst. Martin also informed Mr. Hollaman that he could retrieve "most of the other seized items" from the police after the expiry of Judge Tam's order, if charges were not laid by then.
- [31] The s. 490(9.1) order expired on 31 July 2019, by which time charges had not been laid, nor had the police applied for further detention under s. 490(2).
- [32] On 29 October 2019, Mr. Hollaman appeared in Provincial Court, seeking return of the seized items. It is unclear whether Mr. Hollaman served notice of his application on the Crown or the police. The case was called in court and then stood down. Crown counsel later appeared in response to Mr. Hollaman's application. Once again Judge Tam was presiding. Crown counsel advised that a Report to Crown Counsel had been submitted, that "charges had been approved", and he expected an information to be sworn within two weeks. Judge Tam dismissed Mr. Hollaman's application for return of the seized items, informing Mr. Hollaman it could be renewed later if charges were not laid within a "reasonable amount of time".
- [33] On 7 November 2019, the CFO issued a Notice of Intent to Initiate Administrative Forfeiture Proceedings with respect to the seized cash. The notice was directed to Cst. Martin. Under what was then s. 14.05 of the former Civil Forfeiture Act, S.B.C. 2005, c. 29,[3] this notice gave the RCMP authority to retain the seized cash in connection with forfeiture proceedings under the Act. The civil forfeiture proceedings concluded on 3 February 2020, when the cash was forfeited to the provincial government. The RCMP retained physical control of the cash until 29 September 2020. The RCMP exhibit flow chart (recording movements of seized items) contains an entry on that date which reads "Disposed CFO".
- [34] Meanwhile, the police continued to hold the other seized items, including clothing and seized documents bearing Mr. Hollaman's name, without authority, until charges were laid in the Provincial Court of British Columbia on 10 January 2020.

- [35] In his ruling, the trial judge rejected the argument that the police breached Mr. Hollaman's s. 8 Charter rights by continuing to hold the seized cash under the Civil Forfeiture Act and ultimately turning it over to the CFO, without obtaining an order authorizing its disposition under s. 490. The trial judge gave two reasons for this. The first was that the "civil forfeiture process works independently of the statutory detention of seized items under s. 490". In reaching that conclusion, the trial judge relied on *British Columbia (Director of Civil Forfeiture) v. Qin*, 2020 BCCA 244 at para. 98, where Chief Justice Bauman accepted the notion that the Civil Forfeiture Act and s. 490 of the Criminal Code are "legally distinct" regimes that can operate concurrently: Charter Ruling No. 5 at paras. 23, 44. The judge's second reason was that "the forfeiture process was initiated and completed after the charges were laid and therefore the s. 490 regime no longer applied": Charter Ruling No. 5 at para. 24.
- [4] The trial judge's conclusion on the civil forfeiture issue has not been challenged on appeal, so nothing more needs to be said about it.
- [36] As for the other alleged breaches of s. 490, the trial judge considered whether Cst. Martin's admitted non-compliance with their statutory obligations amounted to an infringement of Mr. Hollaman's Charter rights. The judge reasoned that "not every breach of s. 490" will result in an infringement of s. 8 of the Charter, because "[t]he applicant must also demonstrate that he had a reasonable privacy interest", or "an ongoing residual privacy interest" in the seized things: Charter Ruling No. 5 at paras. 12-13; at para. 28, relying on *R. v. Craig*, 2016 BCCA 154 at para. 182.
- [37] The trial judge reasoned that "the three types of privacy interests protected by the Charter" are "personal, territorial, and informational": Charter Ruling No. 5 at para. 32. The judge proceeded to consider whether Mr. Hollaman had a continuing "informational" privacy interest in the seized things.
- [38] In the judge's view, Mr. Hollaman had no continuing reasonable expectation of privacy with respect to the seized cash, because cash is "not inherently private", but is, rather, "a medium of exchange" intended to be handed from one person to another. And while cash could be tested for fingerprints, it would be "futile" to do so, "given the number of people who might be expected to handle a banknote" over its time in circulation: Charter Ruling No. 5 at para. 40.
- [39] With regard to the balance of the seized items, the trial judge relied on the unchallenged voir dire testimony of Cst. Martin to find that "many of the things seized including the clothing, documents, and paper items, could and would have been returned to Mr. Hollaman had he asked for them, but he did not do so". The trial judge also referred to Cst. Martin's testimony that he "attempted to contact" Mr. Hollaman after the s. 490(9.1) order expired on 31 July 2019, without success: Charter Ruling No. 5 at paras. 42-43.
- [40] The trial judge found that there had been no breach of Mr. Hollaman's s. 8 rights in connection with the police handling of the seized items, and therefore dismissed the application: Charter Ruling No. 5 at para. 45.

Trial Proper

- [41] The trial proper began on 3 March 2023. The Crown's case consisted of admissions of fact, photographs from the search of the Residence, a collection of documents seized from the master bedroom and adjoining closet, and viva voce testimony from a single police officer, Cst. Lukash.
- [42] The seized documents included the first five pages of a six-page residential tenancy agreement for the Residence. The final page, on which one would expect to find the signatures of the tenants, was not included. This tenancy agreement listed two tenants, Mr. Hollaman and Mr. Kirbyson. In the written admissions, it was an accepted fact that the tenancy agreement was an "authentic document" and that it entitled Mr. Hollaman to "occupy" the Residence on the date of the police search.
- [43] Cst. Lukash gave evidence about the police entry into the Residence, the circumstances in which the police came upon the five men who were found inside, and the subsequent police search. She testified that Mr. Hollaman was initially in the ensuite bathroom. About 30 seconds after the police arrived, he stepped into the master bedroom. He appeared "nervous and sweaty". Cst. Lukash placed Mr. Hollaman under investigative detention. (He was later arrested by another officer at the scene, although that evidence was adduced in one of the voir dires and never became part of the Crown's case in the trial proper.)
- [44] The defence case began later in the day on 3 March 2023. The defence called one witness, Mr. Hollaman. In his testimony in chief, he acknowledged that he was one of the tenants of the Residence, but asserted that he did not live in the master bedroom. He said the master bedroom tenant was Mr. Kirbyson, the other individual listed on the lease.
- [45] Mr. Hollaman said he and Mr. Kirbyson initially lived together at another address in Kelowna, before moving to the Residence. Mr. Hollaman did not know Mr. Kirbyson well, and did not know what he did for a living.
- [46] Mr. Hollaman testified that he lived in a bedroom in the lower level of Residence, adjacent to the garage. He claimed that he and the other tenants would sometimes go into the master bedroom to use drugs.
- [47] On the date of the police search, Mr. Hollaman was in the master bedroom using drugs with some of the other tenants. He went into the ensuite to use the toilet, and when he came out the police were present.
- [48] Mr. Hollaman denied that the clothing and personal effects in the master bedroom were his. He denied having any knowledge of, or control over the contraband located in the master bedroom. He admitted that the business cards and some of the other seized documents were his, but said he had no idea how they ended up in the master bedroom.

- [49] In cross-examination, Mr. Hollaman admitted that the tenancy agreement was filled out in his handwriting. It listed Mr. Kirbyson as a tenant, with no associated phone number. Mr. Hollaman denied that Mr. Kirbyson was an unhoused person whose name was written on the tenancy agreement as part of a ruse.
- [50] Mr. Hollaman claimed to have no idea why documents in his name were found in the master bedroom and closet. He denied that the notebooks were his or that they contained his handwriting. He agreed with the suggestion that the first few pages of notes could have been written by someone who worked in tiling, but denied that he was the one who wrote them.
- [51] Mr. Hollaman testified that he saw Mr. Kirbyson once after the police search, less than a week later, but then lost track of him. He said that at the time of trial he did not know Mr. Kirbyson's whereabouts.
- [52] Mr. Hollaman agreed with the suggestion put to him in cross-examination that Mr. Grant was also a tenant and that his testimony would be "helpful" in confirming Mr. Kirbyson's occupancy of the master bedroom. Mr. Hollaman testified that by the time of the trial he had no idea where Mr. Grant was.
- [53] The defence did not call any other witnesses. Immediately after defence counsel closed his case, Crown counsel announced that he intended to call rebuttal evidence. The trial was set to continue on 11 May 2023.

Crown Application to Call Rebuttal Evidence

- [54] The Crown proposed to call rebuttal evidence from two police witnesses who had dealt with Mr. Kirbyson in circumstances suggesting that he was experiencing homelessness. The intended purpose of this evidence was to show that Mr. Kirbyson did not live at the Residence.
- [55] The defence argued the Crown was attempting to split its case. Defence counsel pointed to the Crown's reliance on the tenancy agreement to prove Mr. Hollaman's connection to the master bedroom, when Mr. Kirbyson was also listed as a tenant. In defence counsel's submission, any evidence the Crown had to show Mr. Kirbyson was not the occupant of the master bedroom ought to have been led in the Crown's case in chief, not held back for rebuttal.

Trial Judge's Ruling on the Rebuttal Application (2023 BCSC 1613)

- [56] On 11 May 2023, the trial judge ruled orally on the application to call rebuttal evidence (the "Rebuttal Ruling").
- [57] The trial judge instructed himself on the relevant legal principles, relying on *R. v. F.S.M.* (1996), 111 C.C.C. (3d) 90, 1996 CanLII 4012 (Ont. C.A.); *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555, 1994 CanLII 125; and *R. v. Heltman*, 2018 BCSC 2385. He noted that an underlying concern in determining whether to allow rebuttal evidence is "whether the Crown is seeking to split its

case": Rebuttal Ruling at para. 8. In the judge's view, the two questions he had to address were whether the proposed rebuttal evidence arose "only from the evidence tendered in the defence case" such that it was not an attempt to re-open the Crown's case, and whether the proposed evidence went to an essential element of the case as opposed to a collateral issue: Rebuttal Ruling at para. 10.

- [58] On the first question, the trial judge was satisfied that, in view of the evidence and the information available through the police investigation, the Crown was not trying to split its case. The Crown presented a circumstantial case linking Mr. Hollaman to the contraband located in the master bedroom and ensuite based upon: (i) personal documents in Mr. Hollaman's name, seized from the master bedroom; (ii) business cards in his name, located on top of the safe in which some of the drugs were stored; (iii) a key to the safe, located in the master bedroom; and (iv) a notebook containing handwritten notes consistent with work done in a tiling business, and other handwritten notations referencing illicit drugs, amounts or numbers, and names: Rebuttal Ruling at para. 18. By contrast, aside from the name on the tenancy agreement, "[n]o part of the investigation or search showed any documents, sightings, observations, or anything else with regard to Mr. Kirbyson": Rebuttal Ruling at paras. 19, 21. In the trial judge's view, the "actual whereabouts and living arrangements of Mr. Kirbyson" only became a significant issue when Mr. Hollaman took the stand and gave evidence Mr. Kirbyson actually lived in the master bedroom: Rebuttal Ruling at para. 27.
- [59] Moving to the second question, the trial judge determined that the proposed rebuttal evidence related to a material point rather than a collateral one. The key issue in the trial was whether the Crown could prove beyond a reasonable doubt that Mr. Hollaman "was in possession and control of the contents of the master bedroom, and in particular the contents of the safe", and if Mr. Kirbyson did not live at the Residence at the material time, "it would be evidence material and relevant in the analysis of who was in possession and control of the master bedroom": Rebuttal Ruling at paras. 30-31.

- [60] The trial judge therefore granted the Crown's application to call rebuttal evidence.

Rebuttal Evidence

- [61] The Crown called its two rebuttal witnesses at the continuation of the trial on 14 June 2023.
- [62] Cst. Lange testified that in 2018, he was a member of the Kelowna RCMP Downtown Enforcement Unit. In that capacity, he came to know Mr. Kirbyson as an individual who was "experiencing homelessness". Relying on the doctrine of past recollection recorded, the Crown elicited evidence from Cst. Lange about an incident report he had written on 20 December 2018, in which he responded to a complaint about two males and a female "camped in front of" a social services centre in downtown Kelowna. Cst. Lange and another officer attended the scene and got the three individuals, one of whom was Mr. Kirbyson, to pack up and leave.

[63] Cst. Walton testified that on 28 November 2018, he was on duty as a member of the Kelowna RCMP Special Enforcement Team. He responded to a complaint about three individuals who were overstaying their welcome at a local hotel. Cst. Walton and other officers conducted surveillance in which they saw Mr. Kirbyson coming and going from the hotel room. The officers ultimately entered the room to assist in the eviction of the occupants. Mr. Kirbyson and the other two occupants packed up their clothing and other belongings and left the hotel without incident. Cst. Walton later saw a posting in the police station indicating that Mr. Kirbyson died of a drug overdose some time after the events in issue.

Defence Application to Call Surrebuttal Evidence

[64] Immediately after the rebuttal evidence, the defence applied to call a single witness in surrebuttal. In particular, defence counsel sought to call Mr. Grant, one of the men found in the Residence when the police executed the search warrant. Counsel advised that Mr. Grant was one of the tenants and would testify on an "extremely narrow" point, namely that Mr. Kirbyson was also a tenant living at the Residence at the time of the police search.

[65] The Crown objected, arguing that Mr. Kirbyson's residential status became a "live issue" during cross-examination of Mr. Hollaman. Knowing that, the defence ought to have called Mr. Grant in the defence case, and the proposal to call him in surrebuttal amounted to case-splitting.

Trial Judge's Ruling on Surrebuttal Application (2023 BCSC 1630)

[66] The trial judge ruled orally on the application to call surrebuttal evidence on 14 June 2023 (the "Surrebuttal Ruling").

[67] The trial judge took guidance from *R. v. Norris*, 2019 NLCA 29, in which the court set out two general propositions governing a judge's exercise of discretion to permit surrebuttal evidence. First, "the permissible scope of defence surrebuttal evidence should be liberal in favour of the accused" in the interests of ensuring an "opportunity to make full answer and defence": *Norris* at para. 42. Second, the opportunity to make full answer and defence cannot be stretched so far as to permit the defence to split its case. Failure to present one's full case in chief "may result in prejudice to the other side and interference with the orderly and expeditious conduct of the trial": *Norris* at para. 43.

[68] The trial judge also summarized a list of relevant factors identified by the court in *Norris*, including:

[9] the relevance of the proposed testimony, whether the accused had the opportunity during the presentation of his or her defence to address the issues for which surrebuttal evidence is requested, whether the accused failed to provide a complete foundation for the defence and sought instead to split its case, and the extent to which the evidence adduced by the Crown in rebuttal is new, for example, evidence directed to an alternative explanation dealt with in defence evidence, or Crown rebuttal evidence that included observation of the accused

during the trial

Surrebuttal Ruling at para. 9, citing Norris at para. 44.

- [69] The trial judge determined that, in seeking to call Mr. Grant in surrebuttal, the defence was splitting its case. Mr. Hollaman testified in chief that Mr. Grant lived in the Residence, and on cross-examination he agreed that Mr. Grant would have been in a position to testify about whether Mr. Kirbyson also lived there. Yet, the judge noted, "no efforts had been made to locate him": Surrebuttal Ruling at para. 10. Further, there was no explanation for why Mr. Grant was suddenly available to be called in surrebuttal, when Mr. Hollaman testified in cross-examination that he had no knowledge of Mr. Grant's whereabouts and had taken no steps to locate him: Surrebuttal Ruling at para. 11.
- [70] The trial judge went on to consider whether the surrebuttal evidence would prejudice the Crown, explaining that the "primary concern" was "trial fairness": Surrebuttal Ruling at para. 15. Mr. Grant was available to testify on the final day of the trial, and the timing was such that it would have been open to the defence to apply to re-open its case to call Mr. Grant before the Crown presented its rebuttal evidence. Had the matter proceeded in that way, the Crown would have been free to cross-examine Mr. Grant at large, and the defence re-examination of Mr. Grant would have been restricted to new matters that were not part of the defence case and arose only in cross-examination. By contrast, if Mr. Grant was called as a surrebuttal witness, examination in chief would be narrowly confined to the question of Mr. Kirbyson's residential status, and if the Crown cross-examined Mr. Grant at large, the defence would have a "very liberal ability to re-examine": Surrebuttal Ruling at para. 14. In other words, calling Mr. Grant in surrebuttal would give the defence the final opportunity to examine him on anything beyond the narrow point of fact that triggered the surrebuttal application.
- [71] In the result, the trial judge dismissed the defence application to call Mr. Grant in surrebuttal: Surrebuttal Ruling at para. 15.

Conclusion of the Trial Proceedings (2023 BCSC 1612)

- [72] After the dismissal of the surrebuttal application, the parties proceeded directly to closing submissions.
- [73] In oral reasons given on 5 July 2023 (the "Conviction Reasons"), the trial judge found Mr. Hollaman guilty on all counts. Applying the framework set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93, the trial judge did not believe and was not left with a reasonable doubt by Mr. Hollaman's testimony that he resided in the basement bedroom and that the master bedroom was in fact occupied by Mr. Kirbyson: Conviction Reasons at paras. 44, 60, 65. Having rejected Mr. Hollaman's evidence, the trial judge then considered whether the Crown had proven its case: Conviction Reasons at paras. 66-67. The judge was satisfied beyond a reasonable doubt that the only reasonable inference to draw from all of the evidence was that Mr. Hollaman resided in the master bedroom and had knowledge of and control over

the drugs and the taser: Conviction Reasons at paras. 88-89.

Issues Raised on Appeal

[74] Mr. Hollaman's five grounds of appeal fall into two broad categories:

- i. Whether the trial judge erred in granting the Crown's application to call rebuttal evidence, and in refusing the defence application to call surrebuttal evidence; and
- ii. Whether the trial judge erred in failing to find that the police non-compliance with s. 490 of the Criminal Code violated Mr. Hollaman's s. 8 Charter rights, and if so, whether any of the evidence from the police search ought to have been excluded under s. 24(2) of the Charter?

(1) Rebuttal and Surrebuttal Evidence

Legal Principles Governing the Reception of Rebuttal Evidence

[75] Although a ruling on rebuttal evidence raises a question of law within the meaning of s. 686(1)(a)(ii) of the Criminal Code, the standard of review on appeal is deferential. This is because a decision about whether to allow rebuttal evidence is a matter within the trial judge's discretion: *R. v. Dalen*, 2008 BCCA 530 at para. 13; *R. v. G.P.* (1996), 112 C.C.C. (3d) 263 (Ont. C.A.) at 13-14, 1996 CanLII 420. Consequently, an appeal court will only intervene where the trial judge commits an error in law or principle, misapprehends relevant evidence, or where the rebuttal ruling does not accord with the interests of justice: *R. v. Bronk*, 2017 BCCA 88 at para. 42; *R. v. Pasqua*, 2009 ABCA 247 at paras. 8-9.

[76] In the civil context, the law on rebuttal evidence was compendiously stated by Justices Hunt and Costigan in *Elgert v. Home Hardware Stores Limited.*, 2011 ABCA 112, as follows:

[54] Rebuttal evidence is admissible when the matter arises out of the defence case, is not collateral and the party could not have foreseen its development. Otherwise, the general rule is against case-splitting because of possible unfairness and to avoid unending alternation of fragments of the case: *R v Krause*, [1986] 2 SCR 466 at paras. 15-16, 33 DLR (4th) 267.

We can see from this passage that the legal parameters guiding a trial judge's discretion in determining whether to allow rebuttal evidence can be described by way of a general rule, coupled with a relatively narrow exception to that rule.

[77] The parameters of rebuttal evidence are the same, or similar, in civil and criminal cases alike. Nevertheless, it is fair to say that in the criminal context the general rule against rebuttal evidence takes on a particular significance in safeguarding the accused's entitlement to be presented with the entire Crown case, thereby allowing the accused to make an informed decision about how to respond: *R. v. Krause*, [1986] 2 S.C.R. 466 at para. 16, 1986 CanLII 39; *Dalen* at para. 15.

- [78] The general rule is that the Crown, as the moving party in a criminal prosecution, must adduce within its case in chief all relevant evidence that it intends to rely upon to prove the accused's guilt: Krause at para. 15. The purposes of this rule are to ensure trial fairness, and to protect the integrity and orderliness of the trial process. With regard to fairness, the principal concern is preventing the Crown from gaining a strategic advantage by holding evidence in reserve so as to "split its case", or to spring a "trap" on the accused: Krause at para. 15; R. v. Chaulk, [1990] 3 S.C.R. 1303 at 1364, 1990 CanLII 34, citing R. v. Drake (1970), 1 C.C.C. (2d) 396 (Sask. Q.B.) at 397, 1970 CanLII 577. As to the orderliness of the trial process, the rule is intended to avoid "unending alternation" between the parties in the presentation of their respective cases: Elgert at para. 54.
- [79] The narrow exception to the general rule is that the Crown may be permitted to call rebuttal evidence where the defence case has raised a new matter going to the question of guilt or innocence and which the Crown could not reasonably have anticipated: Krause at para. 16; Chaulk at 1365; Dalen at para. 17. There are two particular features of this exception that have attracted attention in the case law.
- [80] First, to qualify as a proper subject for rebuttal evidence, the issue said to arise from the defence case must bear on a question of guilt or innocence, rather than a collateral issue: Krause at para. 17; R. v. Aalders, [1993] 2 S.C.R. 482 at 497-498, 1993 CanLII 99. This ensures that rebuttal evidence does not undermine the collateral facts rule, under which the accused, or any other witness, may be widely cross-examined on issues going to credibility, but no evidence may be called to contradict the witness's testimony on a matter that is collateral to the material issues in the case.
- [81] Second, to qualify as a proper subject matter for rebuttal evidence, the matter arising from the defence case must be entirely new, or it must have been something only "marginally", "minimally", or "doubtfully relevant" based on the information known to the Crown at the close of its case: Chaulk at 1364, citing Drake at 397. As Justice Rosenberg explained in G.P. at 13, "[d]espite the broad language from Krause it has always been understood that the trial judge has a discretion to admit evidence in reply concerning an issue that was of only marginal importance during the prosecution's case in chief, but that took on added significance as a result of the defence evidence" [emphasis added].
- [82] Both of these limitations are concisely set out in a single sentence in Aalders at 498, in which Justice Cory stated, "If the reply evidence goes to an essential element of the case and the Crown could not have foreseen that such evidence would be necessary, then it is generally admissible". Justice Cory went on to explain why rebuttal evidence should be admitted where it meets the narrow parameters laid out above:

It is true that the Crown cannot split its case to obtain an unfair advantage. Nor should the Crown be able to put in evidence in reply on a purely collateral issue. However, it is fit and proper that reply evidence be called which relates to an integral and essential issue of the case. In such circumstances, it would be wrong to deprive the trier of fact of important evidence relating to an

essential element of the case. The course of a trial, particularly a criminal trial, must be based upon rules of fairness so as to ensure the protection of the individual accused. However, the rules should not go so far as to deprive the trier of fact of important evidence, that can be helpful in resolving an essential element of the case.

Applying the Principles

- [83] It was common ground that to prove its case against Mr. Hollaman the Crown had to establish beyond a reasonable doubt that he had knowledge of, and control over, the drugs and the weapon found in the master bedroom and ensuite bathroom.
- [84] The thrust of Mr. Hollaman's argument in opposition to the rebuttal evidence was that the Crown's case against him was entirely circumstantial, the tenancy agreement was a key element of that circumstantial case, and the agreement listed two tenants, Mr. Hollaman and Mr. Kirbyson. Accordingly, Mr. Hollaman argued at trial and repeats on appeal that Mr. Kirbyson's possible connection to the master bedroom was an issue the Crown could readily have anticipated based upon its own evidence. The issue of Mr. Kirbyson's connection to the master bedroom did not, in Mr. Hollaman's submission, arise from the defence case. Thus, Mr. Hollaman says the Crown was seeking to split its case by calling rebuttal evidence about Mr. Kirbyson's living arrangements.
- [85] The trial judge fully appreciated Mr. Hollaman's position. The judge reasoned that although the tenancy agreement listed Mr. Kirbyson as one of two tenants of the Residence, there was no other evidence at the Crown's disposal to suggest that Mr. Kirbyson had any actual connection to the residence, or more particularly to the master bedroom and ensuite bathroom where the contraband was located. Mr. Kirbyson was not one of the five men in the residence when the police executed the warrant. There was no indication that he was seen in surveillance coming or going from the residence in the days leading up to the search. And apart from the tenancy agreement, the search of the master bedroom and ensuite did not turn up any other documents in his name or circumstantially linked to him. Taking all of this into account, the trial judge concluded that "[t]he actual whereabouts and living arrangements of Mr. Kirbyson, an individual wholly unconnected with the investigation, [became] significant solely because [Mr. Hollaman] testified that the master bedroom and the safe containing the drugs was actually Mr. Kirbyson's bedroom": Rebuttal Ruling at para. 27. Thus, the judge granted the Crown's application to call rebuttal evidence.
- [86] Mr. Hollaman has not demonstrated that the trial judge committed any reviewable error in permitting the rebuttal evidence. The case law recognizes that the rebuttal evidence rule is easy to state, but often hard to apply. It was open to the trial judge, as a matter within his discretion, to admit evidence going to an issue that was of only "marginal relevance" at the close of the Crown case, and subsequently became a "live issue" as a consequence of evidence adduced in the defence case. In other words, paraphrasing from G.P. at para. 13, the rebuttal evidence went to an issue that could fairly be regarded as a matter of "marginal importance" during the Crown's case in chief, but that took on "added significance as a result

of the defence evidence".

- [87] I return briefly to Mr. Hollaman's submission about the circumstantial nature of the Crown's case. He argues that since the case was circumstantial, the Crown would have had to account for innocent inferences that may arise from its own evidence. Thus, while not affirmatively required to "prove a negative", the Crown had to be in a position to establish that the inference of guilt was the only rational inference to be drawn from all of the evidence. The Crown relied on the tenancy agreement as part of its case against Mr. Hollaman, knowing that the agreement also listed another tenant, Mr. Kirbyson. Mr. Hollaman's position is that the Crown, having made a choice not to call evidence tending to diminish Mr. Kirbyson's connection to the Residence as part of its case in chief, should have been required to live with the consequences of that choice.
- [88] The trial judge acknowledged this point. He reasoned that if the defence had called no evidence on this issue and simply pointed to the tenancy agreement in argument to say that Mr. Kirbyson, and not Mr. Hollaman, occupied the master bedroom and had knowledge and control of the contraband, then it would not have been open to the Crown to re-open and bolster its case. However, the situation changed once Mr. Hollaman took the stand to offer affirmative evidence about Mr. Kirbyson's alleged connection to the master bedroom. As the trial judge put it, responding to "possible inferences that may be drawn from the absence of evidence" is different from calling rebuttal evidence in response to "actual evidence called in the trial which must be dealt with": Rebuttal Ruling at para. 28. I see no error of law or principle in this reasoning.

Legal Principles Governing the Reception of Surrebuttal Evidence

- [89] The trial judge's discretion to admit surrebuttal evidence is governed by principles that are largely, if not entirely, the same as those that govern the admission of rebuttal evidence. The animating concern is that either party's failure to present its full case, "whether the Crown in proving the elements of the offence, or the accused in establishing a defence, may result in prejudice to the other side and interference with the orderly and expeditious conduct of the trial": Norris at para. 43.
- [90] A trial judge may exercise discretion to permit surrebuttal evidence in relation to any issue that is material and genuinely arises out of the Crown's case in rebuttal: Norris at paras. 39, 44-45; R. v. Ewert (1989), 52 C.C.C. (3d) 280 (B.C.C.A) at 284, 1989 CanLII 7140. This discretion ought to be exercised liberally in view of the accused's right to make full answer and defence to the entirety of the Crown's case, both in chief and in rebuttal: Ewert at 283. However, the right to make full answer and defence does not justify the defence splitting its case to the Crown's prejudice: Norris at para. 43.

Applying the Principles

- [91] At trial, the defence submitted that, once the Crown obtained leave to call rebuttal evidence tending to undermine Mr. Kirbyson's connection to the Residence, the defence ought to have been permitted to contest that point by adducing surrebuttal evidence from Mr. Grant.
- [92] The trial judge rejected that position, finding that the issue of Mr. Kirbyson's living arrangements arose out of Mr. Hollaman's testimony during the defence case, such that any further evidence on that issue ought to have been called within the defence case. Even allowing for Mr. Hollaman's evidence that he was unaware of Mr. Grant's whereabouts at the time of his testimony (on 3 March 2023), the trial judge reasoned that the defence was clearly in a position to call Mr. Grant on the continuation date (on 14 June 2023), and could have done so before the Crown's case in rebuttal began. Instead of doing so, defence counsel waited until after the Crown called its rebuttal evidence, thereby splitting the defence case: Surrebuttal Ruling at paras. 11-12.
- [93] On appeal, Mr. Hollaman submits that while it "may have been preferable" to call Mr. Grant in the defence case, "given the overarching concern about full answer and defence", the "real question" was whether allowing the defence to call Mr. Grant in surrebuttal prejudiced the Crown. Mr. Hollaman submits that the trial judge did not identify any such prejudice. I do not agree. The trial judge found prejudice in relation to the scope of permissible re-examination.
- [94] To explain, the trial judge reasoned that, if Mr. Grant were called in surrebuttal, his testimony in chief would have to focus on two narrow material points, namely: (i) whether Mr. Kirbyson lived at the Residence; and (ii) which of Mr. Kirbyson and Mr. Hollaman occupied the master bedroom. Although the Crown would be free to cross-examine Mr. Grant at large (i.e., about matters other than these two narrow points), the defence would then have a "very liberal ability" to re-examine Mr. Grant, with no further opportunity for the Crown to cross-examine: Surrebuttal Ruling at para. 14.
- [95] This reasoning factored into the trial judge's conclusion:
- [15] Ultimately the primary concern for the court here is trial fairness. I conclude that the fact that Mr. Grant had already been located and that the accused wished to call him as a witness could and should have been raised before the Crown rebuttal evidence was called. Returning to Norris, I find that calling Mr. Grant at this point would be splitting the defence case. Mr. Grant obviously became available after March 3 when the defence closed its case. But no application was brought to reopen the defence case before the rebuttal witnesses were called. In the circumstances, because I find that it is a splitting of the defence case, I will not permit the calling of Mr. Grant as a surrebuttal witness.

- [96] I see no error in the trial judge's analysis. He concluded that the defence was seeking to split its case, and that the effect of doing so would prejudice the Crown. Considering the whole of the record before the trial judge, it was reasonably open to him to make these findings. Although Mr. Hollaman disagrees with the surrebuttal ruling, no basis has been shown for interfering with the manner in which the judge exercised his discretion.
- (2) Charter Implications of Non-Compliance with s. 490 of the Criminal Code

The Nature of the s. 490 Regime

- [97] The overall purpose of s. 490 of the Criminal Code is to provide for the administration and judicial supervision of things seized in connection with criminal investigations, in a manner that achieves a balance between the societal interest in the investigation of crime on the one hand, and the property and privacy interests of individuals from whom the things were seized on the other: *Further Detention of Seized Things (Re)*, 2024 BCSC 297 [Ruling 24/297] at para. 54, citing *Further Detention of Seized Things (Re)*, 2024 BCSC 93 at para. 17. The "gateway" to the scheme is the statutory requirement for a peace officer to report the initial seizure of things in a criminal investigation to a justice under s. 489.1: *Ruling 24/297* at para. 57, citing *R. v. Garcia-Machado*, 2015 ONCA 569 at paras. 15, 55. Various subsections in s. 490 then set out the steps required to obtain orders authorizing detention of seized things for various periods of time (per ss. 490(1), (2), and (3)) prior to the commencement of proceedings in which the seized things will be required. The statute also provides for other aspects of the administration of seized things, including a process for interested parties to access or view the seized things (per s. 490(15)), and a process for lawful disposition of seized things after the periods of detention provided for in the statute have expired (per s. 490(9)).
- [98] This statutory scheme provides for judicial supervision of the periods of time in which seized things can be detained, up to the point where either proceedings have been instituted in which those things are required, or the investigative authorities determine that the seized things are no longer required: *Re 297* at para. 55; *Alberta (Attorney General) v. Black*, 2001 ABQB 216 at paras. 20-21. Thus, the statutory scheme "aims for the expeditious return of seized items because the rightful owner may want and need those items": *Further Detention of Things Seized (Re)*, 2019 BCSC 1345 at para. 16.
- [99] It is important to bear in mind that the judicial supervision contemplated by the s. 490 regime is delineated by statute. The statutory function of a justice or judge considering an application for further detention under ss. 490(2), 490(3), or 490(9.1) of the Criminal Code does not allow for any determination of the lawfulness of the underlying seizure. Nor does it clothe a justice or judge charged with the determination of an application for further detention with jurisdiction to entertain Charter arguments or grant Charter relief in connection with either the initial seizure, or further detention of seized things: *Re 297* at paras. 74-75, citing *inter alia*, *R. v. Raponi*, 2004 SCC 50 at para. 30; see also *Further Detention of Seized Things (Re)*, 2024 BCSC 817 at para. 6.

[100] However, non-compliance with the s. 490 regime may have Charter implications in criminal proceedings against individuals found to have constitutionally protected interests in the seized things. These Charter implications generally fall to be decided by trial judges, who are courts of competent jurisdiction for the purposes of granting Charter remedies as described in *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 956. Thus, trial judges are permitted and expected to rule on Charter arguments arising from non-compliance with the s. 490 regime: see, for example, *Craig*; *R. v. Backhouse* (2005), 194 C.C.C. (3d) 1, 2005 CanLII 4937 (Ont. C.A.); *R. v. Villaroman*, 2018 ABCA 220 at paras. 6-12.

Whether Statutory Non-Compliance Amounts to a Charter Breach

[101] There has been considerable judicial discussion about whether non-compliance with the s. 490 regime is per se an infringement of s. 8 of the Charter, or alternatively whether some forms of statutory non-compliance are so minor or technical that they might not even engage Charter-protected interests: *Craig* at paras. 168-176; *Villaroman* at para. 12.

[102] In this Court, this point was squarely addressed and resolved in *Craig*. Justice Bennett concluded that "the failure to strictly comply with the statutory provisions of the Criminal Code will result in a Charter breach where the accused had an ongoing residual privacy interest" so as to render the "continuing detention unreasonable": *Craig* at para. 182. Where the non-compliance crosses this threshold, any other circumstances informing the breach of the statutory scheme are "best left for an analysis under s. 24(2) of the Charter": *Craig* at para. 182. These conclusions were re-affirmed in *R. v. Gill*, 2024 BCCA 63 at paras. 76-78.

[103] This was the paradigm that the trial judge applied in Charter Ruling No. 5, in which he reasoned as follows:

- i. He cited *Craig* for the proposition that a failure to comply with the s. 490 regime "will result in a Charter breach" in circumstances where the accused has an "ongoing residual privacy interest in the things seized", which has the effect of "rendering the continued detention of those things unreasonable": at para. 28.
- ii. Referencing *R. v. Gomboc*, 2010 SCC 55, the trial judge acknowledged that s. 8's protective mantle extends to personal, territorial, and informational privacy interests. In the particular context before him, the operative question was whether Mr. Hollaman had a continuing residual informational privacy interest in the things seized from the bedroom and ensuite bathroom of the Residence: at para. 32.
- iii. On the authority of *R. v. Jones*, 2017 SCC 60, it was open to Mr. Hollaman to rely on the Crown's "theory of the case" as a basis for asserting that his Charter-protected informational privacy interests were engaged: at para. 33.
- iv. To determine whether there was a breach of Mr. Hollaman's s. 8 rights, it was necessary to consider whether he had a reasonable expectation of privacy "with regard to the specific items seized", rather than "simply [bundling] them together", or making "raw assumptions": at para. 38.

- v. With regard to the seized cash, the trial judge reasoned that cash was not "inherently private", but rather a "medium of exchange" intended to be handed from one person to another in exchange for goods or services. While cash could be fingerprinted, the exercise would be "obviously futile", given the number of people who could be expected to handle a bank note during its circulation. The judge concluded that Mr. Hollaman had no continuing expectation of privacy in the seized cash: at para. 40.
- vi. With regard to the balance of the seized things, the judge cited Cst. Martin's voir dire testimony informing Mr. Hollaman that, if and when Judge Tam's order expired, he could retrieve "any belongings in which he had an interest" from the police detachment: at para. 42. The judge inferred that "many of the things seized, including the clothing, documents, and paper items, could and would have been returned to Mr. Hollaman had he asked for them": at para. 43. On this basis, the trial judge appears to have concluded that Mr. Hollaman either did not have a continuing expectation of privacy in these things, or that he waived any such privacy interest by failing to make efforts to retrieve them after the expiry of the s. 490(9.1) order on 31 July 2023.
- vii. The trial judge concluded that failure of the police to comply with s. 490 of the Criminal Code did not result in any breach of Mr. Hollaman's s. 8 rights: at para. 45.

[104] On appeal, Mr. Hollaman argues that the trial judge erred in failing to find that he had a continuing expectation of privacy in the things seized from the master bedroom and ensuite bathroom. His factum focused on continuing privacy interests in the seized cash, but his oral submissions also addressed the other seized things. The Crown's factum addressed the status of all of the seized items.

[105] Whether the trial judge identified the proper legal test for establishing an expectation of privacy, and whether the trial judge properly applied that test to the facts are both questions of law reviewable on a standard of correctness: *R. v. Felger*, 2014 BCCA 34 at para. 30; *R. v. Pipping*, 2020 BCCA 104 at para. 32.

[106] Before addressing the merits of this ground of appeal, I should note one potentially significant change in circumstance that arose between the trial judge's ruling on Mr. Hollaman's Charter application and the hearing of the appeal. In the Charter application, Mr. Hollaman relied on the Crown's "theory of the case" to assert a continuing privacy interest in the seized things. That theory was that Mr. Hollaman was the occupant of the master bedroom such that he had knowledge of, and control over, the things contained within the master bedroom and the ensuite. However, in the trial proper Mr. Hollaman testified that he did not occupy the master bedroom, and expressly disavowed any connection whatsoever to the majority of the seized items, including the cash and drugs seized from the safe, and the clothing seized from the closet.

[107] On appeal, Mr. Hollaman has framed his Charter arguments on the basis of the "Crown theory" connecting him to the subject matter of the alleged Charter breach, while simultaneously relying on his trial testimony denying any interest in that subject matter as part of the factual matrix for his rebuttal and surrebuttal arguments. It is unclear whether,

in this circumstance, the Supreme Court of Canada's holding in *Jones* that an accused is entitled to rely on the "Crown theory" as a basis for asserting Charter rights applies. *Jones* answered the question of whether an accused must prove a subjective expectation of privacy in the subject matter of a search to advance a s. 8 claim. It did not address whether an accused may continue to assert a subjective expectation of privacy after disavowing, under oath, any personal connection to the subject matter.

- [108] However, this issue must be left for another day, as it was not raised in the Crown's factum, and therefore not argued before us. I therefore proceed to analyze Mr. Hollaman's Charter arguments on the basis that in claiming a continuing expectation of privacy he is entitled to rely on the "Crown theory" that he in fact occupied the master bedroom and had knowledge of and control over the things seized from that part of the residence, which of course is the basis on which Mr. Hollaman was ultimately convicted.
- [109] Returning to the merits of Mr. Hollaman's argument, in my view the trial judge made two overarching legal errors in addressing the Charter implications of the police non-compliance with the s. 490 regime. First, the trial judge considered too narrow a set of interests in assessing whether Mr. Hollaman had a continuing expectation of privacy in the seized things. Second, as explained in more detail below, the trial judge considered the "circumstances" of the police non-compliance as a basis for finding that Mr. Hollaman did not have a continuing expectation of privacy triggering a s. 8 Charter violation (the breach stage), when the case law makes it clear that such "circumstances" are only to be considered in assessing whether admission of the evidence would bring the administration of justice into disrepute under s. 24(2) (the remedy stage).
- [110] The trial judge correctly focused on informational privacy, since territorial and personal privacy interests were no longer at stake when the initial detention order expired, three months after the warrant was executed.
- [111] In assessing an informational privacy claim, the court must consider the "totality of the circumstances". The relevant considerations can be grouped into the following "lines of inquiry": (i) the subject matter in issue, (ii) whether the claimant had a direct interest in that subject matter, (iii) whether the claimant had a subjective expectation of privacy in the subject matter, and (iv) the objective reasonableness of that expectation, having regard to the totality of the circumstances: *Jones* at para. 13; *Craig* at para. 79.
- [112] The subject matter in issue was the collection of things seized from the Residence, which the police held for various periods of time without statutory authority under s. 490 of the Criminal Code. I agree with the Crown that, in this case, the focus is not on the location from which the items were seized, because the initial search and seizure was authorized by law pursuant to a valid search warrant. Rather, the focus is on the residual privacy interest, if any, that is implicated by the continued detention of the seized things.

Residual Privacy Interest in Seized Cash

- [113] I accept the trial judge's view that, due to its nature as a financial "medium of exchange", cash is not inherently private. Cash by its nature does not contain or reveal core biographical information. Nevertheless, in my view the trial judge failed to account for the privacy implications of the state's unlawful retention of the cash.
- [114] Privacy can include the ability to exercise control over, access to, and use of a physical item, including the informational content that may be gleaned from it: Craig at para. 99; R. v. Reeves, 2018 SCC 56 at paras. 28-32. Further, the expectation of privacy analysis is not limited to what use the state actually made of a seized thing, but may also take into account the uses the state could make of that thing. In other words, the analysis is not a purely factual inquiry into what the state did with the seized thing: Craig at para. 83, citing R. v. Spencer, 2014 SCC 43 at paras. 17-18. The court must consider the nature of the privacy interests that are "potentially compromised" by the impugned state conduct: Craig at para. 84, citing Spencer at para. 31 and R. v. Ward, 2012 ONCA 660 at para. 65.
- [115] The trial judge touched upon, but did not fully address, the forensic value of the seized cash. The judge acknowledged that it could have been subjected to fingerprinting, but questioned the utility of doing so given that money commonly passes through many hands. The judge did not take into account that the cash could have been subjected to DNA testing, although any resulting information would have questionable value for similar reasons.
- [116] Beyond fingerprinting and DNA testing, there are other forensic techniques that can be used to glean informational content from money. For example, cash can be ion scanned for traces of illicit drugs, which may afford a circumstantial link to drug trafficking activity: Director Under the Seizure of Criminal Property Act, 2009 v. Nauzinor, 2020 SKQB 154 at para. 31.
- [117] Perhaps the most significant source of information that can be derived from cash comes from the serial numbers unique to each bill. These can be used to determine when and where bills were placed in circulation: R. v. Breton, 2014 ONSC 4427 at para. 23.
- [118] The police also have the ability to record the serial numbers of bills used in criminal activity, such as undercover drug buys, or ransom payments, to be checked against cash seized in subsequent investigations. A "match" can be used to link a person found in possession of a quantity of cash to prior criminal activity, or even a specific crime: R. v. Narwal, 2006 BCSC 388 at para. 211; R. v. Gill, 2025 BCSC 288 at para. 12.
- [119] I should not move on from this aspect of the analysis without addressing the fact that the seized cash was ultimately forfeited to the provincial government. Accepting, for the sake of argument, that forfeiture of a thing to the state by due process of law effectively extinguishes any residual expectation of privacy enjoyed by a former owner or party formerly in possession of that thing, this line of reasoning has no practical impact in this case. This is because the earliest point at which the civil forfeiture process could have

impacted Mr. Hollaman's expectation of privacy in the seized cash was on 3 February 2020, when the cash was forfeited under Part 3.1 (now Part 4) of the Civil Forfeiture Act. By that time, charges had been laid and the s. 490 process had run its course. Mr. Hollaman's Charter arguments had to do with the police over-holding of the seized property during the pre-charge period.

Trial Judge's Consideration of the Other Seized Things

[120] I move on to consider the potential residual informational privacy in the other things seized by the police, most notably the seized documents and clothing. The trial judge did not expressly address their informational content, evidently on the basis that Mr. Hollaman gave up any continuing expectation of privacy in these items when he failed to make arrangements to retrieve them after the expiry of Judge Tam's s. 490(9.1) order. This was, in my view, a discrete legal error.

[121] In basing his conclusion on the fact that Mr. Hollaman made no apparent effort to retrieve the seized items from the police station upon the expiry of Judge Tam's order, the trial judge overlooked the unlawful over-holding of the seized things between expiry of the initial s. 490(1)(b) detention order on or about 19 March 2019 and the granting of Judge Tam's order on 24 June 2019. More fundamentally, the trial judge improperly conflated Mr. Hollaman's lack of diligence in seeking return of the over-held items on the one hand with the police obligation to properly account for them under the s. 490 regime on the other. To be clear, Mr. Hollaman's apparent lack of interest in retrieving the seized things, when invited to do so, would be a relevant circumstance in assessing the intrusiveness of any Charter violation at the remedy stage; however, on the reasoning of Justice Bennett in *Craig* at para. 182, such circumstances are properly "left for the analysis under s. 24(2) of the Charter": see also *Gill* at paras. 77-78.

Residual Privacy Interest in Other Seized Things

[122] I turn, then, to the continuing informational privacy interest in the other seized things not considered by the trial judge.

[123] The seized documents clearly had significant informational content. They contained: (i) lists of names and numbers alleged by the Crown to be records of drug transactions; (ii) task or "to do" lists consistent with work in the tiling trade; and (iii) insurance documents and invoices in Mr. Hollaman's name. Personal papers of this sort can include intensely private, core biographical information. Contrary to the Crown's submission, the informational content of these documents was not limited to what the police gleaned from them during the initial lawful detention period. The Crown tendered the documents themselves as evidence at Mr. Hollaman's trial. (The privacy implications might have been different if the police had lawfully copied the documents under s. 490(13), and then returned the originals, but there is no evidence that this is what occurred in this case.) In my view, Mr. Hollaman had an ongoing informational privacy interest in the documents,

which persisted during the periods of time when they were unlawfully over-held.

- [124] The continued detention of the clothing also had informational privacy implications. Although clothing is meant to be worn and seen by others, in this case the clothing bore insignia linking it to a particular group, the Independent Soldiers. Perhaps more significantly, clothing can be forensically tested, and the results may be relied upon by the Crown as powerful circumstantial evidence: Backhouse at paras. 10, 91. That did not occur here, but the state's continuing control over the seized clothing, coupled with the ability of the police to make use of it in this way, had ongoing privacy implications for the person from whom the clothing was seized.
- [125] It is unnecessary to dwell on the second and third lines of inquiry discussed in Jones. On the Crown's theory of the case (which, to repeat, was the basis on which Mr. Hollaman was ultimately convicted), Mr. Hollaman had a "direct interest" in the subject matter in issue, and it can easily be inferred that he had a subjective residual expectation of privacy in that subject matter. This is because the items in issue were seized from Mr. Hollaman's residence, and more specifically from his bedroom. Even after the things had been seized by the police, Mr. Hollaman continued to have a personal privacy interest in them. As the person from whom the things were seized, he was statutorily entitled to notice under s. 490(2) of any police application for further detention.
- [126] I turn to the fourth line of inquiry, the objective reasonableness of the expectation of privacy. The issue is whether it was objectively reasonable for a person to retain some residual expectation of privacy in cash, documents, and clothing detained by the police following the lawful seizure of those things in a criminal investigation. I accept that none of the things in issue are inherently private, in the sense that they do not contain or reveal core biographical information. However, privacy is not an all or nothing concept. There are degrees of privacy. Even a relatively low expectation of privacy, if reasonable, falls under the protective mantle of s. 8: Craig at para. 121, citing *R. v. Cole*, 2012 SCC 53 at para. 9.
- [127] In my view, considering the totality of the circumstances -- most notably the information that can be gleaned from such items even after they have been located, photographed, and seized -- a person in Mr. Hollaman's shoes retains an objectively reasonable expectation of privacy even after these items had been seized from the person's residence in a criminal investigation. Such a person would continue to have informational privacy interests in seized cash, documents, and clothing taken from the person's residence, and could reasonably expect that these things would be properly and lawfully accounted for by the authorities. The person would reasonably expect that any subsequent examination or testing to extract informational content from these things would be carried out lawfully and reasonably. The person would also reasonably expect the police to safeguard the items and not to expose them to examination by third parties without authorization as contemplated in s. 490(15).

[128] I conclude that the trial judge erred in finding that Mr. Hollaman had no residual reasonable expectation of privacy in the things seized from the Residence. Applying Craig, the admitted non-compliance with the s. 490 regime rendered the continued detention of the seized things unreasonable under s. 8 of the Charter.

Cataloguing the s. 490 Breaches

[129] For the sake of the analysis under s. 24(2) of the Charter, it is necessary to particularize the specific breaches of the s. 490 scheme. On the trial judge's findings, the police failed to meet their statutory obligations in two ways.

[130] First, the police held the seized things for more than three months from the date of seizure without seeking and obtaining an order for further detention under s. 490(2) of the Criminal Code. As a result of this breach, the police over-held the seized things from 19 March 2019 (three months from the date of the initial seizure) until 19 June 2019 (the initial date for the hearing of the s. 490(9.1) application).

[131] Second, the police continued to hold the seized things after expiry of the s. 490(9.1) order on 31 July 2019. As a result of this breach, the police: (i) over-held the seized cash from 1 August 2019 until 7 November 2019, when they were served with the CFO notice requiring them to hold it under the Civil Forfeiture Act; and (ii) over-held the other seized things from 1 August 2019 until 10 January 2020, when charges were laid in which the seized things were required as evidence.

[132] Insofar as the relationship between the first of these statutory breaches and the second, the Crown takes the position that the s. 490(9.1) order rendered the detention of the seized things lawful for the entire period up to the expiry of that order on 31 July 2019. In other words, the Crown says that, once granted, the s. 490(9.1) order retroactively legalized the detention of the seized things during the initial over-holding period. With respect, I do not agree. The s. 490(9.1) order was a judicial determination that, notwithstanding the unlawful over-holding of the seized things, it was in the interests of justice to authorize their further detention for a specified period of time. The effect of the s. 490(9.1) order was to prospectively bring the police back into compliance with the statutory scheme, not to retroactively negate the unlawful over-holding that took place prior to the granting of the order.

[133] Mr. Hollaman says the police breached their statutory obligations in a third way, by failing to apply for an order to return the seized things after the expiry of the applicable detention period, as required under s. 490(6). However, on my reading of the statute, a breach of s. 490(6) is an inevitable legal consequence of the overholding of seized items after the expiry of a s. 490 detention order. It would be a form of double counting to treat this as a separate breach of the statutory scheme.

[134] To explain, s. 490(6) provides that upon expiry of any s. 490 detention order, the police are required to bring an application (to the appropriate judicial officer as provided for in s. 490(5)(a) or (b), as the case may be) for either an order returning the seized things to the person from whom they were seized under s. 490(9), or an order for further detention in the "interests of justice" under s. 490(9.1). In this case, when Judge Tam's order expired on 31 July 2019, the police intended to seek approval for criminal charges in which the seized things would be required, so they ought to have sought another order of further detention under s. 490(9.1). However, their failure to do so was in effect the flip-side of their overholding of the seized things after the expiry of Judge Tam's earlier s. 490(9.1) order. Characterizing this as an additional violation of the statutory scheme would amount to double counting.

Admissibility of the Evidence

[135] Having found no violation of Mr. Hollaman's rights in connection with the police non-compliance with s. 490 of the Criminal Code, the trial judge did not consider whether admission of the evidence would bring the administration of justice into disrepute under s. 24(2) of the Charter.[5] Despite this, neither party argued before us that it was necessary to order a new trial at which the admissibility of the evidence could be ruled upon by the court of first instance. I agree. As stated in *Craig* at para. 143, "[a]ll of the evidence that could be called on the subject was tendered at the trial", and this Court is in a position to rule on the admissibility of the evidence, with due deference to the trial judge's findings of fact: see also *Spencer* at para. 75.

[136] On appeal, Mr. Hollaman focused his submissions on the admissibility of the seized documents. This makes sense, since the documents were amongst the things that were over-held by the police as a result of their failures to comply with the s. 490 regime, and the documents were tendered by the Crown as part of its circumstantial case against Mr. Hollaman.

[137] As a threshold to securing relief under s. 24(2), Mr. Hollaman must establish that the evidence he seeks to exclude was "obtained in a manner" that infringed his Charter rights. Where the nexus between the Charter infringement and the impugned evidence is too remote or tenuous, s. 24(2) is not engaged. However, the law does not require a direct causal connection between the Charter breach and the discovery of the evidence: *R. v. Strachan*, [1988] 2 S.C.R. 980 at 1000-1002. Rather, the threshold is met where the applicant establishes a sufficient temporal, contextual, or causal connection between the Charter breach and the evidence: *R. v. Wittwer*, 2008 SCC 33 at para. 21. The court must take a "purposive and generous approach" to this question, based upon "the entire chain of events": *R. v. Tim*, 2022 SCC 12 at para. 78.

[138] In *Gill*, the trial judge found a sufficient nexus between the s. 8 Charter breach arising from police non-compliance with s. 490 of the Criminal Code and the impugned evidence. That conclusion was not challenged on appeal, and this Court ultimately upheld the trial judge's

decision to exclude the evidence: Gill at paras. 81, 103-106. However, the key piece of evidence sought to be excluded in Gill -- a voice recording recovered from the accused's cell phone -- was discovered after the police non-compliance with the s. 490 regime. The case at bar is different, because the impugned evidence -- documents seized in the search at the Residence -- was discovered and lawfully seized prior to the Charter-infringing conduct, which began months later when the police failed to obtain an order for further detention.

- [139] Mr. Hollaman asserts in his factum that the evidence is "sufficiently connected" to the Charter breach because the police failure to comply with s. 490 resulted in a complete absence of "judicial oversight" over the seized documents for a period of months. Presumably, these circumstances are relied upon to establish a "contextual" connection between the Charter breach and the impugned evidence.
- [140] For its part, the Crown did not join issue on this point, focusing instead on whether admission of the evidence would bring the administration of justice into disrepute under what is sometimes referred to as the evaluative stage of the s. 24(2) analysis, discussed below. I take the absence of submissions from the Crown as a tacit concession that the threshold requirement has been satisfied.
- [141] To be clear, Mr. Hollaman is not seeking to exclude all of the evidence from the police search. He does not seek exclusion of: (i) Cst. Lukash's viva voce testimony about what was located and seized in the search; (ii) the photographs taken during the search; or (iii) the seized substances, admitted to be illicit drugs, or the seized taser, admitted to be a weapon. Rather, Mr. Hollaman's application is focused on the seized documents, which were over-held by the police in breach of the s. 490 regime, and which were ultimately tendered as exhibits at trial and relied upon by the Crown as part of its circumstantial case against him.
- [142] In all of these circumstances, I accept that the seized documents -- over-held under s. 490 of the Criminal Code, and then physically tendered by the Crown as exhibits at trial -- constitute evidence "obtained in a manner" that infringed Mr. Hollaman's Charter rights. As a result, I proceed to the evaluative stage of the s. 24(2) analysis, where the admissibility of this documentary evidence will be considered based on the three lines of inquiry set out in Grant.

Seriousness of the Charter-Infringing Conduct

- [143] The Charter-infringing conduct consisted of the over-holding of seized things for two time periods. The first was from the expiry of the initial detention order (on 19 March 2019) until the initial return date for the police application for further detention (on 19 June 2019). The second was from the date of the expiry of the order of further detention (on 31 July 2019), until the laying of charges (on 10 January 2020). These were two separate breaches, as a result of which the police over-held the seized items for slightly longer than eight months. This was not an inconsequential amount of time. This was not a case where the police missed a single detention deadline by a matter of mere days or weeks.

- [144] Mr. Hollaman argues that the police non-compliance with the s. 490 regime was not a product of "inadvertence", and ought to be characterized as "negligent", or "reckless". Mr. Hollaman cites Cst. Martin's voir dire testimony, in which the officer was unable to cite any "formal policy" or training with regard to s. 490.
- [145] With respect, these submissions disregard the trial judge's factual findings, characterizing Cst. Martin's conduct as "inadvertent". The trial judge accepted Cst. Martin's testimony that his unit had a system in place to achieve compliance with the s. 490 regime, and concluded that the three-month deadline under s. 490(2) was missed due to a case-specific "oversight". Thereafter, the police made efforts to bring themselves back into compliance by obtaining an order under s. 490(9.1). Cst. Martin missed a second deadline, but by that point the police were in the process of preparing and submitting a Report to Crown Counsel. The record suggests that a large proportion of the delay from that point forward was attributable to the charge approval process, although to be fair, it was open to the police to seek a further detention order pending the Crown's charge approval decision.
- [146] The trial judge's findings support a conclusion that the Charter-infringing conduct falls toward the low end of the spectrum of seriousness. The evidence was lawfully seized under a valid search warrant. The police made efforts to comply with the s. 490 regime, and although they failed to fully meet their obligations by obtaining further detention orders in a timely fashion, their failures were not a product of indifference, ignorance, or deliberate disregard.
- [147] The police conduct in this case is readily distinguishable from that which was at issue in Gill, where the trial judge characterized the Charter-infringing conduct as so deliberate and flagrant that it represented an affront to the rule of law: Gill at paras. 94, 104. In that case, the police unit conducting the investigation operated with deliberate disregard for the s. 490 regime for a period of years, in the face of multiple legal opinions advising them of their statutory obligations and the potential Charter implications. Whereas in Gill the police conduct was properly placed at or near the top of the "culpability scale for Charter-infringing conduct", the police conduct in the case at bar falls near the bottom of that scale. This line of inquiry weighs in favour of admitting the evidence.

Effect on Charter-Protected Interests

- [148] The police non-compliance with the s. 490 regime had little impact on Mr. Hollaman's Charter-protected interests. On the Crown theory that Mr. Hollaman occupied the master bedroom, he had a reasonable expectation of privacy in the things located therein. However, this expectation of privacy was greatly reduced when the things in issue were seized by way of a valid warrant. And although Mr. Hollaman had a continuing residual informational privacy interest after the things were seized, there was no actual state intrusion into these residual informational privacy interests during the over-holding periods.

- [149] Mr. Hollaman says the overholding of the seized items intruded significantly on his interests. He refers to his statements to Judge Tam at the hearing of the Crown's s. 490(9.1) application, asserting that the seized cash came from his business, and that he needed it to pay workers and cover expenses. I would not place any stock in these statements, which were not under oath, and are completely inconsistent with Mr. Hollaman's trial testimony denying any connection to the master bedroom, the safe, and its contents, including the \$8,000 in cash. In the face of these inconsistencies, I give no credence to Mr. Hollaman's unsworn assertion that the seized cash was from legitimate means. An alternate conclusion, much more consistent with the trial judge's findings, is that it came from drug trafficking. One cannot overlook that the \$8,000 was located in a safe in the ensuite bathroom, next to large quantities of illicit drugs, with a notebook containing handwritten entries consistent with drug trafficking located nearby.
- [150] Mr. Hollaman says that what occurred in the s. 490 proceedings demonstrates that his Charter-protected interests were overridden by the police conduct. He twice argued before Justice Tam for the return of the seized cash, and was twice denied. However, in my respectful view, the fact that Mr. Hollaman was able to argue for the return of the seized things before a Provincial Court judge demonstrates that, despite the police failure to fully comply with their statutory obligations, the seized things were not immunized from judicial supervision. The process was not followed assiduously or seamlessly, but substantial compliance was achieved. Most significantly, there is no evidence that the police overholding had any material impact on Mr. Hollaman's residual privacy interests in the seized things.
- [151] It is also relevant that Mr. Hollaman declined the opportunity to retrieve all of the seized things, with the exception of the cash, when charges were not laid prior to the expiry of the s. 490(9.1) order on 31 July 2019. To be clear, Mr. Hollaman had no obligation to act on Cst. Martin's offer in order to preserve his Charter rights. Nevertheless, the fact that he did not retrieve any of the seized things (with the exception of the cash, which he twice sought to have returned to him) speaks to his lack of interest in regaining possession of them. This tends to further diminish the already negligible intrusion into Mr. Hollaman's Charter-protected interests.
- [152] Taking all of foregoing into account, I conclude that the effect of the police non-compliance on Mr. Hollaman's constitutionally-protected interests was minimal, such that this line of inquiry weighs in favour of admitting the evidence.

Societal Interest in Adjudication on the Merits

[153] The evidence in issue -- a collection of seized documents -- is highly reliable. The admission of this evidence was an important component of the Crown's circumstantial case against Mr. Hollaman, and its exclusion would exact a toll on the truth-seeking function of the trial in relation to very serious criminal offences. The societal interest in adjudication of the case on its merits therefore weighs heavily in favour of admission.

Balancing the Three Lines of Inquiry

[154] The trial judge found a separate breach of Mr. Hollaman's Charter rights in connection with the police failure to comply with what was then s. 487.1(7) of the Criminal Code. However, the judge's findings do not support a conclusion that the two Charter breaches were connected in any way, so as to establish a pattern of disregard for Mr. Hollaman's rights.

[155] I return to the breach of Mr. Hollaman's s. 8 Charter rights arising from the police non-compliance with the s. 490 regime. This Charter infringement was a product of case-specific mis-steps, and it had a negligible impact on Mr. Hollaman's constitutionally-protected interests. The evidence sought to be excluded -- seized documents linking Mr. Hollaman to the master bedroom where the contraband was located, including handwritten notes providing a circumstantial link to drug trafficking -- was important to the truth-seeking function of the trial. All three lines of inquiry weigh in favour of the conclusion that admission of the evidence would not bring the administration of justice into disrepute. I therefore have no difficulty concluding, despite the able submissions of counsel for Mr. Hollaman, that the evidence should not be excluded under s. 24(2) of the Charter.

Conclusion

[156] I would dismiss the appeal.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice MacNaughton"

[1] S.C. 2022, c. 17, s. 22 subsequently repealed and replaced former s. 487.1(7) with new s. 487.093, which extends the same notice requirement to a number of different forms of warrants issued under the Criminal Code, including conventional s. 487 search warrants.

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- [2] This was correct based on the relevant Criminal Code provisions in force at the time of this search, although those provisions have now been amended to make the requirement to provide a copy of the warrant to a person in ostensible control of the premises applicable to the execution of many kinds of warrants, including s. 487 search warrants. See S.C. 2022, c. 17, s. 22, enacting new s. 487.093.
- [3] Now s. 33 of the Civil Forfeiture Act, R.S.B.C. 2024, c. 1.
- [4] This conclusion is factually incorrect, since the CFO first invoked the Civil Forfeiture Act as a basis for the police to continue to hold onto the seized cash on 7 November 2019, and the charges were not laid until 10 January 2020. However, this apparent error does not alter the soundness of the trial judge's first point, namely that the Civil Forfeiture Act can operate concurrently with s. 490 of the Criminal Code, so long as the former is not used to override or frustrate the operation of the latter.
- [5] In Charter Ruling No. 4, the trial judge's s. 24(2) analysis was limited to a consideration of the admissibility of the evidence in connection with the violation of Mr. Hollaman's s. 8 rights arising from the police failure to present a copy of the search warrant to the person in apparent control of the premises as required under s. 487.1(7) of the Criminal Code.
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