
CANADA / JUDGMENT

R. v. Montgomery

2016 BCCA 379

COURT

British Columbia Court of Appeal

DECIDED

20 September 2016

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2016 BCCA 379 R. v. Montgomery

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Montgomery,

2016 BCCA 379

Date: 20160920

Docket Nos.: CA42138; CA42304; CA42334

Docket: CA42138

Between:

Regina

Respondent

And

Salvador Ascencio-Chavez

Appellant

- and -

Docket: CA42304

Between:

Regina

Respondent

Clifford Roger Montgomery

Appellant

- and -

Docket: CA42334

Between:

Regina

Respondent

And

Tariq Mohammed Aslam

Respondent

Corrected Judgment: The judgment was corrected on September 28, 2016.

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated August 6, 2014 (R. v. Montgomery, 2014 BCSC 1483, Kelowna Docket 73426).

Counsel for the Appellant,

Salvador Ascencio-Chavez:

K.B. Molle

Counsel for the Appellants,

Clifford Roger Montgomery, and

Tariq Mohammed Aslam:

N.L. Cobb

E.P. Lewis

Counsel for the Respondent:

W.P. Riley, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

November 26 and 27, 2015

Written Reply Submission filed by the Appellants Montgomery and Aslam

December 11, 2015

Place and Date of Judgment:

Vancouver, British Columbia

September 20, 2016

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fenlon

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Summary:

Appeals from convictions on substantive and conspiracy charges arising from the importation of a large quantity of cocaine hidden in a fruit-grinding machine. The appellants raised numerous grounds of appeal. Held: Appeals dismissed. The trial judge did not err in: (a) upholding the validity of a wiretap authorization; (b) upholding the validity of a search warrant for a residence; (c) finding that the search warrant was executed in a reasonable manner; (d) admitting evidence seized from the residence notwithstanding a delay in filing the Form 5.2 with respect to that search; (e) upholding the arrest of one of the appellants; (f) admitting into evidence data recovered from a BlackBerry seized incidental to arrest; (g) finding that the failure to bring an appellant personally before a justice of the peace within 24 hours of his arrest was not, in the circumstances, a breach of s. 503 of the Criminal Code; (h) declining to embark upon a voir dire regarding a general warrant; (i) declining to embark upon a voir dire regarding the previous arrest of two of the appellants on an unrelated matter; (j) granting the Crown's application to amend the indictment; (k) refusing an application to withdraw admissions; (l) failing to declare a mistrial; (m) dealing with informer privilege issues; and (n) applying the co-conspirator exception to the hearsay rule. The verdicts were reasonable and supported by the evidence.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

INTRODUCTION

- [1] Following a trial that lasted almost 70 days, Madam Justice Beames of the Supreme Court of British Columbia convicted Salvador Ascencio-Chavez, Clifford Roger Montgomery, and Tariq Mohammed Aslam of possession of cocaine for the purpose of trafficking and conspiracy to traffic in cocaine. The trial judge also convicted Mr. Ascencio and Mr. Montgomery of conspiracy to import cocaine. The drugs were hidden in a fruit-grinding machine imported into Canada from Argentina. No defence evidence was called on the trial proper.
- [2] The first part of the trial consisted of a series of voir dires, during which the judge ruled on a number of objections raised by Mr. Montgomery and Mr. Aslam to the admissibility of evidence the Crown sought to tender. On this appeal, Mr. Ascencio, Mr. Montgomery, and Mr. Aslam challenge almost all of the rulings made during the trial that were decided against them. In addition, they raise several issues in relation to the judge's reasons for conviction. A number of the grounds are common to all three appeals. Collectively, the appellants raise 13 main grounds of appeal, several of which have multiple sub-grounds.
- [3] There was a further ground of appeal raised by Mr. Ascencio. In his factum, Mr. Ascencio challenges the judge's dismissal of his application for a stay based on unreasonable delay. However, at the hearing of this appeal the Court declined to hear that ground as Mr.

Ascencio had not included the record of the stay application in the material filed on this appeal. Mr. Ascencio's counsel agreed that record was required; in effect, this ground was abandoned. On August 29, 2016, Mr. Ascencio's counsel wrote to the Court asking permission to file supplementary submissions on that ground and a supplementary record. In light of what occurred at the hearing, I would deny that request.

[4] For the reasons that follow, I would dismiss these appeals.

FACTUAL BACKGROUND

[5] What follows is intended as general background. Other aspects of the trial record are discussed later, in relation to specific grounds of appeal.

[6] Gavril Szucs operated Gaby Enterprises, in Kelowna, British Columbia. In the summer of 2010, Mr. Szucs became friendly with Fernando Diaz. When Mr. Diaz learned that Mr. Szucs had an import/export licence he asked Mr. Szucs to assist him in importing a fruit-grinding machine from Argentina. Mr. Szucs retained a customs broker to arrange for the importation. Mr. Szucs was not aware drugs would be hidden in the machine.

[7] In the summer of 2010 there were communications between a cellular telephone associated with Mr. Diaz and Mr. Montgomery's BlackBerry. During the last four days of August 2010, there were four calls from Mr. Ascencio's cellular telephone--registered under the name Victor Perez--to Mr. Montgomery's BlackBerry. On September 1, 2010, a text message reading "Fernando is going to call you tomorrow" was sent from Mr. Ascencio's telephone to Mr. Montgomery's BlackBerry. The reply text message was, "I just talked to him".

[8] Between September 1 and 15, 2010, Mr. Diaz provided Mr. Szucs with \$10,000 towards expenses for the importation of the fruit-grinding machine, instructions regarding the machine's importation, and the place where the machine was to be delivered after it cleared customs, namely, the Happy Shacks storage facility in Kelowna.

[9] The machine, which weighed approximately 2,400 kilograms, was shipped on September 14, 2010, by MW Logistica SRL, of Moreno, Buenos Aires, Argentina, and arrived in Canada on September 21, 2010. Gaby Enterprises was the consignee.

[10] On September 22, 2010, members of the Canada Border Services Agency ("CBSA") inspected the machine and discovered 97 kilograms of cocaine hidden inside three metal drums; each drum contained more than 30 kilograms. The CBSA decided to inspect the machine because in April 2010, cocaine had been discovered in a shipment of machine spare parts sent from Argentina--a source country for drugs--to Barry Ready of Kelowna. That discovery and the investigation that followed--known as Project E-Piquet--are discussed in detail below.

[11] The CBSA notified the Royal Canadian Mounted Police ("RCMP"). As a result, the RCMP South East District Drug Section ("SEDDS") commenced an investigation that became known as Project E-Pleura.

- [12] The police removed most of the cocaine from the drums and replaced that cocaine with a placebo. A powdered purple dye was sprinkled on the top of each drum. An alarm was installed on each drum designed to transmit a signal when a drum was opened. Those alarms failed to operate.
- [13] The telephone number for Gaby Enterprises on the machine's waybill was Mr. Szucs's cellular telephone. On September 24, 2010, Staff Sergeant Brian Patrick Gateley, posing as a delivery company driver, telephoned Mr. Szucs. The officer told Mr. Szucs that the machine had cleared customs and that he would be picking it up after the weekend.
- [14] On September 25, 2010, Mr. Ascencio illegally entered Canada at the Edmonton International Airport using a false passport in the name of Victor Perez-Rodriguez. Mr. Ascencio flew to Vancouver where he rented a Jeep using a driver's licence in the name of Victor Perez-Rodriguez.
- [15] On September 29, 2010, a judge of the Supreme Court of British Columbia granted wiretap authorization P.12/2010 in connection with Project E-Pleura. Among other things, that authorization permitted the police to intercept Mr. Szucs's cellular telephone. It also permitted the police to intercept the communications of all persons in close proximity to the machine. The police installed an audio transmitting device in the pallet to which the machine was attached. They also installed a video camera to assist in surveillance of the Happy Shacks storage facility.
- [16] Staff Sergeant Gateley called Mr. Szucs on September 29, 2010, to advise him that the machine would be delivered the following day. Mr. Szucs then called Mr. Diaz, to relay that information. Mr. Diaz told Mr. Szucs that Mr. Diaz's friend would call Mr. Szucs and come by in a day or two to pay Mr. Szucs to release the machine.
- [17] On September 30, 2010, five calls were made from Mr. Ascencio's telephone to Mr. Montgomery's BlackBerry, two of which connected, resulting in conversations. There was also a text message sent from Mr. Ascencio's telephone to Mr. Montgomery's BlackBerry.
- [18] At approximately 10:00 a.m. on September 30, 2010, Staff Sergeant Gateley delivered the machine to Happy Shacks. He ensured the machine was placed in an area of the storage yard within the range of the video camera installed by the police.
- [19] Mr. Szucs called Mr. Diaz at a number in Arizona before going to the storage yard and told Mr. Diaz he was going to meet the "delivery guy". When Mr. Szucs and Staff Sergeant Gateley met, the officer demanded more money for the delivery. While still at the storage yard, Mr. Szucs called and left a message for Mr. Diaz to the effect that the driver had demanded a further \$2,000. When Mr. Diaz returned the call, he told Mr. Szucs to pay the additional amount and to not worry about it. However, Mr. Szucs complained to the customs broker.

- [20] On October 1, 2010, Mr. Szucs called Mr. Diaz and told him the issue with the additional delivery charge had been resolved. Mr. Diaz said he was in discussion with "the guys" who would be picking the machine up. Mr. Diaz instructed Mr. Szucs to release the machine to Mr. Diaz's friend, if the friend paid Mr. Szucs \$10,000.
- [21] Shortly before 11:00 a.m. on October 1, 2010, Mr. Diaz called Mr. Szucs and told him that "Victor" would be picking the machine up and paying Mr. Szucs \$5,000 in cash. Mr. Diaz said Victor would be renting a truck and making arrangements for a crane to move the machine.
- [22] Shortly after speaking with Mr. Diaz, Mr. Szucs received a call from Mr. Ascencio; Mr. Szucs and Mr. Ascencio arranged to meet at the storage yard. Ten minutes after this call, an unanswered call was placed from Mr. Diaz's telephone to Mr. Montgomery's BlackBerry.
- [23] Mr. Ascencio arrived at the storage yard driving the Jeep he had rented and he and Mr. Szucs examined the machine. Mr. Ascencio looked at the waybill and took photographs of the machine. The police overheard part of their conversation by means of the audio device in the pallet. Mr. Ascencio told Mr. Szucs he was going to "talk to the guys" and then come back.
- [24] While standing beside Mr. Szucs's car, which was parked outside the storage yard, Mr. Ascencio called Mr. Diaz. When Mr. Ascencio passed his telephone to Mr. Szucs, Mr. Diaz told Mr. Szucs that Victor would return with the money and pick up the machine. Mr. Ascencio then left in the Jeep.
- [25] The police followed the Jeep but lost sight of it in the Horizon Drive area of West Kelowna. During that time, a completed call was made from Mr. Ascencio's telephone to Mr. Montgomery's BlackBerry.
- [26] Constable Arpad Frank Horvath, who was conducting surveillance in the Horizon Drive area, noticed the Jeep as it approached the intersection of Horizon Drive and Pinewood Place. Mr. Ascencio was driving the Jeep; Mr. Montgomery was the only passenger. Mr. Montgomery got out of the Jeep and had a brief conversation with Constable Horvath. Mr. Montgomery said he lived in the area and expressed concern about recent break-ins in the neighbourhood; Constable Horvath said he was waiting for his girlfriend. Mr. Ascencio and Mr. Montgomery then drove away.
- [27] Mr. Ascencio and Mr. Montgomery arrived at Happy Shacks shortly before 2:00 p.m. At 2:00 p.m., Mr. Ascencio called Mr. Szucs and told Mr. Szucs he was getting a truck and would be at the storage yard in 20 minutes. A few minutes later, Mr. Ascencio called Mr. Szucs again and told him that he would need more time. Mr. Ascencio and Mr. Montgomery then left the storage yard and drove to Mr. Montgomery's residence at 979 Pinewood Place in West Kelowna.

- [28] By means of aerial surveillance, the police observed a pickup truck--later determined to be a Chevrolet Silverado, B.C. licence plate CT0279--with a trailer attached, parked in front of Mr. Montgomery's residence. There were two or three people in the front yard. The trailer was detached from the truck and left in the driveway. A short time later, the Jeep and the pickup truck left the area together and drove in the direction of Kelowna.
- [29] At 3:01 p.m., Mr. Ascencio called Mr. Szucs to tell Mr. Szucs that he was five minutes away from Happy Shacks. When Mr. Ascencio and Mr. Szucs met at Happy Shacks, Mr. Ascencio gave Mr. Szucs \$5,000 in cash. They then went into the Happy Shacks office and Mr. Szucs told the man in the office that Mr. Ascencio was authorized to take the machine. Mr. Szucs then left.
- [30] While in the area of the machine Mr. Ascencio spoke with someone on his cellular telephone. That conversation was not in English. Mr. Ascencio left the storage yard at 3:45 p.m. and drove in the Jeep to a Walmart store.
- [31] A few minutes after Mr. Ascencio left Happy Shacks, Mr. Montgomery and Mr. Aslam arrived at Happy Shacks in the Silverado pickup truck towing a trailer. Mr. Montgomery was wearing a black t-shirt and black sweatpants; Mr. Aslam was wearing a grey hoodie. Two Happy Shacks employees assisted Mr. Montgomery and Mr. Aslam in loading the machine onto the trailer. Mr. Ascencio returned after the loading started and assisted in strapping the machine down.
- [32] At approximately 4:20 p.m., Mr. Ascencio returned to the Jeep. A few minutes later, the pickup truck with Mr. Aslam and Mr. Montgomery inside, pulled away from Happy Shacks towing the trailer with the machine. Mr. Ascencio followed behind.
- [33] The police followed the pickup truck and the Jeep. At approximately 6:00 p.m. those vehicles drove into a rural property known as the Aspen Hills Ranch. Police officers took up surveillance positions in the area.
- [34] Between 6:00 p.m. and 10:00 p.m., the police overheard conversations in the vicinity of the machine involving Mr. Ascencio, Mr. Montgomery, and Mr. Aslam. Within minutes of arriving at the property the three of them discussed dismantling the machine. They mentioned using tools such as screwdrivers, pliers, sledge hammers, and ratchets. The police heard loud sounds, including intermittent banging and machinery noises.
- [35] At approximately 9:45 p.m., Mr. Ready arrived at the Aspen Hills Ranch driving a van and was greeted by Mr. Montgomery. Thereafter, Mr. Ready's voice was also overheard. At one point, someone asked Mr. Ready if he had a breaker bar in his van.

- [36] At about 11:45 p.m., Mr. Ascencio, Mr. Montgomery, and Mr. Aslam left the Aspen Hills Ranch in the pickup truck. Just before they left, Mr. Montgomery was heard to tell Mr. Ready to "take all this shit, break it down" and "get the shit, get it all in there, all the bolts, all the shit, all the pins, just break it all down and put it in there. Okay? We're outta here right now " The police attempted to follow the pickup truck but were unable to do so because it was travelling at a high rate of speed.
- [37] After the pickup truck left the only voice the police heard by means of the audio device was Mr. Ready's. From time to time, banging could also be heard.
- [38] On the evening of October 2, 2010, the police entered onto the Aspen Hills Ranch under the authority of a general warrant and remained there for several hours. The machine had been dismantled. One of the officers noticed three cylinders, two of which had their back ends removed.
- [39] On the morning of October 3, 2010, a police officer observed the Silverado pickup truck parked in front of 979 Pinewood Place.
- [40] On October 4, 2010, the police executed a search warrant at the Aspen Hills Ranch. The three cylinders had been taken out of the machine and their contents removed. The police found purple dye in various places, including on parts of the machine, on a garden hose, and on nitrile gloves in the barn. There was white powder on the ground in front of the barn and on the barn floor.
- [41] Mr. Montgomery was arrested on October 4, 2010, just after he left 979 Pinewood Place. He had small purple spots on fingers on both his hands. In that residence the police found documents addressed to or in the name of Mr. Aslam, including Mr. Aslam's passport and an airline boarding pass. In the master bedroom the police found a black t-shirt and black sweatpants identical to the ones worn by Mr. Montgomery on October 1, 2010; both the t-shirt and sweatpants had purple dye stains. In the main floor closet the police found a grey hoodie identical to the one worn by Mr. Aslam on October 1, 2010; the hoodie had purple dye stains.
- [42] On October 13, 2011, American border patrol agents arrested Mr. Aslam and Mr. Ascencio in California close to the United States-Mexico border. Mr. Aslam agreed to return to Canada. Mr. Ascencio was extradited to Canada. In Mr. Ascencio's personal effects the police found a passport, driver's licence, and credit cards all in the name of Victor Perez-Rodriguez.

DISCUSSION

- [43] To the extent possible, I will address the issues raised by Mr. Ascencio, Mr. Montgomery, and Mr. Aslam in the order in which they were dealt with by the trial judge, ending with the grounds relating to the judge's reasons for conviction. On occasion the judge released multiple rulings on the same day.

Challenge to the Wiretap Authorization

[44] Mr. Montgomery and Mr. Aslam submit that the trial judge erred in upholding the validity of P.12/2010. As at trial, they challenge that authorization on three bases, all of which relate to the fact that the affidavit filed in support of the application for that authorization did not disclose Project E-Piquet. First, they argue they should have been named in the authorization as "known" persons and that because they were not named the interception of their private communications violated their rights as guaranteed by s. 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, i.e., the protection against "unreasonable search or seizure". Second, they argue that failure to disclose Project E-Piquet undermines the "investigative necessity" requirement for the issuance of P.12/2010. Last, they argue that the failure to disclose Project E-Piquet subverted the authorization process.

Project E-Piquet

- [45] On April 22 and 23, 2010, members of the CBSA in Vancouver inspected two shipments of machine spare parts; each shipment weighed slightly more than 40 kilograms; the shipper was Lindford SRL, of Moreno, Buenos Aires, Argentina. By means of a drill the officers discovered a total of six kilograms of cocaine hidden inside those parts. The shipments were consigned to Mr. Ready at an address in West Dauphin, Manitoba, and another address in Kelowna. DHL Express was the shipping company. The CBSA notified the RCMP.
- [46] On April 28, 2010, Constable Fred Coon, posing as a DHL employee, called Mr. Ready and told him the shipments were available to be picked up at the DHL outlet in Kelowna. Photographs of Mr. Ready, Mr. Montgomery, Mr. Aslam, and another man were given to the officers involved in the investigation.
- [47] Shortly after speaking with Constable Coon, Mr. Ready attended at the DHL outlet and picked up the shipment. Mr. Ready was arrested immediately.
- [48] As Mr. Ready was picking up the shipment, the police observed Mr. Montgomery and Mr. Aslam in the vicinity. They were circling the DHL outlet, doing what appeared to be counter-surveillance. Mr. Montgomery and Mr. Aslam drove away when a marked police vehicle arrived to take Mr. Ready to the detachment. Mr. Ready was placed in a cell with an undercover officer, Constable Blanchette, but did not make any incriminating statements to that officer. Mr. Ready was released without being charged.
- [49] The police commenced an investigation into the April shipment. They had some information from a confidential informer regarding Mr. Montgomery. They determined there were links between Mr. Ready and Mr. Montgomery. Mr. Montgomery had a significant criminal history and the police suspected he was involved in the importation of cocaine.

- [50] On July 22, 2010, Constable Blanchette approached Mr. Ready at a gas station. The officer portrayed himself as being involved in selling large quantities of stolen cigarettes and offered to sell some to Mr. Ready. Mr. Ready replied he had a friend who might be interested. Mr. Ready also mentioned that he would be going back to Mexico in the near future. They exchanged telephone numbers.
- [51] Constable Blanchette and Mr. Ready met again on August 16, 2010. Mr. Ready expressed an interest in purchasing a large quantity of stolen cigarettes. He said he had been arrested in April for importing cocaine from Argentina; he told the officer that he and the people with whom he worked had paid \$12,000 US per kilogram for the cocaine. During this conversation Mr. Ready mentioned ways to smuggle cocaine into Canada. Mr. Ready said he was currently out of the cocaine business and had been advised by his lawyer that the importation charge had been dropped because the police did not have sufficient grounds.
- [52] On September 10, 2010, an operational plan with respect to continuing the investigation arising out of the April shipment was approved under the name Project E-Piquet. The plan included having the undercover officer attempt to use Mr. Ready to make contact with persons at a higher level in the drug trade than Mr. Ready.

Project E-Pleura and Authorization P.12/2010

- [53] On September 28, 2010, the SEDDS submitted an operational plan seeking approval to conduct an investigation with respect to the cocaine discovered in the fruit-grinding machine. Mr. Szucs was the only person identified as a target of that investigation. That plan was approved on September 29, 2010, under the name Project E-Pleura.
- [54] On September 29, 2010, Constable Jonathan Brooke Argue, a member of the SEDDS, swore the affidavit in support of P.12/2010. In that affidavit, Constable Argue accurately set out the facts relating to the discovery of the cocaine in the machine. He also set out that: (a) the police had determined Mr. Szucs went by the name "Gaby"; (b) Staff Sergeant Gateley had been in touch with Mr. Szucs in regard to delivering the machine to Mr. Szucs in Kelowna; (c) a video camera had been installed to assist in surveillance of the Happy Shacks storage yard; and (d) the police had conducted surveillance of Mr. Szucs from September 23 to 28, 2010, and had not observed him associating with any known criminals or engaging in any suspicious behavior.
- [55] In the summary at the beginning of the affidavit, Constable Argue deposed as follows:

18 I believe the SZUCS has imported the fruit grinding machine into Canada from Argentina for an unknown person or persons. I do not know the extent, if any, of SZUCS [sic] knowledge of the 97.45 kilograms of cocaine concealed within the fruit grinding machine. It is my belief, as explained below in my affidavit, that the use of conventional investigative techniques will not lead to the identification and prosecution of the unknown person or persons who have a controlling interest in the cocaine. I believe the use of an Authorization to intercept private communications will allow investigators to identify other persons involved in the importation

and their respective roles.

[56] Mr. Szucs was the only person listed in the affidavit under the heading "Principal Known Person". Two members of Mr. Szucs's family were listed under the heading "Other Known Persons". Those persons lived in the same residence as Mr. Szucs. Constable Argue deposed that it was possible Mr. Szucs did not know about the cocaine and may have been hired by an unknown person to import the machine.

[57] In addressing why conventional investigative techniques were unlikely to result in the police identifying all the persons involved in the importation of the cocaine and their respective roles--the "investigative necessity" requirement--Constable Argue deposed:

72 While conventional techniques, in the absence of an authorization to intercept private communications, may allow investigators to identify SZUCS being involved in meetings which are suspicious in nature, I do not believe conventional techniques will reveal all the persons involved in the drug importation network or their roles in the importation and distribution of [sic] Conventional techniques alone may meet some of the objectives of the investigation but I do not believe they will allow investigators to meet all of the objectives of the investigation which include:

72.1 To identify SZUCS' associates and co-conspirators in relation to the importation of the cocaine within the fruit grinding machine;

72.2 To obtain evidence in relations to SZUCS [sic] role and involvement in the importation of cocaine, including his knowledge of the cocaine within the fruit grinding machine;

72.3 To disrupt the further importation and distribution of cocaine.

[58] Constable Argue further deposed, in part, that:

- (a) surveillance was of limited value as it would not provide details of arrangements made during private conversations between Mr. Szucs and others involved in the importation;
- (b) there were no confidential informers providing information on Mr. Szucs;
- (c) as the cocaine was about to be delivered an undercover operation would be of limited use since it would take time for an undercover officer to establish a relationship with Mr. Szucs;
- (d) no suspects had been interviewed because there were no known suspects other than Mr. Szucs;
- (e) the police did not have sufficient information to apply for any search warrants;
- (f) a warrant had been obtained authorizing the installation of a tracking device on the machine;
- (g) a general warrant had been obtained authorizing the installation of alarm devices on the machine and the drums containing the drugs; and

- (h) there were currently no police agents involved in the investigation.
- [59] In setting out the police "Investigational Strategy/Operational Plan", Constable Argue deposed that the police intended to install an audio device in or near the machine.
- [60] No mention is made in the affidavit of Mr. Montgomery, Mr. Aslam, Mr. Ready, the April seizure, or Project E-Piquet.

Authorization P.12/2010

- [61] P.12/2010 was granted to assist in the investigation of: (a) importing a controlled substance; (b) trafficking in a controlled substance; (c) possession of a controlled substance for the purpose of trafficking; and (d) conspiracy to commit those offences.
- [62] Mr. Szucs was the primary target of the authorization, i.e., he was the only person named under the heading "Principal Known Person". The two members of Mr. Szucs's family who lived with him were secondary targets, i.e., they were named under the heading "Other Known Parties".
- [63] Mr. Szucs's private communications were the principal focus of the authorization. The authorization expressly permitted the police to intercept Mr. Szucs's communications over his cellular telephone, at his residence and over his residential telephone, at or near the machine, and at any other place or premises resorted to or used by him.
- [64] The authorization also contained a "basket clause" which permitted the police to intercept the private communication of "all persons" (i.e., both "known" persons and "unknown" persons) over Mr. Szucs's cellular and residential telephones and, subject to a minimization provision, at any place resorted to or used by Mr. Szucs.
- [65] There was a specific "basket clause" authorizing the interception of anyone in the vicinity of the machine:
7. The communication of persons in close proximity to the fruit grinding machine described in sub-paragraph 4.2 may be intercepted by means of an electromagnetic, acoustic, mechanical or other device, implanted on or secreted in the said fruit grinding machine.
 8. The communications referred to in paragraph 7 may be intercepted at any place or premises in Canada where the fruit grinding machine described in sub-paragraph 4.2 is delivered or taken.

Cross-Examination of Constable Argue

- [66] The trial judge granted Mr. Montgomery's and Mr. Aslam's application for leave to cross-examine Constable Argue on the voir dire held with respect to the validity of P.12/2010: 2013 BCSC 1727. During that cross-examination the officer was questioned about the similarities between the April and September shipments of cocaine. He was aware that one of the reasons the CBSA examined the September shipment was because of its similarity with the

April shipment. He acknowledged that shipping cocaine from Argentina to Kelowna inside machinery was not a "common occurrence".

- [67] Before finalizing his affidavit, Constable Argue discussed the similarities between the April and September shipments with Constable Trent Marshall (Corporal Marshall at the time of trial), the primary investigator on Project E-Pleura. They concluded that any link between the April and September shipments was speculative and, as a result, Project E-Piquet was not mentioned in the affidavit.
- [68] Constable Argue was aware that the officers involved in Project E-Pleura had been given the same photographs of Mr. Montgomery, Mr. Aslam, and others, that had been given to the officers involved in Project E-Piquet.
- [69] Constable Argue asked a police intelligence analyst to make enquiries about whether there were any informers providing information with respect to Mr. Szucs; he was told there were no such informers. Constable Argue did not speak with the officer in the SEDDS who was handling the Project E-Piquet informer. He said if that handler had received information relating to Project E-Pleura, then he would have shared the information with Constable Argue. It was not until October 3, 2010, four days after P.12/2010 was granted, that the police received information from another informer that changed the direction of Project E-Pleura.

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- [70] The trial judge found as a fact that Project E-Pleura and Project E-Piquet were separate investigations. She noted that while there were similarities between the two shipments there were also significant differences, such as the shippers, the size of the machinery, the amount of cocaine, and the consignees. She held that there was nothing but suspicion or speculation linking the two shipments which "[fell] well short of credibly-based probability or likelihood, linking Mr. Szucs to Mr. Montgomery and even less so to Mr. Aslam", i.e., "there were no reasonable grounds" for naming them as "knowns" in the authorization. The judge accepted Constable Argue's evidence with regard to his discussions with Constable Marshall; she found that Constable Argue's conclusion that the two shipments were not linked was "arrived at in good faith."
- [71] With respect to the investigative necessity requirement, the judge rejected Mr. Montgomery's and Mr. Aslam's argument that by late September 2010 Project E-Piquet had been "wildly successful". The judge found there was urgency in the investigation of the September shipment. Further, she noted when P.12/2010 was sought the undercover officer involved with Mr. Ready had just begun to develop a relationship with Mr. Ready and had not received any information with respect to Mr. Ready's associates.

- [72] The judge went on to find that even if she was wrong, and Constable Argue should have disclosed Project E-Piquet, then that disclosure would not have had a negative impact on the merits of the application for an authorization to assist in Project E-Pleura:
- [33] The affidavit, I find, met the standard of full and frank disclosure of relevant and material information. It demonstrated reasonable and probable grounds to believe that interception of Ms. Szucs' communications and communications of persons in the immediate vicinity of the fruit-grinding machine would likely provide evidence with regard to the offences under investigation. The requirement of investigative necessity had been established.
- [73] The judge did not expressly deal with the argument that the failure to disclose Project E-Piquet amounted to a subversion of the authorization process. It is, however, evident that she did not find it necessary to do so because she found the link between the April and September shipments to be weak.

Analysis

Known Persons

- [74] The interception of private communication is governed by Part VI (Invasion of Privacy) of the Criminal Code, R.S.C. 1985, c. C-46. The following provisions, are germane to the question of whether a person is required to be "named" in an authorization:

- s. 185(1) An application for an authorization to be given under section 186 shall be made ex parte and in writing to a judge of a superior court of criminal jurisdiction

and shall be accompanied by an affidavit, which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters:

...

- (e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, ...
- s. 186(4) An authorization shall
- (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
- [75] If a person whose private communications were intercepted was "known" but not "named" in the authorization, then those interceptions will have been unlawfully made. With respect to that person those interceptions will amount to a warrantless search and seizure and a breach of that person's rights as guaranteed by s. 8 of the Charter: see *R. v. Mooring* (1999), 137 C.C.C. (3d) 324 at para. 48 (B.C.C.A.).

[76] How to determine whether a person is "known" was addressed in *R. v. Chesson*, [1988] 2 S.C.R. 148. When that case was decided, what is today Part VI of the Criminal Code was Part IV.1, s. 185(1)(e) was s. 178.12(1)(e), and s. 186(4)(c) was s. 178.13(2)(c). Further, s. 178.12(1)(e) used the expression "reasonable and probable grounds to believe" as opposed to the present s. 185(1)(e), which uses the expression "reasonable grounds to believe". However, as discussed in *Baron v. Canada*, [1993] 1 S.C.R. 416 at 446, both expressions have the same meaning: see also *R. v. Webster*, 2008 BCCA 458 at para. 47, 238 C.C.C. (3d) 270.

[77] In *Chesson*, Mr. Justice McIntyre said this (at 164):

How is it to be decided whether a particular person is known or unknown for the purposes of Part IV.1 [now Part VI] of the Code? In my opinion, the answer to this question is to be found in Part IV.1 itself. The starting point is s. 178.12(1)(e) of the Code [now s. 185(1)(e)], which sets out the two pre-conditions to be met before a person may be lawfully identified and named in an authorization and thus be a known person. The first and most obvious condition is that the existence of that person must be known to the police. Second, and equally important, however, is the additional requirement that the person satisfy the standard of being one "the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence". If at the time the police apply for a judicial authorization a person meets both these criteria, he will be a known person and therefore, if the interceptions of his communications are to be admitted against him, he must be named in the authorization as a target for interception. If he is not named his interceptions are not receivable since there is no authority to make them. A "known" person, then, for the purposes of Part IV.1 of the Code is one who satisfies the two criteria in s. 178.12(1)(e).

[Emphasis added.]

[78] Mr. Justice McIntyre further stated that whether a person is "known" within the meaning of what is today s. 185(1)(e) is a question of law to be determined on the basis of the facts found by the trial judge (at 166):

The determination of the question of law, however, depends upon the underlying finding of fact. The question then is: At the time of the application for the authorization did reasonable and probable grounds exist for the belief that the interception of her private communications could assist the investigation?

[79] In *Chesson*, the police obtained an authorization in which Neil Whiteman was named as a "known" person and subsequently installed a listening device in Mr. Whiteman's truck. Through the use of that device the police intercepted conversations between Mr. Whiteman and Lorelie Vanweenan, who was not named in the authorization. In finding that Ms. Vanweenan was a "known" person and, therefore, should have been named in the authorization, McIntyre J. stated (at 166):

Vanweenan and Whiteman were close associates and in the past had joined in criminal activity. She was the girlfriend of Whiteman and surveillance of the Whiteman vehicle prior to June 29 established her use of the vehicle. She had previously been involved in criminal activity with him and on June 29, 1983 Vanweenan and Whiteman were co-accused under an indictment with respect to drug offences. The police officer, Peterson, considered it reasonable to assume that her private communications would, or could, assist the investigation. All that was required to include her in the application was reasonable and probable grounds that her communications may assist. This test was met in the present case. I would therefore conclude that she was a "known" person and that the Crown may not rely on the basket clause.

[Emphasis added.]

[80] More recently, in *R. v. Mahal*, 2012 ONCA 673, 292 C.C.C. (3d) 252, leave to appeal ref'd [2013] 2 S.C.R. x, Mr. Justice Watt described the test as follows:

[71] The threshold for describing a person as a "known" in the supportive affidavit is a modest one. Investigators need not have reasonable and probable grounds to believe that the person was involved in the commission of an offence being investigated. Provided investigators know the identity of the person and have reasonable and probable grounds to believe that the interception of that person's private communications may assist the investigation of an offence, that person is a "known" for the purposes of s. 185(1)(e): *Chesson*, at p. 164; [*R. v. Schreinert* (2002), 165 C.C.C. (3d) 295 (Ont. C.A.)], at para. 43; and *R. v. Nugent* (2005), 193 C.C.C. (3d.) 191 (Ont. C.A.), at paras. 8-9.

[Emphasis added.]

See also: *R. v. Beauchamp*, 2015 ONCA 260 at para. 105, 326 C.C.C. (3d) 280; *R. v. Doiron*, 2007 NBCA 41 at para. 51, 221 C.C.C. (3d) 97, leave to appeal ref'd [2007] 3 S.C.R. viii.

[81] The reasonable-grounds standard is well known. As discussed by Madam Justice Deschamps in *R. v. Morelli*, 2010 SCC 8 at paras. 127-129, [2010] 1 S.C.R. 253 (dissenting, but not on this point), quoting the leading decision of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 167, reasonable grounds is "the point at which credibly-based probability replaces suspicion". Determining whether that standard has been met involves "a practical, non-technical, and common-sense assessment of the totality of the circumstances": *R. v. Ballendine*, 2011 BCCA 221 at para. 53, 271 C.C.C. (3d) 418. Accordingly, the question of law to be determined in this case is whether, when the application for P.12/2010 was made, the police had information that rose to the level of objectively establishing a credibly-based probability that the interception of the private communications of Mr. Montgomery or Mr. Aslam "may assist" the investigation of the September shipment. As I will explain, I agree with the trial judge, that this standard was not satisfied.

[82] In advancing their position, Mr. Montgomery and Mr. Aslam have examined the information available to the police in microscopic detail, pointing out the similarities between the April and September shipments. In particular, they rely on the following:

- Both shipments contained cocaine, originated in Buenos Aires, Argentina, and were destined for Kelowna, a relatively small community.
- They were both observed conducting what appeared to be counter-surveillance when Mr. Ready picked up the April shipment.
- The police were aware of links between Mr. Ready and Mr. Montgomery.
- Mr. Montgomery had a criminal record and the police suspected he was involved in the importation of cocaine.

In light of these facts, Mr. Montgomery and Mr. Aslam say that after the September shipment arrived in Kelowna the police had every reason to believe that they would "show up" again.

- [83] There are, however, dissimilarities between the two shipments in that the shippers and consignees were different and the April shipment was much smaller than the September shipment.
- [84] More significantly, the police had no information linking Mr. Montgomery, Mr. Aslam, or Mr. Ready to either the September shipment or Mr. Szucs; surveillance of Mr. Szucs after he was advised the shipment had arrived in Canada did not show any such link. Additionally, a month before the September shipment arrived, Mr. Ready told an undercover officer that he was out of the cocaine business.
- [85] With respect to Mr. Aslam, his connection to the September shipment is more attenuated than Mr. Montgomery's, in that the only information the police had in regard to him was that he appeared to conduct counter-surveillance when Mr. Ready picked up the April shipment.
- [86] In my view, even though the requirement for naming a person as a "known" in an authorization is a "modest one" (Mahal at para. 71), that requirement was not met here. The most that can be said of the information available to the police when P.12/2010 was sought is that it gave rise to a bare suspicion that Mr. Montgomery and Mr. Aslam might in some way be involved with the September shipment. That information is too tenuous to support a credibly-based probability that the interception of either of their private communications may assist in the investigation of that shipment.
- [87] The present case bears some similarities to *R. v. Chow*, 2005 SCC 24, [2005] 1 S.C.R. 384, aff'g 2003 BCCA 131, 180 C.C.C. (3d) 184, upholding a conviction for murder. In that case, different units with the Vancouver Island District Drug Section of the RCMP conducted three separate drug investigations. Mr. Chow was a target of two of those investigations and had been named in authorizations obtained in connection with those investigations. However, by reason of what the trial judge described as a "communications failure within the RCMP" (BCCA at para. 45), the officers conducting the third drug investigation--Project E-Page--were not aware of Mr. Chow's drug related-activities until after the second authorization obtained in that investigation had been granted. Thereafter, Mr. Chow was

named as a "known" in subsequent Project E-Page authorizations. The police intercepted telephone calls under the sixth and seventh authorizations that implicated Mr. Chow in a murder.

- [88] At trial and on appeal Mr. Chow contended that he was "known" from the outset of Project E-Page and, therefore, should have been named in the first two authorizations. In particular, he argued the police violated his rights under s. 8 of the Charter when they intercepted his calls under the second authorization and, therefore, those calls could not be used to support the granting of the third authorization. If the third authorization was invalid, then the subsequent authorizations were also invalid.
- [89] In this Court, Mr. Justice Donald assumed, without deciding, that Mr. Chow was a "known" from the outset of Project E-Page. He went on to uphold the third authorization on the basis that even with Mr. Chow's calls excised from the affidavit sworn in support of the third authorization, what remained was sufficient to sustain that authorization, including the naming of Mr. Chow: paras. 46, 48.
- [90] In the Supreme Court of Canada, Mr. Justice Fish agreed, in the alternative, with Donald J.A.'s approach. Mr. Justice Fish's primary basis for upholding the validity of the third authorization was that Mr. Chow was not "known" in connection with the Project E-Page investigation:
- [34] Some police officers knew of Chow's existence and suspected his involvement in criminal activity when the applications for the first and second authorizations were made. The RCMP unit conducting Project E-Page, however, was unaware of his connection to the specific investigation for which those authorizations were sought. It was not known, nor were there reasonable grounds to believe, that Chow was a person whose private communications would, if intercepted, assist in that investigation.
- [39] The evidence thus supports the Crown's contention that Chow was not a "known" within the meaning of the Criminal Code, and Chesson, when the first and second authorizations were sought and obtained. In any event, I agree with the Court of Appeal that, even if it were assumed that Chow was then a "known", there was enough evidence independent of any prior Charter breach to justify the third and subsequent authorizations.
- [Underlining in original; bold emphasis added.]
- [91] In my view, Chow stands for the proposition that it is not enough that a person is known to engage in the type of criminal activity being investigated. Rather, before a person can be named in an authorization there must be reasonable grounds to believe he or she is involved in the particular criminal activity in connection with which an authorization is sought.

[92] I wish to note that I am aware that some trial judges have expressed the view that, in light of the Charter, "may assist" must now be interpreted as "will assist" for the purpose of determining whether a person is required to be named in an authorization. Some of those decisions are referred to in *R. v. Durban*, 2012 ONSC 6939, wherein Madam Justice Molloy held (at paras. 44–50) that the "will assist" interpretation is foreclosed by the judgment in *Mahal*. As this point was not raised on this appeal, I have not considered it.

Failure to Disclose Project E-Piquet: Investigative Necessity/Subversion of the Authorization Process

[93] Mr. Montgomery and Mr. Aslam contend Project E-Piquet was a material fact that should have been disclosed in the affidavit filed in support of authorization P. 12/2010. They say, firstly, that the progress that had been made in the Project E-Piquet investigation, particularly the fact that an informer had provided some information on Mr. Montgomery and an undercover officer had made contact with Mr. Ready, negates the "investigative necessity" that would otherwise have existed with respect to Project E-Pleura. They further say the police made a conscious decision to conceal Project E-Piquet from the authorizing judge, and that this "deliberate RCMP conduct deprived the authorizing judge any opportunity to carry out her 'gatekeeper' role".

[94] The investigative necessity requirement is grounded in two sections of the Criminal Code. The first, s. 185(1)(h) requires that the affidavit filed in support of an application for an authorization state:

whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

The second, s. 186(1)(b), requires that the authorizing judge must be satisfied:

that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

[95] As discussed in *R. v. Araujo*, 2000 SCC 65 at paras. 33–34, [2000] 2 S.C.R. 992, investigative necessity is not a "last resort" requirement. Rather, investigative necessity is met if the authorizing judge is satisfied that, practically speaking, there are no other reasonable alternative methods of investigation in the particular circumstances: para. 29. Investigative necessity must be established in relation to the investigation as a whole, not in relation to individual targets: *R. v. Pham*, 2002 BCCA 247 at para. 85, 165 C.C.C. (3d) 97; *R. v. Wasfi*, 2006 BCCA 55 at paras. 34–35, 206 C.C.C. (3d) 203.

[96] It is well-established that there must be "full and frank disclosure of material facts" in an application for a wiretap authorization or search warrant: *Araujo* at para. 46; *Morelli* at para. 44. In this case, Mr. Montgomery and Mr. Aslam argue that Project E-Piquet was a material fact that should have been disclosed to the authorizing judge. They further argue that had

the on-going investigation into the April shipment been disclosed, the authorizing judge could not have been satisfied there were no other reasonable alternatives with respect to the investigation of the September shipment. I do not agree.

- [97] The full and frank disclosure requirement--sometimes expressed as full, frank, and fair disclosure--does not impose a blanket obligation "to disclose every fact which might possibly be relevant": *R. v. Concepcion* (1994), 48 B.C.A.C. 44 at para. 36. As Mr. Justice MacPherson said in *R. v. Ebanks*, 2009 ONCA 851 at para. 43, 249 C.C.C. (3d) 29, leave to appeal ref'd [2010] 1 S.C.R. ix:

The affiant must exercise some judgment in deciding what should and should not be included in a good and effective affidavit. This must admit of some discretion on the affiant's part.

- [98] As with any *ex parte* application, what must be disclosed are material facts. In this regard, the following statement adopted by this Court in *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at para. 33, 237 D.L.R. (4th) 106, is apposite:

A material fact is one that may or might affect the outcome of an application: [citations omitted]. It is for the court to decide what is a material fact: [citations omitted].

- [99] In my view, the facts relating to Project E-Piquet were not material to the application for an authorization to assist in the investigation of the drugs hidden in the fruit-grinding machine. There was no objectively reasonable basis to believe that those involved in the April shipment were also involved in the September shipment. Although both shipments originated in Argentina, they were sent months apart and involved considerably different amounts of cocaine. Most significantly, the September shipment was sent to Mr. Szucs, who did not appear to have any connection to the April shipment or to Mr. Ready, Mr. Montgomery, or Mr. Aslam. While, as Mr. Montgomery submitted in oral argument, "Kelowna is not New York City", Kelowna is nonetheless a major centre with a significant regional population. There is no reason to believe that the importation and distribution of cocaine in that region would be limited to but a few people.

- [100] Having concluded that the facts relating to Project E-Piquet were not material to the application for P.12/2010, it is unnecessary to address Mr. Montgomery's and Mr. Aslam's submission that even if that authorization is sustained under the test for review first articulated in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452, the failure to disclose Project E-Piquet was so subversive to the authorization process that P.12/2010 must be ruled invalid to protect the integrity of that process. This concept is sometimes referred to as the "residual discretion" to hold invalid an otherwise valid authorization (or warrant) when the affiant has deliberately given false material statements or omitted material facts. It is sufficient for the purposes of the present appeal to note that this Court has yet to decide whether such discretion exists: see *R. v. Bacon*, 2010 BCCA 135 at para. 27, 285 B.C.A.C. 108; *R. v. Wilson*, 2011 BCCA 252 at para. 60, 272 C.C.C. (3d) 269; *R. v. Loewen*, 2016 BCCA 351 at para. 24.

Admissibility of the Intercepted Communications of Others

- [101] As the interceptions pursuant to P.12/2010 were lawfully made, all the intercepted communications tendered by the Crown were properly admitted into evidence. However, Mr. Ascencio advances an additional argument on which I wish to comment.
- [102] Mr. Ascencio contends, correctly, that if P.12/2010 is invalid, then it is open to him to seek exclusion of his own communications under s. 24(2) of the Charter on the basis that that evidence was obtained in breach of his Charter rights. He further submits that it is open to him to seek exclusion of the intercepted communications of an alleged co-conspirator on the basis that that evidence was obtained in breach of that person's Charter rights. In support of this argument Mr. Ascencio cites one authority in his factum, *R. v. Montoute* (1991), 62 C.C.C. (3d) 481 at 506–507 (Alta. C.A.). In that case, it was held that one co-conspirator has standing to seek exclusion of evidence obtained in breach of another co-conspirator's rights.
- [103] However, Mr. Ascencio does not cite *R. v. Cheung* (1997), 119 C.C.C. (3d) 507 (B.C.C.A.) at paras. 64–65, leave to appeal ref'd [1998] 1 S.C.R. vii, in which this Court specifically declined to follow *Montoute*; *Cheung* is cited in the Crown's factum. It is also to be noted that *Montoute* was not followed in *R. v. Rendon* (1999), 140 C.C.C. (3d) 12 at 45 (Que. C.A.), appeals on other grounds dismissed, 2001 SCC 34, [2001] 1 S.C.R. 997; and, more recently in *R. v. Alcantara*, 2015 ABCA 259 at para. 217, 328 C.C.C. (3d) 293, leave to appeal ref'd [2016] S.C.C.A. No. 14 (sub nom. *Knapczyk*) and [2016] S.C.C.A. No. 15--wherein the Alberta Court of Appeal stated that "*Montoute* is obsolete and has been overruled by the Supreme Court [of Canada]."

Search of Mr. Montgomery's Residence

- [104] Mr. Montgomery contends the trial judge erred in failing to find that the search of his residence breached his rights as guaranteed by s. 8 of the Charter. He advances two principal arguments, each of which has sub-arguments. Mr. Montgomery's first argument is that the judge erred in upholding the validity of the warrant pursuant to which that search was conducted. Second, he says the warrant was executed in an unreasonable manner. Mr. Montgomery did not address these matters in oral argument but relies on the submissions in his factum.

Validity of the Warrant

- [105] Mr. Montgomery advanced a "facial challenge" to the warrant at trial. In other words, he submitted that the facts set out in the information to obtain ("ITO") sworn in support of the application for the warrant were not capable of supporting the issuance of the warrant.

Information to Obtain and Search Warrant

[106] On October 3, 2010, Constable Bau Tranminh applied for a warrant to search 979 Pinewood Place. That application was made pursuant to the telewarrant provision of the Criminal Code, i.e., s. 487.1. On the basis of the ITO drafted by Constable Tranminh a justice of the peace issued a search warrant to assist in the investigation of importing a controlled substance, possession of a controlled substance for the purpose of trafficking, and conspiracy to commit those offences. That warrant authorized the police to search:

The dwelling house, outbuildings and any vehicles, including a grey 2008 Chevrolet Silverado BCL: CT0279, located at 979 Pinewood Place, West Kelowna, British Columbia (the "Property");

for the following items:

- a. Cocaine;
- b. Imitation Cocaine;
- c. Malachite Green [a highly effective dye];
- d. Documents pertaining to the ownership and / or occupancy of the property to be searched;
- e. Documents pertaining to the shipment of a fruit grinding machine;
- f. Electronic communication devices.

[107] The ITO consists of 41 pages plus five appendices. At the beginning of the ITO, Constable Tranminh provided a brief summary of the investigation starting with the discovery of the cocaine in the fruit-grinding machine on September 22, 2010, and ending with the finding of the open drums at the Aspen Hills Ranch on October 2, 2010.

[108] Under the heading "Motor Vehicle Registration", Constable Tranminh stated he conducted inquiries on the Canadian Police Information Centre computerized data base which provides access to motor vehicle records information in various provinces. Through those inquiries he determined that: (a) B.C. Licence plate CT0279 is assigned to a grey Chevrolet Silverado registered to a numbered company at an address in Vancouver, with no listed principal driver; (b) B.C. Licence plate UPP91L is assigned to a Cherokee Travel Trailer registered to Mr. Montgomery at 979 Pinewood Place in Kelowna, with the listed principal driver's licence number being 6054113; and (c) B.C. driver's licence 6054113 is issued to Mr. Montgomery at an address on Thacker Ridge in Kelowna.

[109] Under the heading "Details of Investigation", Constable Tranminh set out in what had occurred beginning with the discovery of the cocaine in the fruit-grinding machine through to the arrangements for the delivery of that machine to Mr. Szucs. Constable Tranminh described the dye that was used as "Malachite Green". He stated that the dye "which is not easily removed, would identify those persons who have come in contact with the inside compartment of the fruit-grinding machine drums."

[110] In the next part of the ITO, under the heading "Recent Developments", Constable Tranminh set out the following:

- Communications between Staff Sergeant Gateley and Mr. Szucs in making arrangements for the machine to be delivered to Happy Shacks.
- Intercepted communications between Mr. Szucs and Mr. Diaz.
- Delivery of the machine to Happy Shacks on September 30, 2010.
- Intercepted communication between Mr. Szucs and Mr. Ascencio (then known as Perez).
- Surveillance of Mr. Szucs and Mr. Ascencio at Happy Shacks.
- Mr. Ascencio's departure from Happy Shacks at 12:03 p.m. on October 1, 2010; the surveillance team lost contact with him at approximately 12:20 p.m. in "a West Kelowna residential neighbourhood".
- The Jeep backing out of the driveway at 979 Pinewood Place at approximately 1:00 p.m. on October 1, 2010; Mr. Ascencio is the driver, Mr. Montgomery is the only passenger.
- The encounter between Constable Horvath and Mr. Montgomery during which Mr. Montgomery stated he lived in the area.
- Arrival of the Jeep at Happy Shacks at 3:13 p.m., followed shortly thereafter by the arrival of Mr. Szucs.
- Arrival of a Chevrolet pickup truck (BCL: CT0279) at Happy Shacks at 3:50 p.m. towing a flat deck trailer with "Rent Me" on the side.
- Loading of the fruit-grinding machine onto the flat deck trailer by Mr. Montgomery, Mr. Ascencio, and Mr. Aslam, and related intercepted communications.
- Departure of Mr. Ascencio in the Jeep and Mr. Montgomery and Mr. Aslam in the pickup truck and the drive to the Aspen Hills Ranch.
- Intercepted communications in the vicinity of the machine at the Aspen Hills Ranch. In some cases Mr. Montgomery and Mr. Ready are identified as the speakers. In other cases the speakers are identified as "Unknown Male". The conversations and other sounds indicate that the machine is being dismantled.
- Departure of vehicles from the Aspen Hills Ranch around midnight on October 1, 2010.
- Observations made at the Aspen Hills Ranch at 1:00 a.m. on October 3, 2010, of the machine having been dismantled.
- At 9:33 a.m. on October 3, 2010, the pickup truck used to transport the machine is seen parked directly in front of 979 Pinewood Place.

[111] Under the heading "Conclusion", Constable Tranminh deposed he had reasonable grounds to believe that: (a) cocaine-related offences had been committed; (b) the items he wished to search for are on the property at 979 Pinewood Place (including the dwelling-house, outbuildings, and any vehicles including the Chevrolet Silverado); and (c) the items sought will afford evidence of those offences. In summarizing the basis for that belief, Constable Tranminh stated, in part:

60.5 MONTGOMERY, ASLAM, and PEREZ [i.e., Ascencio], attended Happy Shack Storage Center and loaded the fruit grinding machine onto a flatbed trailer towed by a Chevrolet pick up truck. MONTGOMERY drove the pickup truck and was followed by PEREZ in a silver Jeep Cherokee. They drove with the fruit grinding machine in tandem to the rural property of Aspen Hills Ranch, where they gained access to the fruit grinding machine drums. The alarm device failed to alert police. The audio monitoring device intercepted MONTGOMERY instruct [sic] everyone to leave;

60.6 On October 3rd, 2010, covert surveillance on the Aspen Hills Ranch property observed the breached fruit grinding machine drums. There were no suspects around. The Chevrolet pickup truck that MONTGOMERY drove is currently at [979 Pinewood Place];

60.7 I believe that MONTGOMERY, ASLAM, and PEREZ are involved in the commission of the named offences and that MONTGOMERY and PEREZ have been frequenting the property during the commission of the named offences. I believe that MONTGOMERY participated in the breaching of the drums of the fruit grinding machine and that he is likely to have Malachite Green dye on his person and his property. I believe that a search of the residence at 979 Pinewood Place, West Kelowna, BC, for the things specified in the warrant will afford evidence of the [sic] those offences.

Voir Dire Ruling

(2013 BCSC 694)

[112] At the outset of her reasons, the trial judge stated (at para. 10):

I do not stand in the place of the authorizing justice. I am not to substitute my view for his, nor to rehear the application. The question before me is whether there was at least some evidence that might reasonably be believed on the basis of which the warrant could have issued (*R. v. Araujo* (2000), 149 C.C.C. (3d) 449, at para. 51.)

The judge then quoted from *R. v. Whitaker*, 2008 BCCA 174 at paras. 41–43, 254 B.C.A.C. 234, leave to appeal ref'd [2008] 3 S.C.R. x, wherein this Court discussed the fact that the determination of whether the reasonable grounds standard was met is based on a consideration of the "totality of the circumstances", and is made on "a practical, non-technical, and common sense basis". That discussion includes a reference to the off-quoted statement by Mr. Justice Cumming in *R. v. Charlton* (1992), 15 B.C.A.C. 272 at para. 34, that in deciding whether the reasonable grounds standard has been met, an issuing judicial officer is entitled to "put two and two together".

- [113] The judge, accepting defence counsel's arguments, excised from the ITO a substantial portion of the voice identification of persons intercepted in close proximity to the machine. In particular, the judge did not accept any of the voice identification in relation to Mr. Montgomery and, as a result, treated the words attributed to him as having been spoken by an "unknown male". The judge also excised Constable Tranminh's interpretation of some of the intercepted conversations and his conclusory statements.
- [114] After the judge determined what portions of the ITO she could consider in determining the validity of the search warrant, the judge stated:
- [22] What the warrant disclosed, after excision, was that 97 kilograms of cocaine had been imported into Canada inside a fruit-grinding machine. Gavriel [sic] Szucs received the machine and took possession of it at the Happy Shacks storage facility. He made arrangements to meet a man at Happy Shacks Storage, and did meet a man who is identified in the ITO as Victor Perez. I will use that name but, as I have already said, it does not matter specifically what name is attached to that individual, Mr. Szucs and Mr. Perez walked to the machine and Mr. Perez took photographs of the machine. Mr. Perez then left the storage facility and drove in his vehicle to pick up Mr. Montgomery. Mr. Montgomery was first seen in Mr. Perez's vehicle when the vehicle was backing down the driveway of 979 Pinewood Place, an address in a residential neighbourhood. The vehicle pulled up to a police surveillance vehicle parked down the street from 979 Pinewood, and Mr. Montgomery got out of the vehicle and spoke to the plainclothes officer, asking him why he was there and telling him in part that he, that is Mr. Montgomery, lived in the neighbourhood. Mr. Montgomery owned a travel trailer, the registration for which showed his address as 979 Pinewood Place.
- [23] Later in the afternoon of October 1, 2010, Mr. Szucs, Mr. Montgomery, Mr. Aslam, and Mr. Perez all attended the storage facility. Mr. Montgomery directed a forklift operator that was loading the fruit grinder onto a trailer, which trailer was attached to a pickup truck. Mr. Montgomery and Mr. Aslam walked respectively to the driver's side and passenger's side of the pickup truck, although the officer who was the source of this information was unable to see those individuals actually enter into the truck. I should pause to note that the trailer attached to the truck was registered to a company associated with Mr. Aslam's brother. That pickup truck then left the storage compound, hauling the trailer, and travelled, in tandem, with Mr. Perez's vehicle, to the Aspen Hills Ranch.
- [24] Various noises and conversations were heard, from the audio bug installed in the fruit grinder, including someone saying, "Looks like some kinda ... baby powder ..." and someone saying, "We're outta here right now ". At approximately 24 hours later, surveillance showed the cylinders or drums had been removed from the fruit-grinding machine, two of them had their back ends removed, and the drums or cylinders had been left at the Aspen Hills Ranch property. The truck which had towed the trailer was observed parked directly in front of 979 Pinewood Place on the morning of October 3, 2010.

[25] On that evidence, and the inferences available to be drawn from it (putting two and two together), I am satisfied that the justice of the peace could have issued the warrant. The accused has not met the burden of establishing that the warrant was not valid. Consequently, the application to quash the warrant to search 979 Pinewood Place is dismissed.

Analysis

[115] Mr. Montgomery advances a number of arguments in challenging the trial judge's decision. I will deal with each in turn.

The Form and Structure of the ITO

[116] Mr. Montgomery's first argument is an attack on the form and structure of the ITO, which he describes as "cumbersome and unmanageable". He submits the judge failed to properly address the many drafting errors in the ITO and, in so doing, ignored pronouncements of the Supreme Court of Canada. Mr. Montgomery goes so far as to describe the approach taken by the judge as "disturbing".

[117] This argument lacks merit. The trial judge, who described the ITO in para. 9 of her ruling as "quite poorly drafted", was alive to the many criticisms voiced by defence counsel and gave effect to those criticisms. Nonetheless, the narrative of events--what the CBSA and RCMP saw, heard, and did from the arrival of the fruit-grinding machine in Canada until the ITO was sworn--was intelligibly set out and those facts were capable of being assessed. As this Court and other courts have recognized, ITOs are generally prepared without the benefit of legal advice, and the quality of a police officer's work-product should not be assessed using the standard expected of a legal draftsman: see *R. v. Melenchuk* (1993), 24 B.C.A.C. 97 at para. 15; *R. v. Nguyen*, 2011 ONCA 465 at paras. 57-58, 273 C.C.C. (3d) 37; *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 364 (Ont. Ct. (Gen. Div.)).

Failure to Establish that: (a) 979 Pinewood Place was Mr. Montgomery's Residence; and (b) the Things to be Searched For were Probably at that Location

[118] Mr. Montgomery takes issue with whether there were reasonable grounds to believe that the things the police were authorized to search for would be found at 979 Pinewood Place.

[119] In his factum, Mr. Montgomery submits that although "the police theory was plainly that [he] resided in a residence on the civic lot at 979 Pinewood Place the actual ITO evidence did not come close to rendering that a probability". He further submits that the "actual admissible evidence in the ITO was plainly far, far short" of establishing "the requisite reasonable probability" that the things to be searched for would be found at that location (emphasis by Mr. Montgomery).

[120] To begin, in neither the ITO nor the warrant is 979 Pinewood Place referred to as Mr. Montgomery's residence.

[121] There was no need for the issuing justice of the peace to be satisfied there were reasonable grounds to believe 979 Pinewood Place was Mr. Montgomery's principal abode. All that needed to be established was a credibly-based probability that the things to be searched for would be found there. Apposite is the following from the judgment of Mr. Justice Hill in Sanchez (at 370):

It is common knowledge from our experience with warrants to search that evidence relating to an offence may be discovered at premises under the control of one suspected to be complicit in the crime or at a location occupied by an innocent third party custodian or possessor of the things to be searched for. Because search warrants are "place specific", it is essential that a search warrant information set out reasonable grounds to establish that things which will afford evidence will be located in a specific place: C.B.C. v. New Brunswick (Attorney General), [[1991] 3 S.C.R. 459 at pp. 551-2], per Cory J.; and Descôteaux v. Mierzwinski, [[1982] 1 S.C.R. 860, at p. 883], per Lamer J. (as he then was) stating:

Indeed the jurisdiction of a justice of the peace to authorize a search thus does not depend on the nature of the place sought to be searched but on a reasonable belief that there are to be found on the premises things covered by para. (b) of s. 443(1) [487(1)(b)].

(Emphasis in original.)

I note that in s. 2 of the Criminal Code "dwelling-house" is defined as "the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence".

[122] In his factum, Mr. Montgomery appears to argue that the ITO failed to even establish that there was a dwelling-house (i.e., a residential structure) at 979 Pinewood Place. There is no substance to that argument. Although, as Mr. Montgomery points out, there is no statement in the ITO with respect to any police officer having observed a dwelling-house at 979 Pinewood Place, the existence of a dwelling-house at that address was an inference that was reasonably open to the justice of the peace to draw: see R. v. Vu, 2013 SCC 60 at para. 16, [2013] 3 S.C.R. 657. That inference is supported by the fact that the ITO disclosed that: (a) 979 Pinewood Place is in a residential neighbourhood; (b) Mr. Montgomery told an officer he lived in that neighbourhood; and (c) Mr. Montgomery owned a trailer registered to him at that address. Even if Mr. Montgomery's principal abode was elsewhere--perhaps at the address in Kelowna listed for his driver's licence--the inference that there was a dwelling-house at 979 Pinewood Place would still be a reasonable one.

[123] With respect to the reference in the ITO to the motor vehicle records relating to the trailer, Mr. Montgomery says the trial judge "inexplicably ignored the undated, hearsay nature of the trailer registration indicating [his] address". This, again, is a submission without merit. It is well-established that hearsay can be relied on to support reasonable grounds. Here the ITO set out that all the motor vehicle registration information came from a computer search of provincial motor vehicle branch records and was stated in the present tense, e.g., "The registered owner [of the trailer] is Clifford Roger MONTGOMERY of 979 Pinewood, Kelowna, BC". The justice of the peace was entitled to accept that information as both

accurate and current.

- [124] Based on the totality of the circumstances, it was open to the justice of the peace to infer that at the time of the events in issue Mr. Montgomery was staying at 979 Pinewood Place and, therefore, had some control over that premises. Not only was it the listed address for a travel trailer registered to Mr. Montgomery, it was also the place from where Mr. Ascencio picked Mr. Montgomery up on the afternoon of October 1, 2010, and the place where the pickup truck driven by Mr. Montgomery from Happy Shacks to the Aspen Hill Ranch was parked on the morning of October 3, 2010.
- [125] I turn now to the question of whether the ITO supported reasonable grounds to believe that the items to be searched for would be found at 979 Pinewood Place. Mr. Montgomery's position is that there was a total absence of evidence that any of the items would be found there. I disagree.
- [126] The warrant was sought approximately two days after Mr. Montgomery had been involved in dismantling the machine. Parts of that machine had been covered with a dye to enable the police to identify persons who had come in contact with it. In the circumstances, there was a credibly-based probability that the clothing worn by Mr. Montgomery when he participated in dismantling the machine would have traces of cocaine, the placebo, and dye, and that that clothing would be found at 979 Pinewood Place.
- [127] With respect to documents pertaining to ownership and occupancy of 979 Pinewood Place, as Mr. Justice Cromwell stated in *Vu* at para. 17, "it is a reasonable inference that a residence would be a place to look for documents evidencing ownership and occupation."
- [128] As for electronic communication devices, that expression covers such things as cellular telephones, smartphones, computers and pagers, all of which are in common usage. In this day and age, such devices are ubiquitous. In the circumstances of this case, it was open to the justice of the peace to be satisfied there was a credibly-based probability that Mr. Montgomery used such a device in connection with the events of October 1, 2010, and that his device would contain information relevant to the offences under investigation.
- [129] What remains to be considered is the authority given in the warrant to search for documents pertaining to the shipment of the fruit-grinding machine. Given Mr. Montgomery's involvement in moving and dismantling a piece of machinery containing a large quantity of drugs, it was open to the justice of the peace to infer it was likely that documentation relating or referring to that machine would be found where Mr. Montgomery was staying and where the truck he used to move the machine was seen parked shortly after those events occurred. Such documentation could be either stored electronically, such as an email, or in hardcopy: *R. v. Vu*, 2011 BCCA 536 at paras. 54–58, 285 C.C.C. (3d) 160.
- [130] In the result, I agree with the trial judge that the search of 979 Pinewood Place was conducted pursuant to a valid warrant.

Execution of the Search Warrant and Post-Execution Procedures

- [131] The police initially intended to arrest Mr. Montgomery at 979 Pinewood Place by telephoning him and asking him to surrender. Mr. Montgomery was to be given a copy of the search warrant following his arrest. Constable Kevin Kenneth Leach was to be the site commander for the search of the residence and the exhibit person. Prior to going to 979 Pinewood Place, Constable Leach obtained two copies of the warrant from Constable Tranminh and gave one to Constable David Michael DeFrane. Constable Marshall assigned the task of arresting Montgomery to Constable DeFrane.
- [132] As a number of police officers were assembling in the vicinity of 979 Pinewood Place, Mr. Montgomery left the residence in a vehicle and drove past several police vehicles. Constable DeFrane instructed an officer in a marked police vehicle to stop Mr. Montgomery, following which Constable DeFrane placed Mr. Montgomery under arrest for importation, trafficking, possession for the purpose of trafficking, and conspiracy and advised him of his rights. Constable DeFrane told Mr. Montgomery a search warrant was going to be executed at his residence. After placing Mr. Montgomery in the back of a police vehicle, Constable DeFrane read the copy of the warrant he had to Mr. Montgomery.
- [133] For safety reasons, Constable DeFrane asked Mr. Montgomery whether anyone was at 979 Pinewood Place. Mr. Montgomery said his wife and children were there.
- [134] Constable Marshall searched Mr. Montgomery's vehicle. He was looking primarily for cellular telephones. Constable Marshall seized three BlackBerrys.
- [135] Constable DeFrane transported Mr. Montgomery to the RCMP Kelowna detachment. While Mr. Montgomery was speaking with a lawyer over the telephone, he asked for a copy of the search warrant and Constable DeFrane gave one to him.
- [136] Following Mr. Montgomery's arrest, Constable Leach went to the front door of 979 Pinewood Place and knocked. Mr. Montgomery's partner, Crystal Lee Walters, came to the door. Constable Leach told Ms. Walters that Mr. Montgomery had been arrested and that he had a warrant to search the residence. Ms. Walters was asked to leave the residence while the search was conducted and made arrangements to be picked up by a friend. Ms. Walters asked for a copy of the warrant. Constable Leach showed Ms. Walters the copy of the warrant he had, but did not give it to her.
- [137] In searching the residence the police seized:
- Clothing with purple stains.
 - Credit cards, a Canadian passport, and a Mexican passport, all in Mr. Montgomery's name.
 - A Canadian passport in Mr. Aslam's name.
 - Documents in Mr. Aslam's name, including an airline boarding pass.

- A money counter and two black bags containing 95 Canadian \$20 bills (\$1,900).
- Several cellular telephones.
- Several laptop computers.
- Several memory sticks.
- A desktop computer.
- Several rifles and shotguns together with ammunition.
- A duplicate prescription pad.

- [138] On October 7, 2010, the electronic devices seized from Pinewood Place were sent to Corporal Gerry Louie of the RCMP's Pacific Region Integrated Technological Crime Unit for forensic examination.
- [139] Constable Leach was responsible for completing and submitting the Form 5.2 post-search report required by ss. 487.1(9) and 489.1 of the Criminal Code with respect to the execution of the Pinewood Place warrant. He was also responsible for completing and submitting Form 5.2s with respect to warrants that had been executed at other locations.
- [140] Constable Leach completed a four-page Form 5.2 for Pinewood Place on October 12, 2010. On October 14, 2010, he faxed that report along with a number of other Form 5.2 reports to a justice of the peace: 21 pages in total. He submitted all the Form 5.2s at the same time as he thought doing so would be convenient for the justice of the peace.
- [141] As the Pinewood Place warrant was a telewarrant, the Form 5.2 had to be filed "as soon as practicable but within a period not exceeding seven days after the warrant has been executed": s. 487.1(9). For warrants other than telewarrants, a Form 5.2 must be filed "as soon as is practicable": s. 489.1(1)(b)(ii). Constable Leach testified that in October of 2010 he believed the time limit for the Pinewood Place warrant was "seven days or as soon as practicable".
- [142] The Pinewood Place Form 5.2 was date-stamped "received" by the Kelowna Registry on October 15, 2010. On October 19, 2010, a justice of the peace granted a detention order pursuant to s. 490(1)(b) of the Criminal Code, authorizing the police to detain the items seized at Pinewood Place.
- [143] Prior to the start of submissions on issues relating to lawfulness of Mr. Montgomery's arrest and the search of his residence, including the examination of electronic devices, Crown counsel, without objection, filed two binders. The first binder, approximately three and one-half inches thick and labelled "Cellular Phone Reports Seized from Blue Infiniti", was marked as Exhibit 25(VD). It contains documents concerned primarily with the handling and forensic examination of the three BlackBerrys seized from Mr. Montgomery's vehicle. The second binder, approximately two and one-half inches thick and labelled "Electronics Seized from House", was marked as Exhibit 26(VD). It contains documents concerned

primarily with the handling and forensic examination of the electronic devices seized from Mr. Montgomery's residence.

- [144] The appellants did not include Exhibits 25(VD) and 26(VD) in the appeal book they filed. Two days before the hearing of these appeals Mr. Montgomery filed a supplemental appeal book which contains an extract from Exhibit 25(VD), being pages 57 to 61 of Tab 2A of that binder. The complete binders are, however, available to the Court.
- [145] The first document in Exhibit 25(VD) is entitled "Assistance Request/Technological Crime", dated October 7, 2010. It relates to all of the electronic devices seized from Mr. Montgomery's residence and vehicle. By that document, the Kelowna RCMP asked the Pacific Region Integrated Technological Crime Unit to assist in the Project E-Pleura investigation:

We are requesting the assistance of Tech Crimes to examine the devices seized for call history, email and text message history as well as phone contacts and any address books.

- [146] Exhibit 25(VD) contains a five-page "Continuation Report" that shows the steps Ken Lew of the Pacific Region Integrated Technological Crime Unit took in conducting a forensic examination of the cellular telephones seized during the investigation. That report indicates Mr. Lew itemized the devices he had been assigned to examine on October 8, 2010, and began actively examining them on November 3, 2010. As the BlackBerrys seized from Mr. Montgomery's vehicle were password protected, Mr. Lew forwarded them to Ottawa on November 4, 2010.
- [147] Exhibit 25(VD) also contains three reports prepared by Constable Christopher Wright of the Ottawa Technological Crimes Unit with respect to the forensic examination of the three BlackBerrys and the data recovered from those devices. Those reports indicate that steps to recover data from those BlackBerrys took place in December 2011 and January 2012. Pages 57 to 61 of Tab 2A of Exhibit 25(VD) is the report with respect to the only BlackBerry from which data--call logs, text messages, and photographs--was tendered by the Crown. That report indicates that the steps needed to recover data from that BlackBerry were completed on January 26, 2012; thereafter that data was analyzed.
- [148] Exhibit 26(VD) contains a 15-page "Continuation Report" listing the steps Corporal Louie took in conducting forensic examinations of computers and related devices. That report indicates that on October 26, 2010, Corporal Louie received a request from the Kelowna RCMP to clone the hard drive of one laptop so that it could be returned to its owner. That cloning was completed on October 28, 2010.
- [149] The report further indicates that Corporal Louie started his forensic examinations on December 11, 2010, and worked through to the end of 2010, by which time he had finished examining most of the devices. Corporal Louie resumed working on the devices on January 27, 2011, and completed the examinations on March 24, 2011. His "Technical Examination Report" dated April 29, 2011, contains the data obtained from the two computers and one

external hard drive that were found to contain information believed to be of evidentiary value.

- [150] When Crown counsel tendered Exhibits 25(VD) and 26(VD), he drew the trial judge's attention to portions of Exhibit 25(VD). In discussing the BlackBerry that contained data of evidentiary value, Crown counsel reviewed pages 57 to 61 of Tab 2A, and referred, in general terms, to the data recovered from that device.

Voir Dire Ruling

(2013 BCSC 1008)

- [151] The trial judge rejected Mr. Montgomery's submission that the search of Pinewood Place was conducted in a "rude" or "piggish" manner. Based on Ms. Walters's testimony, the judge found that Constable Leach had treated Ms. Walters "politely and professionally". Having regard to the post-search photographs Ms. Walters took on October 4, 2010, at the request of Mr. Montgomery's counsel, the judge found there was "nothing that would suggest that there was anything out of the ordinary in the manner in which the search of this residence was physically carried out": para. 26.
- [152] The judge held that the seizure of computers, cellular telephones and memory sticks fell within the scope of the warrant: para. 27. She found that "Constable Leach had reasonable grounds to believe that each was an electronic communication device and/or would or could contain documents pertaining to the ownership and/or occupancy of [979 Pinewood Place] or documents pertaining to the shipment of the fruit-grinding machine": para. 32.
- [153] The judge rejected a submission that the post-seizure forensic examination of the electronic devices seized from 979 Pinewood Place and Mr. Montgomery's vehicle was unreasonable because a warrant specifically authorizing such an examination had not been obtained. Citing *R. v. Giles*, 2007 BCSC 1147, and *R. v. Mann*, 2012 BCSC 1247, 266 C.R.R. (2d) 49, the judge held that such a warrant was not required before a lawfully seized electronic device could be searched: paras. 34–37.
- [154] The judge held that the seizure of the firearms "was not unreasonable, particularly given the nature of the offences the police were investigating and given the concerns about possible unsafe storage": para. 28. The judge further found that the seizure of the \$1,900 in cash and the money counter was "justified": para. 29.
- [155] In finding that the late filing of the Form 5.2 with respect to Pinewood Place did not render the search of that premises unreasonable, the judge said:
- [20] I turn now to the Form 5.2 issue. As I said earlier, the provisions in s. 489.1(9) of the Criminal Code required that the Form 5.2 be filed not later than seven days after the execution of the warrant at 979 Pinewood Place, which would have been sometime in the later afternoon of October 11, 2010. The Form 5.2 was not filed until October 14 or 15. I find that the late filing was caused by Constable Leach's misunderstanding of the provisions of s.

487.1(9) and his decision to provide all of his Form 5.2's to the justice of the peace at once, which he considered would be of convenience to the justice of the peace. It was not, I find, a decision born of bad faith.

- [24] It is, of course, of great importance that the police comply with the Criminal Code regarding returns. Having said that, the failure to comply with the time limits in this case, although a statutory breach, is more, I find, properly characterized as a technical or administrative error than a serious breach. There is no evidence that the error had any actual impact on any of the purposes for filing returns. There is no evidence of any confusion over what the police seized, nor of any refusal to make the detention order sought once it was applied for, nor of any request for return of seized items in the first several months after the seizure.
- [25] In all of the circumstances, I do not find that the failure to file the Form 5.2 within seven days rendered the search invalid or amounted to a breach of Mr. Montgomery's s. 8 Charter rights. I will also say that even in combination, the late filing of the Form 5.2 and the failure to comply with the specific provisions of s. 487.1 do not make the manner of the search of such a nature that a s. 8 Charter breach could be found.
- [156] With respect to the duplicate prescription pad, the judge stated:
- [30] Finally, in terms of the items seized which are said to be outside of the scope of the police authority, the police did seize a doctor's duplicate prescription pad or notebook. Constable Leach testified that he understood such an item could only be possessed by doctors and he was concerned that no one who was not a doctor should have that in their possession. I accept that the seizure of that item was not unreasonable.

Analysis

Challenge to the Seizure of Certain Items from 979 Pinewood Place

- [157] As mentioned above, Mr. Montgomery relies solely on his factum in advancing objections to the search of 979 Pinewood Place. With respect to his argument that the police exceeded the authority granted by the warrant, Mr. Montgomery's argument is set out in the following paragraph of his factum:

9. Overseizure

- [59] We submit the conclusion of the Trial Judge that the seizure of guns, ammunition, money, money counter and [duplicate prescription pad] were not unreasonable is wrong and the seizures were plainly not legally authorized.²⁹ The seizure of computers and electronic devices from Pinewood Place is addressed in greater detail *infra*.

²⁹ See *Regina v. Liu* 2011 BCSC 1266, adopting the reasoning of Mr. Justice Hill as espoused in *Regina v. Cook* [2008] O.J. No. 476 (S.C.J.).

The two trial decisions Mr. Montgomery cites contain a point-form review of the general legal principles applicable to warrantless searches.

[158] I will address the examination of the electronic devices later in these reasons. However, I do not intend to address the submission set out in para. 59 of Mr. Montgomery's factum. In his factum Mr. Montgomery does not set out the factual background with respect to the seizures being challenged with appropriate references to the transcript and appeal book, nor does he set out the legal principles on which he relies other than in a cursory way. On an appeal of this nature, it is not the Court's task to sift through the record and the authorities to address an argument presented in that way.

Late Filing of the Form 5.2

[159] The trial judge's decision on this point has been overtaken by recent developments in the law. In *R. v. Craig*, 2016 BCCA 154 at paras. 177–184, 335 C.C.C. (3d) 28, this Court held that the failure to file a Form 5.2 does not reach back to render constitutionally unreasonable a search or seizure that was lawful at the time it was effected. However, that failure will render the continued detention of the items seized unreasonable--in breach of s. 8 of the Charter--where that detention interferes with the ongoing residual privacy interest of the person(s) from whom those items were seized.

[160] In the present case, the Pinewood Place Form 5.2 was required to be filed not later than October 11, 2010. However, Constable Leach did not fax it to a justice of the peace until October 14, 2010. As Mr. Montgomery clearly had a residual privacy interest in some, and likely all, of the items seized from Pinewood Place, his s. 8 Charter rights were violated for three days. Accordingly, the admission of those items into evidence requires a consideration of s. 24(2) of the Charter. I will address that issue later in these reasons.

Examination of Electrical Devices

[161] Once again, the trial judge's decision has been overtaken by recent developments in the law.

[162] The law with respect to the search of computers seized during the lawful execution of a search warrant changed with the Supreme Court of Canada's decision in *Vu*, decided before the conclusion of the trial in the case at bar. In that case, it was held that the police must have a warrant authorizing them to access the data stored in a computer.

[163] The law with respect to the search of cellular telephones and similar electronic devices lawfully seized incidental to arrest changed with the Supreme Court of Canada's decision in *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, decided after the conclusion of the case at bar. In that case, it was held that the police must have a warrant authorizing them to access data stored in a cellular telephone except when there is an investigative need to examine the device promptly.

- [164] With respect to Vu, it should be noted, as the Crown points out in its factum, that after the Supreme Court of Canada released its decision, the trial judge raised with appellants' counsel whether they wished to "revisit" any of the issues she had ruled on. One of those issues was described as the "data dump", a reference to the forensic examination of all data stored on an electronic device. Although Mr. Montgomery's counsel made further submissions they did not advance any arguments based on Vu.
- [165] Although arguments based on Vu could and should have been raised by Mr. Montgomery at trial, I would not preclude him from doing so now. The record is sufficient to decide both the s. 8 and s. 24(2) points that arise by reason of that decision. In addition, the Crown has not suggested it would be prejudiced in any way.
- [166] In the present case, the data stored in Mr. Montgomery's computers and cellular telephones was accessed without a warrant specifically authorizing the examination of that data. In light of Vu and Fearon those searches infringed Mr. Montgomery's s. 8 Charter rights. Later in these reasons, I will address the impact for those infringements having regard to s. 24(2) of the Charter.
- [167] There is a further issue raised by Mr. Montgomery that needs to be addressed. It relates to when the forensic examination of the electronic devices took place, particularly, the BlackBerry from which recovered data was tendered by the Crown. Mr. Montgomery's challenge to his lawfulness of arrest and the seizure of the three BlackBerrys is dealt with below.
- [168] The argument Mr. Montgomery now makes with respect to the forensic examination of the BlackBerrys is more nuanced than the one he advanced at trial. Mr. Montgomery says that even under the law as it stood prior to Fearon, the forensic examination of the BlackBerrys seized from his vehicle fell outside the limits of a search incidental to arrest because that examination took place a considerable time after those devices were seized.
- [169] As mentioned above, information with respect to how and when the electronic devices were examined is found in Exhibits 25(VD) and 26(VD). It is sufficient for present purposes to address only how the BlackBerry from which recovered data was tendered was dealt with. The timeline with respect to that device is as follows:
- October 4, 2010: Mr. Montgomery is arrested and the BlackBerry is seized from his vehicle.
 - October 7, 2010: BlackBerry is sent to Vancouver for forensic examination.
 - November 3, 2010: BlackBerry is examined in Vancouver but its data could not be accessed because the device was password protected.
 - November 4, 2010: BlackBerry is forwarded to Ottawa for further examination.
 - December 11, 2011: Completion of the first step needed to access the data.
 - January 20, 2012: Completion of the second step needed to access the data.

- January 24, 2012: Completion of the third step needed to access the data.
- January 26, 2012: Completion of the fourth and fifth steps needed to access the data; access gained.

[170] Mr. Montgomery now says that because of the nearly 16-month gap between when the BlackBerry was seized and when its data was accessed, that access cannot be said to be part of a search incidental to his arrest.

[171] I am at a loss to understand why Mr. Montgomery did not advance this argument at trial, particularly after Constable Wright testified and the trial judge gave the appellants an opportunity to "revisit" previous rulings. However, for the reasons stated above with respect to Vu, I would not preclude Mr. Montgomery from advancing it now.

[172] R. v. Caslake, [1998] 1 S.C.R. 51, is the leading authority on searches incidental to arrest. In that case, Chief Justice Lamer stated:

[24] The temporal limits on search incident to arrest will also be derived from the same principles. There is no need to set a firm deadline on the amount of time that may elapse before the search can no longer said to be incidental to arrest. As a general rule, searches that are truly incidental to arrest will usually occur within a reasonable period of time after the arrest. A substantial delay does not mean that the search is automatically unlawful, but it may cause the court to draw an inference that the search is not sufficiently connected to the arrest. Naturally, the strength of the inference will depend on the length of the delay, and can be defeated by a reasonable explanation for the delay.

Of course, what the Chief Justice was discussing was the timing of the post-arrest search leading to the seizure of an item, not the later forensic examination of a lawfully seized item. In the present case, the physical seizure of the BlackBerry from Mr. Montgomery's vehicle occurred very shortly after he was lawfully arrested and was incidental to that arrest.

[173] Mr. Montgomery relies on R. v. Hiscoe, 2013 NSCA 48, 297 C.C.C. (3d) 35. In that case, the police arrested Mr. Hiscoe for trafficking in drugs and seized a "smart phone like a BlackBerry" which was on the seat of Mr. Hiscoe's vehicle. The smartphone was not password protected. At the scene of the arrest, an officer reviewed the text messages stored in the smartphone; he transcribed them later that day. A month later the police took the smartphone to a RCMP Technological Crime Unit, at which time its entire contents were downloaded onto a DVD. The trial judge found that the examination of the smartphone that occurred on the day of the arrest was lawful but that, by reasons of the one-month delay, the downloading of its contents was not. The Court of Appeal agreed: paras. 65–66.

[174] In my view, a significant factor in Hiscoe is that the officer who seized the smartphone and found the text messages testified that after having done so he had all the information he needed from that device: para. 7. Further, the lead investigator who arranged for the downloading of the smartphone's contents testified that he did so for "easy reference" by Crown counsel and defence counsel: para. 9. Accordingly, that downloading was not for the

purpose of securing evidence which is a necessary requirement for a valid search incidental to arrest: Caslake at paras. 19–20.

- [175] The situation in the case at bar is different. Within days of the lawful seizure of the BlackBerry the Kelowna RCMP sought technical assistance to access the data stored in that device. The Vancouver Technological Crime Unit attempted to access that data a month later but was unsuccessful because the BlackBerry was password protected. As a result, the BlackBerry was sent to the Ottawa Technological Crime Unit. While, for reasons that were not explored at the trial, over a year passed before the Ottawa unit dealt with the BlackBerry, I consider what occurred in Ottawa to be part of a continuum of forensic examination that began within a few days of Mr. Montgomery's arrest. But for the warrant requirement in Fearon--decided nearly three years after the BlackBerry's data was accessed--the Ottawa examination would have been a valid warrantless search incidental to arrest.

Lawfulness of Mr. Montgomery's Arrest and the Search of His Vehicle

- [176] Mr. Montgomery contends the police did not have reasonable grounds to arrest him and that as a consequence, both his arrest and the search of his vehicle were unlawful. In his factum Mr. Montgomery submits that while it is arguable that the information the police had is objectively capable of supporting reasonable grounds to believe he had control of the fruit-grinding machine in Kelowna, there is nothing to objectively support a belief that he knew cocaine was hidden in the machine. Mr. Montgomery did not press this argument in oral submissions.
- [177] As I have already set out the events leading up to Mr. Montgomery's arrest, there is no need to repeat them. Suffice it to say that both Constable Marshall (the lead investigator) and Constable DeFrane (the arresting officer) were aware of those events.

Voir Dire Ruling

(2013 BCSC 1010)

- [178] The trial judge summarized the arguments raised by Mr. Montgomery in regard to the lawfulness of his arrest as follows:
- [29] The defence argues that, viewed objectively, the police did not have reasonable and probable grounds to arrest Mr. Montgomery. It is the defence submission that the police drew unwarranted and unfounded inferences, in the absence of investigative facts to prove them. Defence counsel says there is no evidence to support an inference that Mr. Montgomery was the driver or passenger of the Chevy truck that left the storage facility towing the fruit grinder. Further, they say no evidence establishes that Mr. Montgomery was at the Aspen Hills Ranch when the machine was disassembled. No evidence, they say, has been provided to establish that Aspen Hills Ranch is not a natural area to which a fruit-grinding machine would be taken. No evidence has been provided, they say, to show any past, present, or future link between Mr. Montgomery and Mr. Szucs or Mr. Montgomery and the man in the

black shirt who Corporal Marshall referred to as the man then known to be Victor Perez.

[179] In rejecting those arguments, the judge stated:

[33] I am satisfied that each of Constable DeFrane and Corporal Marshall subjectively believed that there were reasonable and probable grounds to arrest Mr. Montgomery. While they drew certain inferences, they were entitled to do so based on the information they had and the events as they unfolded. As the court said in *R. v. Balatoni* [[2003] O.J. No. 5788 (S.C.J.)], quoted in *R. v. Radjenovic*, 2011 BCSC 1839 at para. 35:

the test is whether or not a reasonable observer in the position of the police officer could (not would) reach the same conclusion that the police officer subjectively did. In other words, in circumstances where more than one conclusion could be reached on an objective basis, but where one of the conclusions that is objectively supportable is that view held subjectively by the police officer, then the objective requirements for a valid arrest will have been met.

[34] Objectively, I am satisfied that there were reasonable and probable grounds to arrest Mr. Montgomery by no later than when the pickup truck towing the fruit-grinding machine left the storage facility and the grounds were strengthened, in my view, not lessened, by the events which occurred from that time until the time of the arrest. I find the arrest was lawful.

[180] The judge further found that the seizure of the BlackBerrys from Mr. Montgomery's vehicle had been affected during a lawful search incidental to his arrest. The judge accepted Constable Marshall's testimony that he believed that cellular telephones possessed by Mr. Montgomery would likely have communications stored in them relating to the fruit-grinding machine: paras. 36–37.

Analysis

[181] This ground of appeal deserves only the briefest response.

[182] The police observed Mr. Montgomery picking up a machine in which a large quantity of drugs had been concealed and taking that machine to a remote location. They then overheard Mr. Montgomery and others dismantling the machine into the late hours of the day and removing what had been hidden inside. The suggestion that those facts are incapable of supporting reasonable grounds to believe that Mr. Montgomery and the others were aware of what they removed from the machine is wholly without merit.

Admissibility of the Data Recovered from the BlackBerry Seized from Mr. Montgomery's Vehicle: Charter, s. 24(2)

- [183] As I have found that breaches of s. 8 of the Charter occurred, it is necessary to consider the impact of those breaches on the admissibility of evidence tendered by the Crown. Those breaches are: (a) the delayed filing of the Pinewood Place Form 5.2; and (b) the forensic examination of data stored in the electronic devices seized from Mr. Montgomery's residence and vehicle.
- [184] Although a number of electronic devices were examined, the Crown only tendered data recovered from one of the BlackBerrys seized from Mr. Montgomery's vehicle. The significant aspects of that data are:
- (a) communications between the BlackBerry and a cellular telephone used by Mr. Diaz in the summer of 2010;
 - (b) the text messages involving the BlackBerry and Mr. Ascencio's cellular telephone on September 1, 2010, regarding "Fernando" (i.e., Mr. Diaz);
 - (c) the calls and text messages involving the BlackBerry and Mr. Ascencio's cellular telephone on September 30, 2010; and
 - (d) two photographs showing Mr. Montgomery and Mr. Aslam posing with five or six other men.
- [185] The framework for determining whether evidence should be excluded is set out in the reasons for judgment of Chief Justice McLachlin and Madam Justice Charron in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. At the outset of their reasons, they explained the purpose of s. 24(2):
- [67] The words of s. 24(2) capture its purpose: to maintain the good reputation of the administration of justice. The term "administration of justice" is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.
- [68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall reputation of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.
- [69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the reputation of the justice system.

- [70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term reputé of the justice system.
- [186] The factors to be considered under s. 24(2) are succinctly stated at para. 71 of Grant. In deciding whether to admit or exclude evidence, a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:
- (1) the seriousness of the Charter-infringing state conduct (admission may send a message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send a message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits.
- [187] Little need be said about the three-day delay in the filing of the Form 5.2. It was, at most, a technical violation of the Charter, and had no tangible impact on Mr. Montgomery's privacy interests. As the trial judge found, the delay was brought about by Constable Leach's failure to appreciate that the time requirements for filing a Form 5.2 in respect of a telewarrant are more restrictive than those in respect of a normal warrant. As well, the officer, who was responsible for preparing a number of Form 5.2s, wished to file all of them at the same time.
- [188] Conversely, the warrantless forensic examination of Mr. Montgomery's electronic devices did have a significant impact on his privacy interests. However, having regard to the fact that those examinations took place prior to the Supreme Court of Canada's decision in *Vu and Fearon*, I am of the view that the admission of data recovered from the BlackBerry would not bring the administration of justice into disrepute. I say this because: (a) at the time those examinations took place the police had no reason to believe that a specific warrant was required to access the data stored in electronic devices lawfully seized either under a warrant or pursuant to the common-law power of search incidental to arrest; (b) had the police been aware of the need for such a warrant they could have obtained one; (c) the evidence recovered from the BlackBerry was reliable and relevant, and existed independent of any Charter breaches; and (d) the serious nature of the offences.
- [189] In their joint reply factum, Mr. Montgomery and Mr. Aslam submit that in examining Mr. Montgomery's BlackBerrys the police engaged in conduct that was "a serious violation of long-standing and well-known limits on their powers of search truly incidental to arrest". That submission is belied by an examination of how the jurisprudence with respect to the examination of cellular telephones has evolved.
- [190] When the BlackBerrys were seized from Mr. Montgomery's vehicle in October 2010, the governing authority in this jurisdiction was *Giles*, wherein it was held that the power to search incidental to arrest included the power to access the contents of a cellular telephone or similar device. *Giles* was followed in *Mann*, decided in August 2012. This Court did not pronounce on the issue until the appeal in *Mann* was decided in June 2014. In *R. v. Mann*,

2014 BCCA 231, 310 C.C.C. (3d) 143, leave to appeal ref'd [2014] 3 S.C.R. ix, this Court held it was no longer permissible for the police to conduct warrantless examinations of the entire contents of a cellular telephone that had been lawfully seized incidental to arrest: para. 123. In doing so, it noted that in August 2012, Giles represented the law in this jurisdiction and that no appellate court in Canada had suggested or found that a warrantless examination of a cellular telephone incidental to arrest violated s. 8 of the Charter: para. 116. It was not until the Supreme Court of Canada decided *Fearon* in December 2014 that the permissible scope of a warrantless examination of a cellular telephone incidental to arrest was finally settled.

[191] In *Mann* at paras. 124–134, this Court declined to exclude text messages obtained by the warrantless examination of Mr. Mann's BlackBerry. More importantly, in *Fearon*, a case from Ontario, the Supreme Court declined to exclude text messages and photographs obtained from the warrantless examination of Mr. Fearon's cellular telephone conducted at a time when the dominant view of the courts in Ontario was that such examinations could be conducted incidental to arrest. As Mr. Justice Cromwell stated in *Fearon* at para. 95, "The police simply did something that they believed on reasonable grounds to be lawful and were proven wrong, after the fact, by developments in the jurisprudence." See also: *R. v. Goodkey*, 2015 BCCA 64 at paras. 154–159, 367 B.C.A.C. 231, leave to appeal refused [2015] S.C.C.A. No. 160 (sub nom. *Krieger*); *R. v. Dhillon*, 2015 BCCA 375 at paras. 41–49, 376 B.C.A.C. 265.

[192] I turn now to the examination of the computers and related devices seized from Mr. Montgomery's residence. Although the Crown did not seek to tender any evidence obtained by those examinations, I am prepared to proceed on the basis that there is a sufficient investigatory connection between those examinations and the examination of the BlackBerry from which evidence was tendered to engage s. 24(2): see *R. v. Goldhart*, [1996] 2 S.C.R. 463 at para. 39; *R. v. Mack*, 2014 SCC 58 at para. 38, [2014] 3 S.C.R. 3.

[193] Once again, what militates against exclusion is the fact that the law with respect to the examination of computers was not settled until the Supreme Court of Canada decided *Vu* in November 2013, more than two years after the examination of the computers, etc., seized from Mr. Montgomery's residence. In that case, Cromwell J., in declining to exclude evidence obtained by the warrantless examination of computers found in a residence during the execution of a search warrant, stated (at para. 69):

The Langley [RCMP] department had a policy of searching computers found on premises and there was no clear law prohibiting them from doing so. Indeed, the trial judge found that, "the officers carried out the search in the belief that they were acting under the lawful authority of the warrant granted by the justice": voir dire decision, at para. 77. This case should serve to clarify the law on this point and prevent this kind of confusion in the future.

[Emphasis added.]

Failure to Bring Mr. Montgomery Before a Justice of the Peace

[194] Mr. Montgomery contends his right not to be arbitrarily detained guaranteed by s. 9 of the Charter was infringed because he did not appear in person before a justice of the peace within 24 hours of his arrest. He says that because of this the court lost jurisdiction over him. This argument is grounded in s. 503(1)(a) of the Criminal Code, which requires that a person who has been arrested be taken before a justice of the peace:

where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period

[195] It is common ground that Mr. Montgomery was not personally present when his case was first spoken to before a justice of the peace. That appearance, at which duty counsel appeared on Mr. Montgomery's behalf, took place within 24 hours of Mr. Montgomery's arrest. Mr. Montgomery personally appeared before a Provincial Court judge two days later.

[196] Mr. Montgomery further says that, in any event, s. 503 was breached because he was not taken before a justice of the peace before duty counsel appeared on his behalf.

Factual Background

[197] Constable DeFrane arrested Mr. Montgomery at 12:08 p.m. on October 4, 2010, and advised Mr. Montgomery of his right to counsel. Mr. Montgomery was then taken to the RCMP detachment. In connection with Mr. Montgomery exercising his right to counsel, the following occurred at the detachment that day:

- 1:25 p.m.: Mr. Montgomery is given an opportunity to contact counsel and attempts to reach Daniel B. Geller; messages are left asking Mr. Geller to call back.
- 1:38 p.m.: Mr. Montgomery asks to speak with Neil L. Cobb; a message is left asking Mr. Cobb to call back.
- 1:56 p.m.: Mr. Montgomery speaks with Mr. Cobb's partner, Elizabeth P. Lewis.
- 4:33 p.m.: Mr. Montgomery speaks with Mr. Geller.
- 6:37 p.m.: Mr. Montgomery speaks with Mr. Cobb.
- 7:28 p.m.: Mr. Montgomery speaks with Mr. Geller.

[198] From the time of Mr. Montgomery's arrest until after just after 12:00 a.m. on October 5, 2010, the police undertook a number of steps in furtherance of the investigation. Those steps included a cell-plant operation, the execution of a general warrant which involved taking skin swabs from and photographs of Mr. Montgomery, and an attempt to obtain a statement from him.

[199] On October 5, 2010, the following occurred:

- An information is sworn charging Mr. Montgomery with drug-related offences.
- 9:53 a.m.: Mr. Montgomery speaks with Mr. Geller.
- 10:01 a.m.: Mr. Montgomery speaks with Ms. Lewis.
- 11:45 a.m.: Mr. Montgomery's case is spoken to before a judicial case manager (i.e., a justice of the peace) at the Kelowna courthouse. Mr. Montgomery is not present but is represented by duty counsel, Gavin Jones. Mr. Montgomery is remanded into custody, to appear on October 7, 2010.
- 12:03 a.m.: Mr. Montgomery speaks with Mr. Geller.
- 12:20 a.m.: Mr. Montgomery speaks with Mr. Jones.
- 1:15 p.m.: The sheriffs transport Mr. Montgomery to the regional correctional centre.

[200] Mr. Montgomery personally appeared before a Provincial Court judge on October 7, 2010. On December 10, 2010, a Provincial Court judge ordered Mr. Montgomery's release on bail upon Mr. Montgomery entering into a recognizance in the amount of \$250,000 with one surety. That recognizance contained numerous conditions.

[201] Mr. Montgomery did not call viva voce evidence to support his allegation that his s. 9 Charter rights were infringed. Rather, he filed an affidavit sworn by Ms. Lewis, who deposed to what she was told by Mr. Montgomery and by Mr. Cobb. Both Ms. Lewis and Mr. Cobb acted for Mr. Montgomery at the trial. The pertinent part of that affidavit reads:

15. I was present on Monday May 6, 2013 while Mr. Cobb spoke to Mr. Hough [Crown counsel at the October 5, 2010 appearance] by telephone. The telephone call was via speaker phone and I heard the conversation. Mr. Hough confirmed he presently had no records of his involvement in this matter and had deleted his email folder containing his correspondence with his boss, Ms. Devlin, about the matter. He confirmed that the appearance on this matter necessitated several trips by him to the [judicial case manager's] office on both the morning and afternoon sessions of his ongoing BC Supreme Court trial. He recalled attending the [judicial case manager's] office both in the morning and the afternoon and said the matter was "quite a distraction" from his other file. When asked whether he had turned his mind to the section 503 Criminal Code appearance issue before being recently spoken to about it, Mr. Hough responded that he had not saying, "it is completely news to me". When specifically asked when he had first been spoken to about this issue by Mr. Greenwood [Crown counsel at trial] Mr. Hough declined to answer and told Mr. Cobb that he should ask Mr. Greenwood about that.
16. As the [Provincial Court] record of proceedings would appear to confirm that Mr. Montgomery did not appear personally in Court on October 5th, 2010 but that he somehow appeared through duly counsel, Mr. Gavin Jones, Mr. Cobb has attended upon Mr. Jones in person and by telephone. As a result, I am informed and believe that Mr. Cobb has secured the following information:

- Mr. Jones was duty counsel on that day and did appear before the Judicial Case Manager in respect of many of the more than one dozen persons in custody that day but he has absolutely no notes or records with respect to same.
 - He recalls no instructions from Mr. Montgomery or any counsel on his behalf to do anything with respect to this matter in his role as duty counsel or otherwise.
 - Before involving himself with any person arrested on such a major prosecution file, Mr. Jones ethical and professional training would have caused him to first ascertain if that person had counsel and to have contacted that counsel before speaking with the individual in custody.
17. I am instructed by Mr. Montgomery that he denies giving any lawyer instructions to do anything with respect to the October 5th, 2010 court appearance; he believed and still believes that his first appearance before a justice was on October 7th, 2010 when he appeared by video from Kamloops Regional Correctional Centre.
18. I am instructed by Mr. Montgomery that he did not sign a Counsel Designation Notice until much later after he had been admitted to bail in connection with this matter. I am instructed by Mr. Montgomery that he has no recollection of ever being asked by anyone if he was prepared to give up his right to a personal appearance before a justice.
- [202] Mr. Montgomery also tendered, without objection from the Crown, a document entitled "Kelowna Sheriff's Gaol Slate" dated October 5, 2010, that contains handwritten notations with respect to Mr. Montgomery under various headings. "Vancouv Galler" appears under the heading "Counsel" and "RIC Consent Oct 7 Video" appears under the heading "Results". "RIC" is a common abbreviation for "remanded in custody".
- [203] For its part, the Crown tendered, without objection from Mr. Montgomery: (a) the handwritten Provincial Court Record of Proceedings and Endorsement of Information ("ROP") relating to appearances in Mr. Montgomery's case from October 5, 2010 to December 2, 2010 (one page); (b) a computer printout of the entire ROP relating to appearances in Mr. Montgomery's case from October 5, 2010, through to Mr. Montgomery's committal for trial on December 11, 2011 (19 pages); (c) a Ministry of Justice Client Identification Card for Mr. Montgomery, which indicates Mr. Montgomery was admitted to the Kamloops Regional Correctional Centre on October 5, 2010, at 5:52 p.m. (four pages); (d) a letter written by Ms. Lewis to Crown counsel on October 6, 2010, containing a proposal with respect to Mr. Montgomery's being released on bail and suggesting October 22, 2010 for the bail hearing; and (e) Crown counsel's reply letter to Ms. Lewis that same day.
- [204] Both the handwritten and computer versions of the ROP indicate that on October 5, 2010: (a) Mr. Montgomery's case was spoken to before a judicial case manager at 11:45 a.m.; (b) Mr. Jones appeared as Mr. Montgomery's agent (indicated by the letter "A" in the column for noting whether, and if so how, an accused has appeared); and (c) Mr. Montgomery was

remanded in custody to next appear on October 7, 2010. The handwritten ROP only has a checkmark in the column headed "No JIR by Consent", which means "no judicial interim release by consent".

[205] The ROPs indicate Mr. Montgomery personally appeared in custody before a Provincial Court judge on October 7, 2010, and several times thereafter until he was granted bail on December 10, 2010.

[206] In his submissions, Crown counsel took the position that paras. 16 to 18 of Ms. Lewis's affidavit were not admissible for the truth of their contents as they are hearsay. Mr. Cobb, on behalf of Mr. Montgomery, took the position that everything Ms. Lewis had recounted was admissible for its truth. In doing so, Mr. Cobb alluded to the Supreme Court of Canada's principled approach to the admissibility of hearsay, mentioning *R. v. Khan*, [1990] 2 S.C.R. 531. In responding to a question from the trial judge, Mr. Cobb accepted that it is open to an accused to waive through counsel the attendance required by s. 503.

Voir Dire Ruling

(2014 BCSC 446)

[207] The trial judge found that the police, having completed a number of investigative steps around midnight, did not infringe s. 503 of the Criminal Code by holding Mr. Montgomery until the morning, i.e., until a justice of the peace would be sitting: para. 9.

[208] The judge said this about Mr. Jones's involvement in the matter:

[11] According to the original record of proceedings, which is the official court record, at 11:45 a.m., a Kelowna lawyer named Gavin Jones appeared before the Provincial Court's judicial case manager and represented to the court that he was appearing for Mr. Montgomery. Mr. Jones has, according to the affidavit sworn in these proceedings by Ms. Lewis, no notes and no recollection of dealing with this matter. However, he does confirm that he was duty counsel that day, that there were approximately a dozen people in custody to be dealt with that day, which somewhat accords with the sheriffs' gaol slate which shows 13 prisoners in the courthouse cells on October 5th, plus Mr. Montgomery and one other who remained in the RCMP detachment cells, who had to be dealt with by the Provincial Court. Mr. Jones also, according to Ms. Lewis's affidavit, has confirmed that before involving himself on a file such as Mr. Montgomery's, he would have first ascertained if the person had counsel and he would have spoken to that counsel before speaking to the person in custody.

[12] Although it is not said in the affidavit, I accept that before speaking to the matter in court, Mr. Jones would at least have had instructions from someone representing that he or she represented Mr. Montgomery or instructions directly from Mr. Montgomery. The former is more likely, in my view, in this case.

[13] It is of some note that at least the Sheriff Service on the sheriffs' gaol slate had recorded that Mr. Montgomery's counsel as of October 5th was Mr. Geller.

[209] With respect to s. 503, the judge said this:

[14] In any event, at 11:45 a.m. on October 5th, Mr. Jones spoke to this matter, representing to the court that he was doing so on behalf of Mr. Montgomery. While Mr. Montgomery did not personally attend, having examined the original Provincial Court record of proceedings, I am satisfied that the record shows that it was represented to the court by counsel that there would be "No JIR by consent". The sheriffs' gaol slate records the same information. The record of proceedings says the matter was put over to October 7, 2010. All of that was said to have happened at 11:45 and presumably the minutes shortly thereafter on October 5th. At 12:03 p.m., according to the documents made exhibits in this matter, Mr. Montgomery spoke again by telephone to Mr. Geller, and at 12:20 p.m. he spoke by telephone to Mr. Jones. By 1:15 p.m., Mr. Montgomery was released from the RCMP cells into the custody of a deputy sheriff (DS 2001) for transport on the once-per-day shuttle from Kelowna to Kamloops Regional Correctional Centre. Had Mr. Montgomery not been placed on that shuttle, he would have, as counsel know from this case and its transport issues, had to spend another night in RCMP lockup.

[17] Everything which s. 503 is intended to protect and ensure actually happened in this case. I have concluded that the appearance by counsel within the 24-hour outer limit specified by s. 503, after Mr. Montgomery had six opportunities to speak with three different counsel of choice, where a full judicial interim release hearing was required to be scheduled at some later date in any event, was, in all of the circumstances, compliant with s. 503. Even if I had not so concluded, I would have found no breach of Mr. Montgomery's s. 9 rights, as I have concluded that at no time was his detention, or continued detention, arbitrary. Even if I had found a breach, I would have concluded that in these circumstances it was a minor and technical one which had no impact on either the investigation or on Mr. Montgomery's custodial status.

Analysis

[210] A basic proposition in Charter litigation, first articulated in *R. v. Collins*, [1987] 1 S.C.R. 265 at 277, is that the burden is on an accused to prove, on a balance of probabilities, the facts necessary to establish a breach of his or her rights. In this case, the manner in which Mr. Montgomery chose to meet that burden was, to say the least, unorthodox. I am not aware of any statutory provision or common-law rule that permits an accused to put forward his or her version of events for such a substantive purpose through an affidavit, particularly one that contains hearsay and double hearsay.

[211] The trial judge did not expressly address the Crown's hearsay objections with respect to Ms. Lewis's affidavit. However, it is apparent from the judge's reasons that she did not accept the statements attributed to Mr. Montgomery in paras. 17 and 18 of that affidavit as admissible evidence. Clearly, the twin requirements for the admission of hearsay, namely necessity and reliability, were not met. With respect to necessity, Mr. Montgomery was available to testify. With respect to reliability, Mr. Montgomery was not a credible and trustworthy

declarant. As recently discussed in *R. v. Pahl*, 2016 BCCA 234 at para. 60, 336 C.C.C. (3d) 221, an accused's self-interest in the outcome of criminal proceedings is obvious; Mr.

Montgomery could not avoid an assessment of his credibility merely by having his counsel repeat what he said to her.

- [212] It is also apparent that the judge did accept the hearsay statements attributed to Mr. Jones in para. 16 of the affidavit. It is arguable that the necessity requirement was not met with respect to Mr. Jones's statements. However, the Crown does not challenge that aspect of the affidavit and, indeed, relies on it with respect to what took place on the morning of October 5, 2010.
- [213] Based on Mr. Jones's statements and the documentary evidence, the judge found as a fact that Mr. Jones appeared on behalf of Mr. Montgomery and consented to Mr. Montgomery being remanded in custody until October 7, 2010, without the need for Mr. Montgomery to appear before the justice of the peace. The judge further found that Mr. Jones acted as he did on the basis of the instructions he had received from either Mr. Montgomery or counsel acting for Mr. Montgomery, with the latter being the more likely. These findings were open to the judge on the evidence and I do not understand Mr. Montgomery to now take issue with them. In the absence of any evidence to the contrary, it must be presumed that counsel who instructed Mr. Jones did so on the basis of instructions from Mr. Montgomery. I note that Mr. Montgomery appears to have engaged the services of Mr. Cobb on October 4, 2010, as Ms. Walters testified during the voir dire phase of the trial that when she returned to Pinewood Place after the police had finished the search there was a voice mail message from Mr. Cobb. Ms. Walters returned the call. Mr. Cobb asked Ms. Walters if she had a copy of the search warrant and directed her to take photographs of the premises.
- [214] Contrary to the position Mr. Montgomery took at trial, he now says an accused cannot waive the requirement to be brought before a justice of the peace within 24 hours of arrest. In support of that argument, Mr. Montgomery points to provisions of the Criminal Code that provide for an accused to personally appear by means of a closed-circuit television link or other technology, i.e., s. 515(2.2) (bail hearing); ss. 537(1)(j), (k) (preliminary inquiry); ss. 650(1.1), (1.2) (trial); and ss. 683(2.1); 688(2.1) (appeal proceedings). He also points to s. 650(2)(b) (power to permit an accused to be absent from trial), and s. 650.01(3)(a) (accused may designate counsel to appear).
- [215] The requirement to bring an arrestee before a justice of the peace within a specified time first appeared in s. 28 of The Criminal Procedure Act, R.S.C. 1886, c. 174, which became s. 552(7) of The Criminal Code, S.C. 1892, c. 29. Initially, an arrestee had to be taken before a justice no later than noon on the day following the arrest. The 24-hour limit was introduced in 1954 with the coming into force of s. 438(2)(a) of the Criminal Code, S.C. 1953–54, c. 51.

[216] In *R. v. Davidson*, 2004 ABCA 337 at para. 24, 193 C.C.C. (3d) 63, the Court stated that the purpose of what is today s. 503 "is to ensure that a person is not held incommunicado". In *R. v. Simpson* (1994), 88 C.C.C. (3d) 377 at 386 (Nfld. C.A.), rev'd on other grounds [1995] 1 S.C.R. 449, Chief Justice Goodridge said that "[s]ection 503 may be one of the most important procedural provisions of the Criminal Code."

[217] In my view, an accused can waive the requirements of s. 503, in the same way that he or she can waive other procedural requirements enacted for the benefit of the accused. For example, in *Korponay v. The Queen*, [1982] 1 S.C.R. 41, the Supreme Court of Canada held that Mr. Korponay, who had elected to be tried by a judge sitting with a jury, waived compliance with the Criminal Code's re-election provisions when he re-elected for a trial by judge alone. In that case, Mr. Justice Lamer, as he then was, stated that the validity of a waiver of a statutory right is (at 49):

dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.

[Emphasis in original.]

This is also the standard that applies to the waiver of Charter rights: *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1315–1316 (s. 11(f)); *R. v. Sharma*, [1992] 1 S.C.R. 814 at 823 (s. 11(b)); *R. v. Bartle*, [1994] 3 S.C.R. 173 at 203 (s. 10(b)).

[218] It is understandable that Mr. Montgomery, after speaking with counsel, would be prepared to forgo making a perfunctory personal appearance before a justice of the peace. It was obvious that Mr. Montgomery's bail hearing was not going to take place on October 5, 2010, and that a date for that hearing would have to be arranged by Mr. Montgomery's counsel and Crown counsel.

[219] In the result, I agree with the trial judge that Mr. Montgomery's decision not to personally appear at the October 5, 2010 hearing did not give rise to a breach of s. 503.

[220] I turn now to Mr. Montgomery's argument that s. 503 was breached because he was held overnight. Mr. Montgomery does not take issue with not having been taken before a justice of the peace before midnight. What he says is that it was improper for the police not to take him before a justice soon after they had completed a number of investigative steps. I do not agree.

[221] The police did not act improperly in holding Mr. Montgomery overnight for an appearance in the morning when a justice of the peace would be sitting at the Kelowna courthouse. Doing so was entirely reasonable in the circumstances. I would add that the record is silent with respect to whether it would have been possible for the police to have Mr. Montgomery appear before a justice of the peace outside of normal court hours, either in person or by video-link.

Failure to Embark Upon a Voir Dire Regarding a General Warrant

[222] Mr. Montgomery contends the trial judge erred in dismissing his application to embark upon a voir dire to permit him to challenge the validity of a general warrant issued under s. 487.01 of the Criminal Code.

Factual Background

[223] Following Mr. Montgomery's arrest on October 4, 2010, Constable Tranminh applied to a Provincial Court judge for a general warrant authorizing the taking of samples from the surface of Mr. Montgomery's body and the taking of photographs of Mr. Montgomery. In support of that application Constable Tranminh swore a 41-page ITO, the majority of which is identical to the ITO he swore in support of the Pinewood Place search warrant. In a section near the end of the general warrant ITO headed "Recent Developments", Constable Tranminh refers to the arrest of Mr. Montgomery and the fact that purple dye stains had been observed on Mr. Montgomery's lower lip and hands. Based on the facts set out in the ITO, Constable Tranminh stated he had reasonable grounds to believe that "a swab or sample of MONTGOMERY'S lower lip surface will prove his direct contact with the imitation cocaine that was sprinkled with Malachite Green".

[224] The general warrant that was issued authorized the police to do the following:

- a. Obtaining and taking samples from the surface of the body of Clifford Roger MONTGOMERY by means of swabbing or other means determined by a peace officer trained in the collection of forensic evidence;
- b. Photographing and/or videotaping of the body of Clifford Roger MONTGOMERY.

[225] Following the completion of the evidentiary phase of the voir dire held in regard to the validity of the Pinewood Place search warrant, Mr. Montgomery sought a voir dire to challenge the validity of the general warrant. He did not state with any precision how he expected to establish the warrant was invalid. In opposing the application, Crown counsel stated that the samples taken from Mr. Montgomery during the execution of the general warrant had not produced useful evidence and, therefore, the Crown would not be seeking to tender them. With respect to the photographs of Mr. Montgomery, Crown counsel stated that the Crown was not relying on the general warrant, but was taking the position that the police otherwise had authority to take them. Accordingly, the Crown's position was that an inquiry into the validity of the general warrant would not advance any real issue in the case. Mr. Montgomery's position was that an inquiry was appropriate as he was seeking to show that the police disregarded his Charter rights in ways that amounted to a pattern of abuse.

[226] On April 12, 2012, the judge dismissed Mr. Montgomery's application in brief oral reasons given immediately after counsel completed their submissions (2013 BCSC 1487):

The reality is that I am satisfied that nothing can come from a finding that the general warrant was valid or invalid unless there is, eventually, an argument to be made pursuant to 24(2) with respect to relief associated with some other found Charter breach. There has not yet been another found Charter breach and, consequently, I am going to refuse to enter into a voir dire with respect to the validity of the general warrant at this point in time. I give leave to the defence to raise the issue if and when there is a purpose to it as in some purpose that goes to, for example, a 24(2) argument for the purpose of demonstrating a course of conduct of the police.

[Emphasis added.]

[227] After the judge gave her ruling, Mr. Montgomery's counsel stated:

Well, we will renew this application and the strip search application, then, as soon as we're able to. We'll have to wait for your ruling on the Pinewood Place warrant, then, before we can advance this application.

[228] After a discussion with counsel concerning the conduct of the trial, the judge gave her ruling upholding the validity of the Pinewood Place warrant.

[229] Several days later, during the voir dire held with respect to the arrest of Mr. Montgomery and the search of his vehicle, Constable DeFrane testified that when the general warrant was executed Constable Craig Van Every took photographs of Mr. Montgomery and swabbed Mr. Montgomery's hands. Constable DeFrane observed purple spots on Mr. Montgomery's fingers and lips.

[230] During Constable DeFrane's cross-examination, Mr. Montgomery's counsel utilized those photographs taken of Mr. Montgomery and had them marked as a voir dire exhibit.

[231] After court convened on the morning of May 3, 2010, the trial judge gave her ruling upholding Mr. Montgomery's arrest and the search of his vehicle incidental to his arrest: 2013 BCSC 1010. In that ruling the judge held that: (a) Mr. Montgomery was not subjected to a strip-search at the detachment; (b) the police have the power, at common law, to take swabs and photographs incidental to arrest; (c) the police reasonably believed they might discover evidence by examining Mr. Montgomery's body, particularly evidence of the dye; (d) the examination of Mr. Montgomery was carried out in a reasonable manner; and (e) Mr. Montgomery's s. 10(b) Charter rights had been infringed because the police did not provide him with an opportunity to consult with counsel until more than an hour after his arrest.

[232] After the judge gave her ruling Mr. Montgomery's counsel raised the issue of a voir dire with respect to the general warrant. Crown counsel continued to oppose that voir dire. Mr. Montgomery's counsel stated Mr. Montgomery's position was that the warrant was improperly issued and he should be able to challenge it because the police had relied on it.

[233] At the conclusion of submissions, the following exchange occurred:

MS. LEWIS: The problem -- well, we can revisit it then when he goes to tender those photographs, but the problem with that submission is that's not the authority that the police relied on when they took the photos. They read the general warrant to Mr. Montgomery.

THE COURT: I know that.

MS. LEWIS: And they relied on it and they're to be judged on that.

So you have that point and we can make this argument later, I suppose, when the Crown tenders the photos then. You have our position.

THE COURT: All right. All right. Okay. I'm not going to hear argument on general warrant.

[Emphasis added.]

[234] On June 7, 2012, the Crown called Constable Van Every on the trial proper, and through him tendered nine photographs he had taken during the investigation as an exhibit for identification. Seven of those photographs had been taken of Mr. Montgomery following his arrest.

[235] On the afternoon of February 11, 2014, counsel addressed marking exhibits that had been marked for identification in the Crown's case as exhibits proper on the trial. With respect to the photographs taken by Constable Van Every, the following exchange occurred:

MR. GREENWOOD: My Lady, I wonder if we can address the issue of some of the lettered exhibits that I think we've achieved some agreement on, and I'll begin with Exhibit H for identification. And those are photos of some clothing with the purple dye on it and photos 5 and onward and post-arrest photos of Mr. Montgomery that the Crown alleges show purple on his thumb and the like. And the Crown is asking that that be now marked as a numbered exhibit on the trial, subject to any comments that my friends have.

MR. GREENWOOD: There are nine photographs contained in it.

THE COURT: All right. Is it the case that Exhibit H can now become a numbered exhibit in the trial proper by agreement of counsel?

MR. COBB: The comments are these, My Lady. We think it's governed by rulings that you made --

THE COURT: Yes.

MR. COBB: -- in terms of full submissions on one issue and one other issue that was deemed by the court, I think, or on the Crown's submissions to be moot or not one --

THE COURT: All right. So if I was wrong about those, you'll be able to deal with that and the photos, if you're correct in your -- if you're successful in your appeal, the photos fall too.

MR. COBB: And so on that basis we agree that it can be marked as the next numbered exhibit.

THE COURT: All right. So Exhibit H will now become Exhibit 96 on the trial proper.

[Emphasis added.]

[236] On February 17, 2014, two of the Crown's witnesses were recalled for further cross-examination. On February 18, 2014, the judge heard and dismissed Mr. Aslam's application for particulars, brought under s. 587(1)(f) of the Criminal Code: 2014 BCSC 445. Immediately following that ruling, the Crown closed its case.

Analysis

[237] This ground of appeal lacks a factual foundation. The trial judge never refused in a final sense to embark upon a voir dire with respect to the general warrant. Rather, in the course of dealing with a plethora of objections to the admissibility of evidence she left it open to Mr. Montgomery to renew his application for a voir dire when the Crown tendered the post-arrest photographs. However, when that time came, Mr. Montgomery did not seek a voir dire. It is apparent from what Mr. Cobb said that he considered the challenge to the general warrant academic in view of how the judge had ruled on other matters.

Failure to Embark Upon a Voir Dire Regarding a Previous Arrest of Mr. Montgomery and Mr. Aslam: The CABS Photos Issue

[238] This ground relates to the fact that officers involved in surveillance during the investigation of the fruit-grinding machine made use of photographs of Mr. Montgomery and Mr. Aslam to assist in identifying them. Those photographs came from the RCMP's Computer Assisted Booking System ("CABS"). The photographs had been taken several months earlier, after Mr. Montgomery and Mr. Aslam had been arrested in Kamloops for uttering threats.

[239] Mr. Montgomery and Mr. Aslam sought a voir dire to challenge the lawfulness of the Kamloops arrests and the lawfulness of the taking of their photographs. The trial judge dismissed that application.

Background Facts

[240] The trial commenced on April 5, 2013, with the cross-examination of Constable Argue on the voir dire held to determine the validity of P.12/2010. The CABS photographs were a subject of that cross-examination. Constable Argue testified as follows in relation to how and why he obtained those photographs, and what was done with them:

- In April 2010, Constable Argue was aware of Mr. Montgomery in the context of Project E-Piquet because the police had learned that the Kelowna address for Mr. Ready listed on the two shipments of spare parts was also the address listed on Mr. Montgomery's driver's licence. Constable Argue did not know what Mr. Montgomery looked like.

- Prior to making arrangements for Mr. Ready to pick up the shipments, Constable Argue, who had at one time been stationed in Kamloops, had a general telephone conversation with Constable Paul Christensen, who was stationed in Kamloops. During that conversation, Constable Christensen mentioned Mr. Montgomery had been arrested in Kamloops.
- Because Constable Argue was interested in anyone who might possibly be associated with Mr. Ready, on April 21, 2010, he emailed Constable Christensen, asking Constable Christensen to send him any CABS photographs that may have been taken in connection with Mr. Montgomery's arrest.
- On April 22, 2010, Constable Christenson emailed Constable Argue digital copies of the CABS photographs of Mr. Montgomery, Mr. Aslam, and Michael Messner.
- Constable Marshall had "Target Profiles" prepared using photographs the police had of Mr. Ready and others, and the CABS photographs of Mr. Montgomery, Mr. Aslam, and Mr. Messner. Those profiles were distributed to the Project E-Piquet surveillance team prior to April 28, 2010.
- By reason of Mr. Montgomery's photograph, one of the officers involved in surveillance in the vicinity of the DHL outlet on April 28, 2010, was able to identify Mr. Montgomery as being in the area.
- The Target Profiles prepared for Project E-Piquet were distributed to those officers involved in Project E-Pleura who did not already have them.

[241] On April 15, 2013, after the judge had dismissed the challenges to P.12/2010 and the Pinewood Place search warrant, the judge and counsel discussed other challenges the appellants intended to bring to the admissibility of evidence the Crown sought to tender. That discussion involved the CABS photographs. In the Charter notice Mr. Montgomery had given to the Crown he indicated that the challenge to the CABS photographs was based on the fact that the photographs had been taken before a charge had been laid, something the Crown conceded. During submissions, Mr. Montgomery's counsel indicated the lawfulness of the Kamloops arrest was also being challenged as was the dissemination of the photographs, and that he was seeking disclosure of information from the Kamloops detachment with respect to that arrest. The Crown took the position that issues related to the CABS photographs were temporally and causally far removed from what was in issue at the trial and that a voir dire with respect to the taking of those photographs was unnecessary and no disclosure should be ordered.

[242] Although the judge was not convinced "there [was] going to be any basis for delving into the details of the arrest of Mr. Montgomery in Kamloops", she ordered the Crown to disclose material relating to that arrest.

[243] On April 29, 2013, the judge heard further submissions on the CABS photographs issue. Mr. Montgomery's counsel argued first, followed by Mr. Aslam's counsel. Neither counsel provided the judge with any new material in support of their application. Mr. Montgomery's counsel stated that the defence was seeking to cross-examine four officers

from Kamloops to establish that Mr. Montgomery and Mr. Aslam had been unlawfully arrested and that, as a result, the CABS photographs were illegally obtained evidence. Counsel submitted that not permitting cross-examination of the officers would preclude Mr. Montgomery from making full answer and defence.

[244] Mr. Aslam's counsel began his submissions by stating, without reference to any material, that the police had arrested Mr. Montgomery and Mr. Aslam even though the complainant told the police there was "no problem".

[245] At the outset of his submission, Crown counsel filed extracts from the Kamloops material that had been disclosed pursuant to the trial judge's April 15, 2013 order. In the main, those extracts consisted of police reports, police officers' notes, and a report to Crown counsel.

[246] The disclosure material filed by the Crown indicated that:

- At approximately 10:16 p.m. on April 16, 2010, Jason Joseph Robertson, drove into the parking lot of the Kamloops RCMP detachment and asked whether there were undercover officers in the area. Mr. Robertson told the police that a black Chevrolet truck had been "chasing him" and that he had been contacted on his cellular telephone by someone who told him they would put 10 bullet holes in his vehicle if he did not stop.
- The police determined that the cellular telephone from which the message had been sent was associated with Mr. Montgomery, a person known to the police.
- The police were able to locate the Chevrolet truck within minutes and arrested its occupants--Mr. Montgomery, Mr. Aslam, and Mr. Messner--for uttering threats.
- In a search of the truck incident to those arrests, the police located a "slim jim kit", shotgun shells, rifle ammunition, and three knives.
- Mr. Montgomery, Mr. Aslam, and Mr. Messner were booked into the RCMP cells. They were photographed as part of that process, but not fingerprinted. They were released approximately one and one-half hours later on promises to appear requiring them to appear in the morning of June 16, 2010, for the purposes of the Identification of Criminal Act, R.S.C. 1985, c. I-1.
- As Mr. Robertson was uncooperative and would not provide a statement, the police only recommended to the Crown that Mr. Montgomery be charged with possession of break-in instruments.
- On May 5, 2010, the Crown advised the police that it would not approve a charge against Mr. Montgomery.

[247] Crown counsel submitted there were four reasons why the trial judge should exercise her discretion against conducting an inquiry into the Kamloops arrests:

- (a) based on the material that had been filed, there was no factual basis on which to question the validity of the arrests;

- (b) the legality of those arrests was collateral to the real issues in the trial;
 - (c) the taking of the CABS photographs did not constitute a search; and
 - (d) Mr. Montgomery and Mr. Aslam had not identified any remedy that might flow from a finding that their arrests were unlawful; therefore, there was no reasonable likelihood that a voir dire would assist in the resolution of the real issues at the trial.
- [248] At the outset of his reply submissions, Mr. Cobb, on behalf of Mr. Montgomery, said he had "additional information". Mr. Cobb then produced an affidavit sworn by Mr. Robertson on April 18, 2013. Crown counsel had not previously been made aware of that affidavit.
- [249] In his affidavit, Mr. Robertson acknowledged that he drove into the Kamloops detachment parking lot on the night of April 16, 2010, and spoke with the police about a text message, which he described as one that "could be interpreted as threatening or as a prank". He deposed that while speaking with the police he received another text message which he knew to be from Mr. Montgomery. In that message, Mr. Montgomery said the first message was a joke. Mr. Robertson further deposed that when he told the police about the second message and that he had never been in fear of Mr. Montgomery, the officers' demeanour towards him changed; they told him he could be charged with an offence in connection with how he had driven into the detachment parking lot.
- [250] Mr. Cobb submitted that Mr. Robertson's affidavit established "beyond peradventure" that the police knew the arrests were unlawful. Mr. Cobb did not identify what remedy Mr. Montgomery was seeking.
- [251] Mr. Aslam's counsel adopted Mr. Cobb's reply submissions. Mr. Aslam's counsel did not identify what remedy his client was seeking but said that could be addressed with "succinctness and clarity" following cross-examination of the Kamloops officers and "will be articulated in much clearer terms once the [cross-examination] has been developed."
- [252] In responding to Mr. Robertson's affidavit, Crown counsel stated that the Crown did not accept Mr. Robertson's version of events as truthful and that if a voir dire was held, then Mr. Robertson would be required as a witness. Counsel further submitted that the affidavit did not address the Crown's collateral attack point.

Ruling

(2013 BCSC 2557)

- [253] The trial judge gave the following reasons for refusing to embark on a voir dire:
- [2] On all of the submissions that I have heard, given the new evidence with respect to the perspective that Mr. Robertson has about what occurred on April 16, 2010, it may be that there is some issue or could be some issue in law with respect to the lawfulness of the arrest of Mr. Montgomery and Mr. Aslam by members of the Kamloops RCMP in April of 2010. However, even if there is some issue with respect to the lawfulness of the arrest, as raised by

the material that has now been put before the court, I am satisfied that the matter of the Kamloops arrest is a collateral issue upon which this court, in this case, need not and should not embark into an inquiry. With the exception of the written submissions and the oral submissions made by Crown with respect to the legality of the arrest, upon which I now express no view, other than to say that it appears that there is potentially a live issue, I accept the balance of the submissions made by Crown. I could put those no better if I were to reserve overnight and would do nothing more than paraphrase them. Consequently, the defence application with respect to the CABS photographs is dismissed, for the reasons set out in Crown's submissions.

Analysis

[254] In his factum, Mr. Aslam submits the judge "did not articulate [her] reasons for refusing a voir dire", a statement that in my view is erroneous. Having said that, Mr. Aslam goes on to address the reasons the judge gave. In a submission adopted by Mr. Montgomery, Mr. Aslam says the judge erred because:

- (a) the evidentiary threshold on an application by an accused to embark upon a voir dire is low and Mr. Robertson's affidavit established there was a triable issue with respect to the lawfulness of the arrests;
- (b) the challenge to the Kamloops arrests was not collateral because the CABS photographs were provided to the Kelowna RCMP shortly after they were taken and were used in both Project E-Piquet and Project E-Pleura;
- (c) even if the taking of the photographs was not a "search", if the arrests were unlawful, then the taking of the photographs would be tainted; and
- (d) an accused seeking a Charter voir dire is under no obligation to identify what remedy is being sought.

[255] It is well established that the decision whether to embark on a voir dire is a matter within the discretion of a trial judge and will not be interfered with on appeal except in cases in which that discretion was not exercised judicially: *R. v. Pires*, 2005 SCC 66 at para. 46, [2005] 3 S.C.R. 343; *U.S.A. v. Ranga*, 2012 BCCA 81 at para. 15, 286 C.C.C. (3d) 458.

[256] In *Pires*, the Supreme Court of Canada upheld a trial judge's refusal to grant leave to cross-examine the officer who had sworn the affidavit in support of a wiretap authorization. In so doing, Madam Justice Charron said this (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

Those words echo what was said by Chief Justice McEachern of this Court nine years earlier in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 at para. 26, leave to appeal ref'd [1997] 2 S.C.R. xvi, in upholding a trial judge's refusal to embark on a voir dire with respect to the validity of a search warrant:

The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues.

[257] More recently, in *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716, a case in which the Court upheld a trial judge's refusal to conduct a voir dire to permit an accused to challenge the validity of a previous conviction, Mr. Justice Moldaver, with reference to Pires, said this:

[63] In cases like the present one, at the voir dire stage, given the low evidentiary threshold ("some evidence") that must be met to link an accused to the similar act, a trial judge could reject a request to lead evidence to challenge the admissibility of a conviction if he or she believed there was no reasonable likelihood that it would impact on the admissibility of the evidence. Again, this is a function of the trial judge's right to control the proceedings. Judicial resources are scarce and they ought to be used constructively, not wasted on pointless litigation.

[Emphasis added.]

[258] In my view, Mr. Montgomery's and Mr. Aslam's failure to articulate what remedy they were seeking was, on its own, a sufficient reason for the judge to exercise her discretion not to embark on a voir dire. Judicial resources should not be expended on an issue when the party seeking to litigate that issue is unable or unwilling to say what potential impact the determination of that issue might have on the case. As Mr. Justice Sharpe stated in *R. v. Garrick*, 2014 ONCA 757 at para. 8, 322 C.R.R. (2d) 1, "a party advancing a Charter application is not entitled to proceed immediately to a voir dire but is required to put forward a factual and legal basis for the relief sought, failing which, the Charter application may be dismissed."

[259] Before leaving this ground of appeal I wish to comment on the manner in which Mr. Robertson's affidavit was produced. In my view, it is not appropriate for counsel to hold back evidence that directly supports a client's application until after the respondent on the application has completed its submissions.

[260] It is clear from the transcript that notwithstanding that the trial judge permitted Mr. Cobb to file Mr. Robertson's affidavit in reply, she was of the view Mr. Cobb should have produced it during his initial submissions. In response to the judge's comments, Mr. Cobb stated he had not produced the affidavit earlier because he did not know the basis on which the Crown would be opposing the application for a voir dire until Crown counsel had made his submissions and filed extracts from the Kamloops disclosure material.

- [261] Mr. Cobb's explanation is unconvincing. On behalf of his client, Mr. Cobb applied for a voir dire on which he sought to cross-examine witnesses. As the proponent of that application, Mr. Montgomery bore the burden of satisfying the trial judge that there was a triable issue. In advance of the hearing of that application, Mr. Montgomery had an obligation to disclose any evidence upon which he would be relying of which the Crown was not already aware. Mr. Robertson's affidavit was clearly such evidence. It is obvious that Mr. Cobb obtained Mr. Robertson's affidavit specifically for the purpose of contradicting the disclosure material he had received from the Crown which, on face, indicates the arrests were lawful.
- [262] In this case, Crown counsel was able to respond immediately to the post-eleventh hour production of Mr. Robertson's affidavit. However, the untimely disclosure of material by either party to an application brought during the course of a trial can result in the trial being delayed and in the unnecessary expenditure of judicial and other resources. Accordingly, what occurred here is very much to be deprecated.

Amendment of the Indictment

- [263] This ground relates to the trial judge having granted the Crown's application to amend the dates of the conspiracy to import charge by widening the alleged period of the conspiracy. That application was made on the 16th day of the trial proper.

Factual Background

- [264] Count 2 of the indictment alleged that "between the 21st day of September, 2010, and the 5th day of October, 2010," Mr. Montgomery, Mr. Aslam, and Mr. Ascencio conspired with Mr. Diaz, Mr. Ready, and persons unknown to import cocaine into Canada.
- [265] Mr. Szucs testified on May 21 and 22, 2013; he had not testified at the preliminary inquiry. In his examination in-chief Mr. Szucs said he and Mr. Diaz first discussed the importation of the machine in the summer of 2010, after Mr. Szucs had applied for an import-export licence. In cross-examination by Mr. Montgomery's counsel, Mr. Szucs agreed he applied for that licence on June 23, 2010.
- [266] On May 31, 2013, the Crown applied to amend the timeframe in Count 2 to conform to Mr. Szucs's evidence, i.e., to read "between the 23rd day of June, 2010 and the 5th day of October 2010". That application was brought pursuant to s. 601 of the Criminal Code which states, in part:
- (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
 - (a) a count in the indictment as preferred;

...

- (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider
- (a) the matters disclosed by the evidence taken on the preliminary inquiry;
 - (b) the evidence taken on the trial, if any;
 - (c) the circumstances of the case;
 - (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
 - (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

(4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to

- (a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any;
- (5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.

[267] The appellants opposed the amendment. Among other things, they argued that had they known the Crown was alleging a conspiracy commencing in June 2010 as opposed to September 2010, they would have conducted their defences differently, including their cross-examination of witnesses.

Ruling

(2013 BCSC 1488)

[268] The trial judge reviewed in some detail the arguments advanced by both the Crown and the appellants, including one suggesting that the Crown had deliberately chosen the September 21, 2010 start date and waited to seek a late amendment to minimize the connection between Project E-Piquet and E-Pleura, in part, to thwart the appellants' efforts to challenge P.12/2010. Mr. Ascencio submitted that if he had known earlier of the June date, then he might not have made some admissions.

[269] After considering a number of authorities bearing on amendments, the judge stated:

- [37] As I said in giving my ruling in this matter last Thursday, if defence counsel wish to have Crown witnesses recalled for further cross-examination, I will consider any and all such requests as are made in that regard. With respect to further investigations, or a more detailed review or consideration of some of the Crown disclosure already made, if defence counsel need additional time to conduct such investigations, or reviews, or considerations, again, I will hear submissions in that regard. Similarly, defence counsel may advise if any other applications arise, or any other matters need to be addressed.
- [38] It has also been suggested that the date range on the amended indictment would have given rise to new or better defence arguments with respect to the validity of the wiretap authorization, because the importation which was the subject of Project E-Piquet occurred only two months before June 23, 2010. Consequently, defence says, the argument that Project E-Piquet should have been outlined in the affidavit in support of the authorization would have been stronger than when the start date of the conspiracy to import count on the indictment was September 21, 2010. What that submission overlooks is that all of the information upon which the Crown relies to broaden the date range of Count 2 became known to the RCMP only after the first arrest in this matter, a number of days after the authorization was applied for and granted. I reject the submission that the evidence of Mr. Szucs, or the customs' broker he met with on approximately September 20, or the telephone records change, in any way, the evidence, submissions or decision made on the voir dire with respect to the validity of the authorization, and I specifically reject the suggestion that the Crown in some way strategically chose not to broaden the dates on the information or the indictment until after the voir dire on that issue was complete.
- [39] The amendment conforms with the evidence as led to date. Although the amendment application was not made, and notice of the application to amend was not given, until approximately a third to a half way through the trial, the Crown's case had not yet closed. As I have attempted to make clear, it is my view that the amendment causes no irreparable prejudice to any of the accused, nor does it give rise to any injustice. Since the commencement of these proceedings, it has been clear that the Crown alleges that the three accused conspired, with others named and unnamed, to import the cocaine that arrived in Richmond, in the machine, on or about September 21, 2010. The accused have not been misled in their defence. The amendment does not change the offence, the transaction remains the same, the evidence remains the same, and therefore, to quote Bennett, J., in *R. v. Ciancio and Ciulla* [(21 April 2008), Vancouver 23606 (B.C.S.C.)], at para. 10, "time is not an essential element of the offence". If, as a result of the amendment, counsel for the accused, or any one of them, are of the view that some prejudice has occurred, as I have indicated, counsel may apply, including, if necessary, for an adjournment to permit them additional time to deal with the same.

[Emphasis in original.]

Analysis

- [270] As McLachlin J. observed in her dissenting reasons in *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716 at para. 83, all members of the Court in *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555, agreed that whether to grant an application by the Crown to amend a charge is a matter within a trial judge's discretion. See also: *R. v. Montague*, 2010 ONCA 141 at paras. 42–43, 73 C.R. (6th) 359.
- [271] The appellants contend the trial judge failed to appreciate that the amendment would cause them irreparable prejudice. In addition, with reference to disclosure provided to them, they say that the Crown was aware prior to the start of the trial that the importation plans started in June 2010.
- [272] I would not accede to this argument. The judge was in the best position to determine whether the amendment would cause the appellants to suffer irreparable prejudice. She concluded that the prejudice the appellants alleged could be remedied by allowing them the opportunity to seek an adjournment to consider and respond to the amendment, or to recall witnesses for further cross-examination. I am unable to see any basis on which to interfere with the manner in which she exercised her discretion.
- [273] It should be noted that after allowing the amendment, the judge adjourned the trial to permit the appellants to bring applications arising from the amendment and because Mr. Ascencio had expressed an intention to retain new counsel: see 2014 BCSC 223 at paras. 2–3. Following that adjournment the appellants brought several applications. Those applications are discussed below.
- [274] Later, the trial judge granted the appellants' application to have Mr. Szucs recalled for further cross-examination, but refused to order Staff Sergeant Gateley and Constable Marshall to be recalled: 2014 BCSC 444.

Mr. Ascencio's Application to Withdraw Admissions

- [275] Mr. Ascencio contends that the trial judge erred in dismissing his application to withdraw admissions. That application was brought part way through the trial, after Mr. Ascencio retained new counsel.

Factual Background

- [276] Stanley J. Tessmer initially represented Mr. Ascencio. Mr. Tessmer did not participate in the voir dire phase of the trial, as Mr. Ascencio did not challenge the admissibility of the evidence the Crown sought to tender.

[277] On May 17, 2013, the tenth day of the trial proper, the Crown sought to file as an exhibit admissions of fact signed by Mr. Tessmer and counsel for Mr. Montgomery and Mr. Aslam. Because Mr. Ascencio had not read the admissions they were marked only as an exhibit for identification. When the trial resumed on May 21, 2013, Mr. Tessmer advised the trial judge that Mr. Ascencio had looked at the admissions and they could now be marked as an exhibit; they became Exhibit 20.

[278] The opening paragraph of the admissions reads:

Pursuant to section 655 of the Criminal Code of Canada, the accused admit the following facts for the purpose of dispensing with proof thereof at their trial on the charges on Indictment No. 73426, or any amended or substituted version thereof.

[279] The admissions set out in Exhibit 20 concerned the actions of Mr. Ascencio between September 25 and October 4, 2010. They obviated the necessity for the Crown to call evidence to prove the following matters:

- Mr. Ascencio arriving at the Edmonton International Airport on September 25, 2010, on a flight from Puerto Vallarta, Mexico, using the name Victor Perez-Rodriguez, and his flying to Vancouver on the morning of September 26, 2010.
- Video surveillance of Mr. Ascencio at the Vancouver International Airport on the morning of September 26, 2010, including the rental of the Jeep and documents from the rental company.
- Mr. Ascencio not having boarded a flight from Vancouver to Puerto Vallarta on October 2, 2010, on which he had booked a ticket under the name Victor Perez-Rodriguez.
- Mr. Ascencio returning the Jeep at the Vancouver International Airport on the morning of October 3, 2010, including video surveillance and documents from the rental company.
- Mr. Ascencio renting another vehicle at the Vancouver International Airport on the morning of October 4, 2010, and documents from the rental company.
- Mr. Ascencio returning the second vehicle after 11:00 p.m. on October 4, 2010.

[280] On May 31, 2013, Crown counsel advised the judge that the Crown would be making an application to amend Count 2 of the indictment. Crown counsel made his submissions in support of that application on the morning of June 6, 2013.

[281] On the afternoon of June 10, 2013, counsel for Mr. Montgomery and Mr. Aslam made their respective submissions on the amendment application. Mr. Tessmer made his submissions on the morning of June 11, 2013. Crown counsel made his reply submissions, which was followed by surreply by counsel for all three appellants. The judge then reserved her decision.

[282] On the afternoon of June 11, 2013, the Crown filed admissions of fact signed by Mr. Tessmer concerning a statement Mr. Ascencio made on March 16, 2011. Portions of that statement, which were admitted to be voluntary, are set out in the admissions. The opening paragraph of the admissions reads:

Pursuant to section 655 of the Criminal Code of Canada, Salvador Ascencio-Chavez (a.k.a. Victor Perez-Rodriguez) admits the following facts for the purpose of dispensing with proof thereof at his trial on the charges on Indictment No. 73426, or any amended or substituted version thereof:

[283] The admissions were read aloud in their entirety by Crown counsel and translated into Spanish by Julio Barraza, one of the interpreters who assisted Mr. Ascencio during the trial. The admissions were marked as Exhibit 92 and an audio clip of Mr. Ascencio's statement was marked as Exhibit 93.

[284] On June 13, 2013, the trial judge granted the Crown's application to amend the indictment with written reasons to follow. Those reasons were released on June 17, 2013.

[285] On June 19, 2013, Mr. Ascencio addressed the court. He said, "I lost trust in my lawyer. I wouldn't want him to continue being my lawyer. He made a big mistake, and I would like him to comment about it." Mr. Tessmer then stated he had made a mistake in signing the admissions because, "I did not read the preamble to the admissions thoroughly, and in particular what I did not read was the – that part of the admission, the first paragraph prior to the actual admissions that reads 'Or any amended or substituted version thereof'".

[286] As a result of Mr. Ascencio discharging Mr. Tessmer, the trial was adjourned. When the trial resumed on November 25, 2013, Karen B. Molle appeared on behalf of Mr. Ascencio.

[287] Mr. Ascencio applied to withdraw the admissions set out in Exhibits 20 and 92. In support of that application he filed four affidavits, one sworn by Adam W. Alteen, an associate in the law firm acting for Mr. Montgomery, and three sworn by Sarah Kent, a legal assistant employed by Ms. Molle. Mr. Alteen's affidavit and two of Ms. Kent's affidavits deal principally with disclosure issues and correspondence between defence counsel and Crown counsel.

[288] In her third affidavit, Ms. Kent deposed to the information she had received from Mr. Barraza, whom she retained on Ms. Molle's behalf. Ms. Kent stated that "Mr. Barraza was retained and instructed to translate and read [Exhibits 20 and 92] to [Mr. Ascencio in their entirety] and "to then ask [Mr. Ascencio] if these documents had been translated for him previously." Ms. Kent further deposed:

8. Mr. Barraza advised me that on November 13, 2013 he asked [Mr. Ascencio] if the Admission of Fact concerning the travel of Salvator [sic] Ascencio Chavez (a.k.a. Victor Perez Rodriguez) from September 25, 2010 - October 4, 2010 had been translated into Spanish for him previously. Mr. Barraza advised me that [Mr. Ascencio] responded that November 13, 2013, was the first time the entirety of the Admission of Fact concerning the travel of Salvador Ascencio Chavez was translated into Spanish for him.
9. On November 20, 2013 Mr. Barraza advised me he asked [Mr. Ascencio] when was the first time the Admission of Fact concerning statement of Ascencio Chavez (a.k.a. Perez Rodriguez) dated March 16, 2011 taken by Sgt. Bob Ussel was translated into Spanish for him. Mr. Barraza advised me that [Mr. Ascencio] responded that the first time the Admission of Fact concerning statement of Ascencio Chavez (a.k.a.) Perez Rodriguez [sic] dated March 16, 2011 taken by Sgt. Bob Ussel was translated into Spanish was when it was read into Court by Crown Counsel, Mr. Greenwood and the Court Interpreter interpreted it for him as it was being read.
- [289] Ms. Kent also deposed that Mr. Ascencio's wife told her that Mr. Ascencio is unable to read English and has a limited ability to speak and understand English.
- [290] Mr. Ascencio advanced the following reasons for why he should be permitted to withdraw the admissions:
- (a) Ms. Molle's assessment of the case differed from that of Mr. Tessmer;
 - (b) Mr. Tessmer signed Exhibit 20 without realizing it would apply to an amended indictment;
 - (c) the admissions had not been translated into Spanish for Mr. Ascencio before they were filed;
 - (d) Exhibit 20 was filed as an exhibit before the indictment was amended; and
 - (e) there had been later disclosure and continuing disclosure issues which had changed the complexion of the case.

Ruling

(2014 BCSC 222)

- [291] The trial judge held that a change in counsel was not a reason to permit admissions to be withdrawn: para. 12. While expressing "some concern" in regard to Mr. Tessmer's statement that he did not appreciate that the preamble to Exhibit 20 referred to an amended indictment, the judge noted that the same preamble was contained in Exhibit 92, which had been read aloud in court, translated for Mr. Ascencio, and entered "after the amendment had been allowed". The judge further noted that the admissions applied to all of the counts in the indictment: para. 13. (The judge misspoke when she stated Exhibit 92 had been entered after she allowed the amendment to the indictment. That exhibit was marked the same day the judge reserved her decision on the amendment application.)

[292] With respect to Mr. Ascencio's submission that the exhibits had not been translated into Spanish for him before they were marked, the judge said:

[14] With respect to the interpreter issue, Exhibit 20, signed by Mr. Ascencio-Chavez's previous counsel, was first tendered to the court on May 17, 2013. Crown said, on tendering the document, that he and defence counsel had discussed whether the admissions needed to be read into the record and defence counsel said that was not required and that Mr. Ascencio-Chavez had a copy of the admissions. I asked whether Mr. Ascencio-Chavez had read the admissions and defence counsel said he had not read them yet. Defence counsel then proposed Mr. Ascencio-Chavez be given time to read them. I asked that Mr. Ascencio-Chavez be given another copy of the admissions and be permitted to keep them over the weekend and said that if he wished the assistance of an interpreter, arrangements would be made. The admissions were marked for identification. The entire exchange was translated for Mr. Ascencio-Chavez by the translator who was in court on that day. On Tuesday following the long weekend, defence counsel advised the court that his client had looked at the admissions and that the admissions could be formally marked with his client's consent. Again, the exchange took place in Mr. Ascencio-Chavez's presence and was translated simultaneously for him. No concern was raised by him then or at any time before the trial adjourned approximately one month later.

[Emphasis added.]

[293] As for the Mr. Ascencio's late-disclosure issue--which had to do with the whereabouts of Mr. Diaz--the trial judge found no nexus between that issue and the making of the admissions. Further, the judge was not satisfied that the material which was the subject of the disclosure application would have caused Mr. Ascencio not to have made the admissions: paras. 15-16.

[294] In concluding her ruling, the judge said this:

[17] It is of great significance that these admissions were the culmination of a trial strategy adopted by previous counsel as early as the spring of 2011 and averred to by defence counsel on numerous occasions up until the time the admissions were filed. There is no suggestion that Mr. Ascencio-Chavez was not aware of the content of the admissions, that the facts admitted are not true, that counsel acted without authority, and as I said earlier, no issue has been raised before me of incompetent or ineffective representation.

[18] I conclude that the foundation for the application is, in fact, a desire to change strategy and tactics or second thoughts about the strategies and the approach taken to the case by previous defence counsel.

[19] Admissions play an important role in criminal cases. They ought to be permitted to be withdrawn in cases of true mistake and whenever the interests of justice require. This is not such a case and I dismiss the application. Mr. Ascencio-Chavez may not withdraw the admissions made in Exhibit 20 and Exhibit 92.

[Emphasis added.]

Analysis

[295] There is no dispute that whether to permit an accused to withdraw an admission is a matter within a trial judge's discretion. The principles that apply are compendiously set out in McWilliams' Canadian Criminal Evidence, 5th ed., by C. Hill, D.M. Tanovich and L.P. Strezos, Toronto: Canada Law Book, 2013 (loose-leaf updated 2016, release no. 1), at 25:60, which includes the following (footnotes omitted):

As to withdrawal of a factual admission: "The discretion of the Court ought to be warily exercised, normally, to defeat fiction, to help establish truth, and to relieve clients of fatal mistakes by lawyers". "If it is sought to resile from them [admissions], first, the permission of the judge is required; and secondly, the judge is unlikely to give such permission unless he [or she] receives cogent evidence from the accused and those advising him [or her] that the admission had been made by a matter of mistake or misunderstanding." The discretion to allow withdrawal of an admission once made "should be exercised sparingly and cautiously".

Although a trial judge has a wide discretion to relieve a party of the strictures of an express factual admission and to require the party benefiting from the admitted fact to call evidence on the matter, regrets about a tactical decision to make an admission, a strategic decision otherwise falling within the range of reasonably competent counsel decision-making, will rarely result in an admission being backed out of the record of the proceeding. In other words, a factual admission, even if ill-advised or improvident, cannot be simply retracted at the will of a party.

The trial court, however, retains a discretion to avoid the consequence of an admission. The court is empowered to control its own process and to prevent manifest injustice. "From time to time counsel may err in making admissions" and if no prejudice is occasioned to the other side by granting relief from the admission, a court may be inclined to permit withdrawal of the factual admission where satisfied the admission was "made inadvertently and was one which ought not to have been made" or was "made clearly without authority or by mistake". Where an accused would not have made an admission had he received timely disclosure, the court may allow withdrawal of an admission made prior to the late disclosure.

[Emphasis added.]

[296] Mr. Ascencio submits the trial judge failed to give adequate consideration to Mr. Tessmer's statement that Mr. Tessmer did not read the preamble to the admissions and erred by faulting Mr. Ascencio for not raising concerns with the preamble when Exhibit 92 was translated for him in court. Mr. Ascencio further says the withdrawal of Exhibit 20 was necessary to prevent an injustice as once the admissions were withdrawn he would have been able to pursue a new trial strategy, including advancing Charter challenges to the manner in which the police obtained information and documents from the airlines and car rental companies. I would not accede to any of these arguments.

- [297] The judge considered and rejected the submission that Mr. Tessmer had failed to appreciate the effect of the admissions he signed on Mr. Ascencio's behalf; a submission supported only by Mr. Tessmer's unsworn statement from the well of the courtroom. Based on what occurred prior to the formal marking of Exhibit 20, it was open to the judge to conclude those admissions had been made for tactical reasons, with Mr. Ascencio's awareness and agreement. As the judge rightly observed, Mr. Ascencio did not allege that Mr. Tessmer had acted contrary to instructions or had provided less than effective and competent representation.
- [298] I would add that I do not consider the words "any amended or substituted version [of the indictment]" in the preamble of the admission to have much significance. The possibility of amendment always exists with respect to every indictment. Should an amendment be granted, the absence of those words would not negate the validity of any pre-amendment admissions and their inclusion would not preclude a successful application to withdraw the admissions.
- [299] Mr. Ascencio's second argument is directed at para. 14 of the judge's reasons. In that paragraph the judge was focusing on what she described as the "interpreter issue" that had been raised with respect to Exhibit 20, namely that those admissions had never been translated for Mr. Ascencio before they were marked and, as a result, Mr. Ascencio was completely unaware of what his counsel was admitting. Again, based on how the proceeding unfolded it was open to the judge to find that when Exhibits 20 and 92 were marked, Mr. Ascencio was generally aware of what was being admitted.
- [300] Leaving aside the double-hearsay and self-interest issues relating to the affidavit in which Ms. Kent recounts what Mr. Barraza told her what he was told by Mr. Ascencio, it is significant that Mr. Ascencio did not tell Mr. Barraza he was unaware of the nature of the admissions set out in Exhibit 20 prior to November 13, 2010. Rather, what Mr. Ascencio said was only that November 13, 2013, "was the first time the entirety of [Exhibit 20] was translated into Spanish for him" (emphasis added). Similarly, it is significant that Mr. Ascencio did not tell Mr. Barraza that he was unaware of the nature of the admissions set out in Exhibit 92 prior to June 11, 2013. Rather, what Mr. Ascencio said was only that June 11, 2013, was the first time Exhibit 92 was translated into Spanish for him. An accused does not need to have a word-for-word understanding (or translation) of the contents of a written statement of admissions to be aware of the substance of what admissions are being sought by the Crown and to give his or her counsel instructions to make those admissions.
- [301] It was open to the trial judge, in the exercise of her discretion, to hold that Ms. Molle's desire to pursue a different defence strategy than Mr. Tessmer, including possible Charter challenges, was not a valid reason for allowing Mr. Ascencio to withdraw the admissions. In the circumstance of this case, it cannot be said that it was unjust to refuse to permit Mr. Ascencio to turn the clock back so that he could seek to litigate issues he had previously chosen not to raise. In that regard, it is again significant that Mr. Ascencio did not allege that Mr. Tessmer acted contrary to instructions or provided less than effective and

competent representation.

Failure to Declare a Mistrial

[302] The appellants contend the trial judge erred in failing to declare a mistrial following the mid-trial disclosure of information relating to Mr. Diaz. That disclosure related to a document known as "Task 212".

Factual Background

- [303] The Crown provided its initial disclosure package to appellants' counsel in January 2011. The report to Crown counsel included in that package contained a statement to the effect that Mr. Diaz was believed to be an American citizen living in the United States and that "[i]nvestigative efforts are still ongoing in an attempt to locate and interview [him]." That report indicated the RCMP was dealing with a particular Drug Enforcement Administration ("DEA") investigator in Arizona in an effort to locate Mr. Diaz. The report contained information about Mr. Diaz including known addresses, telephone numbers, date of birth, driver's licence number, physical description, and prior employment.
- [304] The initial disclosure package also contained a document entitled Task 212 which was completely redacted and bore the note: "Disclosure of this task delayed".
- [305] In January 2013, three months before the start of the voir dire phase of the trial, the Crown provided a supplementary disclosure package, which included a partially redacted version of Task 212. In his covering letter to appellants' counsel, Crown counsel stated:
6. Task Detail Report 212 described as "Task generated to document information received from the US Drug Enforcement Administration in regard to Fernando Diaz". This was described as delayed disclosure in the original disclosure package. You will see from this report an indication of Mr. Diaz' willingness to speak with the RCMP (2010.12.02 entry, 21:53). I can advise you however, that the RCMP did not meet with or obtain a statement from Mr. Diaz.
- [306] The redacted document contained information regarding the DEA's efforts to locate and question Mr. Diaz. The document disclosed that in an email sent on November 26, 2010, the DEA advised the RCMP that Mr. Diaz had been located and asked whether the RCMP had any specific questions it wished to have put to Mr. Diaz. It also disclosed a summary of an interview the DEA had with Mr. Diaz on December 2, 2010.
- [307] After receiving the redacted version of Task 212, appellants' counsel made no inquiries or requests of the Crown with respect to either Task 212 or Mr. Diaz. In addition, they did not raise any issues with respect to Task 212 or Mr. Diaz with the trial judge during case-management or pre-trial conferences, or during the voir dres conducted prior to the June 2013 adjournment of the trial brought about by Mr. Ascencio's discharge of Mr. Tessmer.

- [308] On November 5, 2013, Ms. Molle, wrote to Crown counsel requesting, among other things, an unredacted copy of Task 212, any materials provided by the DEA, and "a copy of the December 2, 2010 interview of Diaz". She also inquired whether a meeting had ever taken place between Mr. Diaz and any Canadian law enforcement officer pertaining to the importation of the fruit-grinder. That same day, Mr. Montgomery's counsel wrote to inquire whether the redactions in Task 212 were still appropriate and, if so, for an explanation of the basis for the redactions. He also requested full disclosure or any interviews with Mr. Diaz by the RCMP or anyone acting on its behalf.
- [309] On November 7, 2013, Crown counsel wrote to appellants' counsel indicating that Task 212 had been redacted in consultation with, and at the request of, the RCMP, and that the Crown had contacted the RCMP to determine whether the redactions were still necessary. Crown counsel further indicated that the RCMP had never met with Mr. Diaz and that the RCMP was not in possession of a transcript, notes from American investigators, or any audio recordings. Last, Crown counsel indicated the RCMP was not in contact with Mr. Diaz and did not know his whereabouts.
- [310] On November 14, 2013, Crown counsel provided a further copy of Task 212 to appellants' counsel together with related documents. One of those documents was a letter written on December 21, 2010, by the Vancouver office of Legal Attaché of the Consulate of the United States of America to the RCMP describing interviews with Mr. Diaz concerning his involvement in the importation of the fruit-grinding machine, redacted to remove contact and personal information.
- [311] Later, in November, Mr. Ascencio's counsel sought and received further clarification and documents from the Crown. Mr. Montgomery's counsel wrote to the Crown indicating he disagreed with the redaction and gave notice that he would be applying for an order requiring disclosure of any and all information that might assist in locating Mr. Diaz.
- [312] The Crown provided the trial judge with unredacted copies of Task 212, and the documents disclosed in November 2013, including the letter from the American consulate.

Ruling

(2014 BCSC 223)

- [313] The trial judge found that the Crown was entitled to initially delay disclosure of an unredacted version of Task 212 and the consular letter because of threats made against Mr. Diaz. Although the report to Crown counsel incorrectly stated Mr. Diaz's whereabouts were unknown, the judge found that the initial disclosure package included "a significant body of personal data that would have been of use to anyone interested in locating him." The judge noted evidence at the trial indicated that two of the appellants "may have had other information which could have assisted them in locating Mr. Diaz", and that after receiving the initial disclosure package counsel for the appellants did not ask the Crown for information or assistance in locating Mr. Diaz: para. 25.

- [314] The judge found that when the indictment naming Mr. Diaz as an unindicted co-conspirator was filed in 2012, the Crown should have reconsidered disclosing Task 212 in some form. However, it was obvious from what was disclosed in January 2013, that: (a) redactions had been made; (b) Mr. Diaz had been interviewed twice by American officials; and (c) American officials intended to provide the RCMP with a report of those interviews in addition to oral summaries in Task 212. The judge noted that after receiving the redacted version of Task 212, appellants' counsel did not ask the Crown for further information or apply for a disclosure order. Having compared the unredacted versions of Task 212 and the consular letter to the redacted versions disclosed in January 2013, the judge concluded that the redacted version of Task 212 "provided a fair summary of the information provided by the DEA and the U.S. Consulate to the RCMP": paras. 26–28.
- [315] The judge rejected the submission that the statement in the Crown's January 2013 covering letter to the effect that the RCMP had not met with Mr. Diaz or obtained a statement from him was misleading. She found that it was "patently obvious" from the redacted version of Task 212 that Mr. Diaz had been interviewed by American officials: para. 29.
- [316] The judge held the amendment to Count 2 had not brought about a significant change in the Crown's case. The prosecution always related to a single transaction, and its main focus was on events occurring on or after September 22, 2010, when the CBSA discovered the cocaine in the fruit-grinding machine: para. 30.
- [317] The judge found that there was nothing to show that "the 'availability' of Mr. Diaz, as a potential witness for the defence or as a source of a chain of inquiry, changed at any time between the January 2011 disclosure package, the production of the vetted Task 212, and the present date [i.e., January 10, 2014]": para. 31.
- [318] In considering whether the late disclosure of Task 212 warranted a termination of the prosecution, the judge referred to a number of authorities including *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 74–77; and *R. v. Dixon*, [1998] 1 S.C.R. 244 at para. 37. Applying the principles set out in those decisions the judge was not satisfied that anything had occurred that justified the granting of a stay or a mistrial: para. 32. She did, however, order further disclosure with respect to Task 212 and the consular letter of information relating to Mr. Diaz: para. 38.
- [319] Lastly, the judge rejected Mr. Montgomery's submission that a mistrial should be granted on the ground of bias, because, having regard to the rulings the judge had made, a reasonable member of the public could no longer be satisfied the appellants were receiving a fair trial: paras. 35–36.

Analysis

- [320] The appellants challenge a number of the trial judge's factual findings and her ultimate conclusion. I can find no basis on which to interfere with any of the judge's findings or her conclusion.
- [321] The appellants' position is that this is a case of "deliberate" non-disclosure by the Crown. The record, however, supports the judge's finding that the Crown was initially entitled to exercise its discretion to withhold information with respect to Mr. Diaz.
- [322] The record also supports the judge's finding that appellants' counsel did not seek additional disclosure after the redacted version of Task 212 was disclosed three months before the start of the voir dire phase of the trial but waited until months into the trial proper to raise the matter. In relation to Mr. Ascencio, that request was made only after Ms. Molle replaced Mr. Tessmer. As has already been mentioned, Mr. Ascencio does not allege that Mr. Tessmer failed to provide him with effective and competent representation.
- [323] Lastly, the record supports the judge's finding that in light of the redacted disclosure that was made of Task 212, the appellants had not suffered irreparable or irremediable prejudice. As Mr. Justice Ottenbreit stated in *R. v. Anderson*, 2013 SKCA 92 at para. 87, 300 C.C.C. (3d) 296, "A trial judge is particularly suited to make a determination of how late disclosed documents may impact on the trial, whether that late disclosure impacted the defence and the reasons for late disclosure."
- [324] In *Dixon*, Mr. Justice Cory stated:
- [37] In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process.

The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.

- [325] The obligation of defence counsel to diligently seek disclosure is independent of the Crown's obligation to provide disclosure. For the disclosure process to work properly there must be meaningful dialogue between the parties: see, e.g., *R. v. Pickton*, 2005 BCSC 1240 at para. 2. That dialogue can take place only if defence counsel communicates to the Crown his or her views with respect to what additional material should be disclosed. If the Crown is not willing to provide what defence counsel seeks, then it is open to defence counsel to make a disclosure application.

[326] In *R. v. Muller*, 2013 BCCA 528, 304 C.C.C. (3d) 483, Madam Justice Stromberg-Stein (in dissent but not with respect to the legal principles relating to mistrials) stated:

[66] Having regard to the authorities, I conclude a mistrial is a discretionary remedy of last resort that should not be granted unless other, less extreme, corrective measures are incapable of preventing a miscarriage of justice: [*R. v. Chiasson*, 2009 ONCA 789, 258 O.A.C. 50] at para. 14. A mistrial should only be granted "in the clearest of cases", where there is a fatal wounding of the trial process'. A "fatal wounding of the trial process" is "a wounding to the administration of justice which cannot be cured by remedial measures": [*R. v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C.C.A.)] at para. 93, citing [*R. v. Lawson*, (1991), 1 B.C.A.C. 204 (Chambers)] at 209.

[Emphasis by Stromberg-Stein J.A.]

[327] In the present case, it cannot be said that late disclosure by the Crown fatally wounded the trial process when the delay was occasioned by appellants' counsel's failure to actively seek disclosure in a timely way. Inaction by the defence cannot be used to manufacture a reason for terminating a prosecution.

Informer Privilege Issues

[328] The appellants contend the trial judge erred in failing to disclose information over which informer privilege was asserted and with respect to the process she followed in making that determination.

Factual Background

[329] Project E-Piquet--the investigation with respect to the drugs shipped to Mr. Ready--commenced on or about September 10, 2010. In connection with Project E-Piquet the police had an informer who provided information on Mr. Montgomery.

[330] Project E-Pleura--the investigation into the fruit-grinding machine--commenced on September 29, 2010. That day, Constable Argue swore the affidavit in support of P.12/2010. On October 3, 2010, another informer--whom I will refer to as "X"--provided the police with information in relation to Project E-Pleura.

[331] The disclosure package provided by the Crown with respect to the charges arising out of Project E-Pleura did not include the debriefing reports or handler's notes with respect to X. In response to a request from appellants' counsel, the Crown provided disclosure with respect to Project E-Piquet, but again did not provide debriefing reports or handler's notes with respect to the informer in that investigation.

[332] On January 31, 2013--approximately two months before the start of the voir dire phase of the trial--Mr. Montgomery's counsel wrote to the Crown requesting debriefing reports and handler's notes with respect to the Project E-Piquet informer. That letter was copied to counsel for Mr. Ascencio and Mr. Aslam.

[333] On February 26, 2013, Crown counsel wrote to counsel for the appellants in connection with various disclosure issues. That letter included the following:

3. Source Debriefing Reports and Handler's Notes. With respect to your request that we provide any source debriefing reports or handler's notes, I am not prepared to disclose either the source debriefing reports or the handler's notes as they are the subject of informant privilege and in any event did not play a role in E-Pleura.

[334] The voir dres commenced on April 5, 2013. The trial proper commenced on May 8, 2013. On June 19, 2013, the trial was adjourned to permit Mr. Ascencio to retain new counsel.

[335] On August 22, 2013, Ms. Molle, on behalf of Mr. Ascencio, filed a notice of motion seeking disclosure of:

all source debriefing reports, handler's notes, reports, "ops plans" or any other documents referring to or containing informer information that pertains in any way to the importation of the fruit growing [sic] machine, the "E-Pleura" investigation and/or the cocaine investigation known as Project "E-Piquet."

[336] The notice of motion went on to state that disclosure was sought for the purpose of challenging P.12/2010 on the basis that the investigative necessity requirement had not been met. The "Relief Sought" section of the notice sought: "Immediate disclosure of [the sought after documents], edited as required to protect police informer privilege."

[337] On August 29, 2013, after counsel for Mr. Montgomery and Mr. Aslam had indicated they supported Mr. Ascencio's application, the Crown wrote to appellants' counsel reiterating that the Crown was not prepared to disclose the material sought.

[338] The application came on for hearing when the trial resumed on November 25, 2013.

Ruling No. 1

(2014 BCSC 224)

[339] On January 10, 2014, the trial judge gave an oral ruling on Mr. Ascencio's application. She held that the information sought with respect to the Project E-Piquet informer was not relevant to the trial. In doing so, the judge stated, in part:

- [6] I see no way in which general background information about Mr. Montgomery provided by an informant to a handler during the E-Piquet investigation before the importation which is the subject matter of this case and before the wiretap authorization was applied for and granted in this case could be relevant to the issues on the trial proper in this matter.

- [9] My analysis of the affidavit and the validity of the authorization is unchanged by the amendment [to the indictment]. I am satisfied that the informant information on E-Piquet is not relevant and need not be disclosed.
- [340] Turning to X, the judge noted that the appellants were not arguing that the innocence-at-stake exception to informer privilege was engaged. What they questioned was whether X was in fact an informer. They further suggested that X might be a material witness: para. 13.
- [341] To determine whether informer privilege applied to X, the judge, citing *R. v. Basi*, 2010 BCSC 26 and *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, directed an in camera hearing from which the appellants and their counsel would be excluded. The judge indicated she was prepared to receive submissions from appellants' counsel with respect to the questions to be asked at that hearing or the review process itself: paras. 17–18. Counsel for Mr. Montgomery and Mr. Ascencio provided the judge with written submissions which included questions they wished to have asked at the hearing. Some of those questions related to whether X had participated in any way in the importation of the fruit-grinding machine and whether X had been present at the Aspen Hills Ranch when the machine was there.

The In Camera Hearing

- [342] On January 30, 2014, the judge issued a memorandum containing a judicial summary of the evidence she had heard at the in camera hearing. The transcript of that hearing is not before this Court.
- [343] The judicial summary indicates, among other things that:
- (a) the only witness was the RCMP officer who was X's handler;
 - (b) the handler understands that an informer is a person who provides information to the police on the understanding that his or her identity will remain confidential unless innocence is at stake. The handler also understands that an informer is not compellable and is not directed by the police to gather evidence;
 - (c) the handler spends time with a prospective informer outlining the steps that will be taken to protect his or her identity;
 - (d) source debriefing reports are written in such a way that the identity of the informer is not revealed;
 - (e) the handler initiated contact with X with the intention of recruiting X as an informer;
 - (f) the handler assured X that that X's identity and the information X provided "would be unequivocally protected";
 - (g) in August 2010, the handler submitted X for acceptance by the RCMP's Human Source Unit;

- (h) up to October 2010, the handler had contact with X on 12 to 15 occasions. Most of that contact was initiated by the handler. X provided substantive information about criminal activity on eight occasions;
- (i) prior to October 3, 2010, X did not provide the handler with any information about the shipment of cocaine that became the subject of Project E-Pleura. On October 3, 2010, the handler provided information received from X about that shipment to another officer. That information had been provided to the handler in the context of his handler/informer relationship with X;
- (j) the handler believes disclosure of X's identity or the information X provided would put X at risk; and
- (k) the handler did not direct X, X did not "enter the field", and X was not a "police agent" while the handler was dealing with or knew X.

Post-In Camera Hearing Proceedings

[344] In a written response to the judge's memorandum, Mr. Ascencio's counsel made a request for information about how the hearing was conducted, including:

- (a) what questions were asked and what answers were given;
- (b) if any of the questions suggested by Mr. Ascencio were not asked, then an explanation for why they were disallowed;
- (c) a summary of any objections taken by the Crown to Mr. Ascencio's submissions and proposed questions, and the judge's rulings on those objections;
- (d) when the handler first contacted X;
- (e) when X began providing information about "criminal activities";
- (f) whether the information provided by X on any of the eight occasions pertained to the appellants or any alleged named or unnamed co-conspirators; and
- (g) prior to October 3, 2010, whether X provided information about cocaine shipments and any of the appellant or alleged co-conspirators other than the shipment that became the subject of Project E-Pleura.

In addition, counsel submitted that Mr. Ascencio was entitled to disclosure of the debriefing reports relating to X in order to make full answer and defence.

[345] Mr. Montgomery's counsel adopted Mr. Ascencio's counsel's submissions and requested an opportunity to make further oral submissions.

[346] Counsel made further submissions on the morning of February 11, 2014. Those submissions are not included in the transcript filed on this appeal.

Ruling No. 2

(2014 BCSC 443)

[347] In an oral ruling pronounced on the afternoon of February 11, 2014, the trial judge responded to the appellants' submissions and declined to provide them with any further information.

[348] The judge said the following in regard to how the in camera hearing was conducted:

[6] Following receipt of those submissions, which I read and considered, the ex parte in-camera hearing was conducted. One witness testified and that witness was the handler. The procedure undertaken at the hearing was that Crown questioned the witness in a direct-examination style, and I use that expression and I am sure that counsel will understand that I mean by that that the witness for the most part gave his evidence in a narrative sort of form. I also posed questions of the witness and I sought clarification of the handler's evidence as I considered necessary and appropriate and, in that, I was guided by the submissions I had received from defence counsel. There is no transcript and no digital recording of the proceedings available even to me or to court staff at this point in time without a court order.

[349] With respect to the appellants' request for a list of questions and answers, the judge stated:

[8] With regard to the submissions of defence counsel concerning which of their proposed questions were asked and what specific answers were given, as I have said, the witness gave his evidence in a narrative form in response to general direct-examination questions asked by Crown. Neither Crown nor I read aloud verbatim any of the questions proposed in the submissions received. However, as I have said, I read and considered defence counsel's submissions. I heard the evidence as it was given in a narrative form and I asked additional questions as I considered necessary and appropriate based on the written and oral submissions received and, of course, the cases to which I have been referred, and I specifically asked questions which I considered related to the issues on the hearing before me, namely, the existence and the extent of informant privilege, if any, and as informed by my ruling of January 10th of 2014. That is all that I intend to say with respect to the issues raised by counsel in their February 3rd submissions seeking specific information about which questions were asked, what the responses were, and the like.

[350] The judge declined to provide specific information with respect to when X provided information to the handler because she was satisfied that disclosure of that information might tend to identify X: para. 9.

- [351] The judge clarified the statement in her judicial summary to the effect that debriefing reports are written in such a way as to not identify an informer. She stated that even though those reports do not contain the informer's name they do contain information "which might, if disclosed, tend to identify the source, particularly to a person or persons about whom the source was providing information": para. 10.
- [352] With respect to the request for disclosure of whether X had, prior to October 3, 2010, provided information about cocaine shipments other than the shipment that became the subject of E-Pleura, the judge was not satisfied that information, if it existed, would be relevant to the matter before her: para. 11.
- [353] The judge concluded by saying she would permit appellants' counsel to make further submissions "concerning the existence and extent of informer privilege": para. 12.

Further Submissions

- [354] Ms. Ascencio and Mr. Montgomery filed further written submissions. Mr. Montgomery adopted Mr. Ascencio's submissions. One of the arguments raised by Mr. Ascencio was that the Crown had failed to prove X was not a "material witness to the crime". Mr. Ascencio asked the trial judge to provide further written reasons, stating that if the judge concluded that X was not a material witness, then the judge's reasons "should at least illuminate the pathway to the conclusion" (emphasis in original).
- [355] Counsel made further oral submissions on February 18, 2014. Those submissions are not included in the transcript filed on this appeal.
- [356] Following oral submissions, the judge indicated she was in a position to announce her conclusion but would provide written reasons later. With respect to her conclusion, the judge stated:

With respect to the result, I will say this. I did, as all counsel know, hear evidence from a person I have identified as a handler with respect to information received from a person that I have identified as a source. As a result of the evidence I heard in camera, and bearing in mind the obligation imposed on the court as well as others not to breach informant privilege if informant privilege exists, and specifically not to provide information that might tend to identify an informant to whom privilege should be extended, I have provided a summary which respects those obligations.

Defence counsel may wish more information and more particulars but I have concluded that the same cannot be provided without risking disclosure of information that might tend to identify the source. On the evidence I heard, I am satisfied that the source was a confidential informant to whom informant privilege is extended and I am satisfied, on the evidence I heard, that the exception or exceptions to informant privilege categorized by Crown as one exception and categorized by defence as more than one exception do not exist.

Consequently there will be no further disclosure ordered to be provided with respect to the person I have found to be an informant, or the information that person provided.

Ruling No. 3

(2014 BCSC 1812)

[357] In her written reasons, released on September 26, 2014, the trial judge, after reviewing what had occurred since November 2013 with respect to informer privilege, stated as follows:

- [7] Having heard all of the submissions of counsel, from November through to February, and having read the cases referred to me by counsel, and having heard the evidence, including the evidence on the ex-parte hearing, I am satisfied that the source was a confidential informant, who provided information to the police on the express guarantee that the informant's identity would not be disclosed and to whom the informer privilege protection is extended.
- [8] There is but one exception to the informer privilege rule, namely innocence at stake: *R. v. Leipert*, [1997] 1 S.C.R. 281 (at paras. 20–22); *Named Person v. Vancouver Sun*, 2007 SCC 43 (at paras. 28–30); *R. v. Basi*, [2009] 3 S.C.R. 389 (at para. 43); *R. v. Barros*, [2011] 3 S.C.R. 368 (at paras. 34–36); *R. v. X and Y*, 2012 BCSC 325 (at para. 4). As the Supreme Court of Canada has said, the innocence at stake test should be stringent and the privilege infringed only where the accused establishes, on the evidence, some basis for concluding that disclosure is necessary to demonstrate the innocence of the accused; mere speculation will not be sufficient: *Leipert*, at para. 33; *Barros* at para. 34; *R. v. McClure* [2001] 1 S.C.R. 445 (at para. 47).
- [9] There is no evidence in this case, including on the ex-parte hearing, which provides any basis for concluding that disclosure of any information that might tend to identify the informant is necessary to demonstrate the innocence of any of the accused. There is no evidence the accused point to which would support a conclusion that the informant was a material witness, even if there was a separate exception related to material witnesses. No submissions made by counsel for the accused could be said to rise above the level of pure speculation, and the submission that the Crown has the onus of proving an informant is not a material witness, without any foundation for an argument that the informant may be a material witness, is not supported in law.
- [10] I dismiss the defence application for disclosure of the information over which Crown asserts informer privilege.

Analysis

Project E-Piquet Informer

- [358] The appellants contend the trial judge erred by failing to disclose information with respect to the Project E-Piquet informer in connection with their renewed challenge to P.12/2010, as that information went directly to the question of the validity of that authorization. They say this error prevented a proper assessment of whether the authorizing judge was fully informed with respect to the investigative necessity requirement. I do not agree.
- [359] In her initial ruling on P.12/2010, the judge determined that although there were generic similarities between the drug shipments in Project E-Piquet and Project E-Pleura the link between the two was nothing more than speculation: 2013 BCSC 1009 at paras. 24–27. In her first informer ruling, the judge noted that the information from the Project E-Piquet informer pre-dated the importation of the fruit-grinding machine. It was also unknown to Constable Argue, the affiant for the authorization.
- [360] In my view, it was open to the judge to find that Project E-Piquet and Project E-Pleura were separate investigations and that the information the informer had provided in connection with Project E-Piquet was not relevant to the validity of P.12/2010. Accordingly, she did not err in refusing to order disclosure in relation to that informer.

Project E-Pleura Informer

- [361] The appellants contend that in refusing to order disclosure of information relating to X, the judge erred in law:
- (a) by stating there is no material witness exception to informer privilege;
 - (b) by failing to require the Crown to establish that X was not a material witness;
 - (c) by declining to ask the handler the questions they had requested and by failing to provide an explanation for not doing so; and
 - (d) by failing to provide reasons sufficient to permit appellate review.
- [362] The appellants' argument focuses, in part, on the underlined words in the following sentence from para. 9 of the trial judge's final ruling: "There is no evidence the accused point to which would support a conclusion that the informant was a material witness, even if there was a separate exception related to material witnesses."
- [363] There is no error in this statement. When read in the context of the reasons as a whole, it is apparent that what the judge was saying is that even if there was a separate material witness exception to informer privilege—which as I will explain there is not—it would not apply because she was not satisfied that X was a material witness.

[364] The appellants assert that informer privilege can never apply to a material witness. In support of that position they rely on *R. v. Scott*, [1990] 3 S.C.R. 979, a case in which Cory J. appeared to recognize the following as exceptions to informer privilege (at 996):

- (a) where the informer is a "material witness" to the crime;
- (b) where the informer acted as an agent provocateur; and
- (c) where an accused seeks to establish that reasonable grounds for a search did not exist.

[365] With respect to material witnesses, the appellants place particular emphasis on the first sentence of the following paragraph from Cory J.'s reasons (at 996) which appears after his reference to the statement in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 93, that innocence at stake is the only exception to informer privilege:

Certainly, if the informer is a material witness to the crime then his or her identity must be revealed. In *Roviaro v. United States*, 353 U.S. 53 (1957), the United States Supreme Court held that the informer's identity would be divulged if the informer was a material witness. Canadian courts have very properly followed the same path in circumstances where the informer is the only material witness to the crime: see *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.).

[366] However, the Supreme Court of Canada has made it clear in subsequent cases that innocence at stake is "the one true exception" to informer privilege, and that the "so-called exceptions [mentioned in *Scott*] are simply applications of this one true exception": *Named Person v. Vancouver Sun*, 2007 SCC 43 at para. 29, [2007] 3 S.C.R. 253. See also: *R. v. Leipert*, [1997] 1 S.C.R. 281 at paras. 26–27; *R. v. Barros*, 2011 SCC 51 at paras. 1, 34, [2011] 3 S.C.R. 368; *British Columbia (Police Complaint Commissioner) v. The Abbotsford Police Department*, 2015 BCCA 523 at para. 7, 381 B.C.A.C. 110, leave to appeal ref'd [2016] S.C.C.A. No. 75.

[367] The mere fact that the informer witnessed the crime being committed is not sufficient to displace informer privilege. As Mr. Justice Steele stated in *R. v. Peddle* (1996), 111 C.C.C. (3d) 321 at 329 (Nfld. C.A.), to come within the exception discussed in *Scott*, an informer who is also a witness must be "an individual who had personal knowledge of the commission of the offence and possessed essential information needed to demonstrate the innocence of the accused." In other words, as Steele J.A. stated at 330, the informer's evidence must be "critical to the defence's case in order to demonstrate the [accused's] innocence."

[368] I disagree with the appellants' submission that *Barros* "confirmed that a material witness cannot be a confidential informer." In support of that submission they cite the following from the judgment of Mr. Justice Binnie at para. 33 in *Barros*: "No protection is afforded to a 'source' whose conduct goes beyond the provision of information and acts as an 'agent provocateur' or is otherwise a material witness to the crime." However, I do not accept that by this statement the Supreme Court of Canada intended to depart from the well-established principle, mentioned several times in *Barros*, that innocence at stake is the

only exception to informer privilege, and thereby create a stand-alone material witness exception. Indeed, in the first paragraph of his judgment Binnie J. stated that "[informer] privilege is subject neither to judicial discretion nor any balancing of competing interests (although qualified by an 'innocence at stake' exception)." Of note is *R. v. Marshall* (2005), 200 C.C.C. (3d) 179 at paras. 101–104 (Ont. C.A.), leave to appeal ref'd [2006] 2 S.C.R. ix, a case in which an application for disclosure of the identities of two informers on the basis that they were material witnesses was refused because the accused failed to bring himself within the innocence at stake exception.

- [369] With respect to the appellants' second argument--that "the Crown must prove that the informant is not a material witness"--their submission is predicated on the erroneous premise that there is a separate material witness exception to informer privilege. In this case, once the judge was satisfied that X was a person to whom the privilege applies the onus was on the appellants to establish that the innocence at stake exception applied: *Named Person* at para. 27; *Leipert* at para. 33. This is something they never attempted to do.
- [370] The appellants' third argument is that the process the judge implemented was flawed because she "declined to ask any of the questions that [they] requested be asked and provided no explanation for doing so." They say that, as a result, the judge "fell short of the standard required by *Basi*."
- [371] There is nothing in *Basi* that supports the proposition that it is mandatory for a trial judge conducting what is sometimes referred to as a "*Basi* hearing" to ask the questions submitted by the defence counsel or provide an explanation for not asking any of those questions. Indeed, it might be possible in a given case to resolve informer privilege issues in camera without the need for viva voce evidence.
- [372] How a *Basi* hearing is conducted is a matter within a trial judge's discretion. In deciding how to proceed, the judge will have the benefit of defence counsel's submission, but is not bound by those submissions. Apposite is the following from Mr. Justice Fish's judgment in *Basi*:
- [55] In order to protect these interests of the accused, trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence. Trial judges have broad discretion to craft appropriate procedures in this regard.
- [56] Measures that a trial judge may wish to adopt in assessing a claim of informer privilege include inviting submissions on the scope of the privilege - including argument as to who constitutes a confidential informant entitled to the privilege - and its application in the circumstances of the case. Defence counsel may be invited as well to suggest questions to be put by the trial judge to any witness that will be called at the ex parte proceeding.

[Emphasis added.]

[373] The appellants' final argument is that the trial judge's reasons are insufficient to allow for meaningful review of the issues I have just discussed. This submission is so lacking of merit that I need say no more than that I reject it.

Co-Conspirator Exception to the Hearsay Rule

[374] The appellants contend the trial judge misapplied the co-conspirator exception to the hearsay rule set out in *R. v. Carter*, [1982] 1 S.C.R. 938, in two ways: (a) by failing to address her mind to the use she could make of the acts and declarations of Mr. Diaz; and (b) by relying on conversations recorded during the dismantling of the machine. I would not accede to either argument.

[375] The co-conspirator exception, first adopted in *Carter*, was reaffirmed in *R. v. Barrow*, [1987] 2 S.C.R. 694. In that case, McIntyre J. set out the steps to be followed in applying the exception as follows (at 740):

1. The trier of fact must first be satisfied beyond reasonable doubt that the alleged conspiracy in fact existed.
2. If the alleged conspiracy is found to exist then the trier of fact must review all the evidence that is directly admissible against the accused and decide on a balance of probabilities whether or not he is a member of the conspiracy.
3. If the trier of fact concludes on a balance of probabilities that the accused is a member of the conspiracy then he or they must go on and decide whether the Crown has established such membership beyond reasonable doubt. In this last step, only the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the conspiracy as evidence against the accused on the issue of his guilt.

Mr. Diaz's Acts and Declarations

[376] The appellants say that Mr. Szucs's testimony with respect to his dealing with Mr. Diaz-- what Mr. Diaz said and did--is hearsay and subject to the *Carter* rule. That argument, however, is premised on a lack of understanding of what constitutes hearsay. To fall within the *Carter* rule the acts or declarations of an alleged co-conspirator must be tendered for a hearsay purpose. It is trite law that a statement is hearsay only if it is tendered to prove the truth of its contents. If, regardless of the truth of its contents, the fact that a statement was made is relevant to a matter in issue, then the statement is admissible: *R. v. Smith*, [1992] 2 S.C.R. 915 at 924. An act is hearsay only if it is non-verbal conduct intended to communicate a message and is tendered to prove that message: *R. v. Tran*, 2014 BCCA 343 at paras. 87-93, 316 C.C.C. (3d) 270.

[377] All of the evidence concerning Mr. Diaz's activities was tendered by the Crown to prove one relevant fact, i.e., that Mr. Diaz arranged for the importation of the fruit-grinding machine. Whether Mr. Diaz was a co-conspirator was irrelevant as nothing he did or said in making those arrangements with Mr. Szucs amounted to an assertion with respect to the involvement of anyone else with that machine. Having found that Mr. Diaz arranged for the importation of the machine, the trial judge, in applying the Carter rule, was entitled to consider that fact as part of the background against which to consider the appellants' acts and declarations, in the same way that she was entitled to consider what Mr. Szucs said and did as part of that factual background: Tran at para. 118.

[378] There is one further aspect of this argument that needs to be addressed. It was raised for the first time in the post-hearing written reply Mr. Montgomery and Mr. Aslam were given leave to file. In that reply, Mr. Montgomery contends that the judge erred in taking into consideration the fact that in the summer of 2010, there were communications between his BlackBerry and Mr. Diaz's cellular telephone because Mr. Diaz's connection to that cellular telephone was supported only by the hearsay evidence. I disagree.

[379] The call logs recovered from Mr. Montgomery's BlackBerry established there had been a number of calls between Mr. Montgomery's BlackBerry and number 250-869-4525 from mid-July to mid-September 2010. The Crown did not lead any evidence connecting that number to Mr. Diaz. Rather, that evidence was elicited by Mr. Montgomery's counsel during her cross-examination of Mr. Szucs. The following exchange occurred when counsel questioned Mr. Szucs with respect to the telephone numbers he had for Mr. Diaz:

Q Okay, and the phone -- you have four telephone numbers for Fernando?

A Yes.

Q Okay, and I'll just say what they are. So the four phone numbers that you go through with the police are -- there's 1-602-973-9254. That's his United States home telephone number?

A Yes.

Q You understood he had a residence in Phoenix, Arizona.

A Right.

Q Did he tell you that?

A Yes, he did.

Q Okay. Then there's a -- he's got a United States mobile or a cellphone number which is area code 480-226-9025.

A Right.

Q Okay. So that is his U.S. mobile. Then he's got a Canadian mobile, so a Canadian cellphone.

A Yes.

Q 250-869-4525, right?

A Yes.

Q And he's got a Canadian home phone.

A Yes.

Q 778-478-0296, right?

A Right.

Q And those are the four telephone numbers that you had for Fernando that you gave to the police.

A I had them in my -- in my iPhone.

Q Okay. What about the phone number that you're dealing with him in the transcripts on. You didn't give the police that number, did you? Isn't there a different telephone number that you had for Fernando as well?

A No.

Q Those are the only phone numbers you have for him.

A That's the only phone numbers I have for Fernando.

[Emphasis added.]

[380] In my view, Mr. Montgomery having elicited that evidence as he did, it is not open to him to now contend that the link between number 250-869-4525 and Mr. Diaz was not properly established.

Dismantling of the Fruit-Grinding Machine

[381] The appellants contend the trial judge erred in relying on the conversations that were recorded during the dismantling of the machine to convict them on the conspiracy charges. They say most of that evidence is hearsay because anything said by one of them cannot be used against the other two for the truth of what was said. I should note that although voice identification was an issue at trial, the appellants do not now take issue with the judge's findings with respect to who said what in the immediate vicinity of the machine.

[382] Mr. Ascencio's factum contains what is put forward as an example of this alleged error. In convicting Mr. Ascencio of conspiracy to import cocaine the trial judge found that at the Aspen Hills Ranch, Mr. Ascencio "provided information to Mr. Aslam and to Mr. Montgomery about how to access the contents of the machine": para. 140. As support for that finding, the judge set out several excerpts from the transcripts.

[383] Mr. Ascencio sets out portions of those transcript excerpts in his factum. For completeness I set out below the transcript of one of those excerpts, underlining the words quoted by the judge that Mr. Ascencio submits are hearsay. I have bolded other words the judge quoted that Mr. Ascencio does not refer to in his factum. This conversation took place shortly after the appellants and the machine arrived at the Aspen Hills Ranch. "CM" refers to Mr. Montgomery, "TA" to Mr. Aslam, and "[SAC]" to Mr. Ascencio. In the transcript marked as an exhibit at the trial Mr. Ascencio is identified as "VP", for Victor Perez, the name Mr. Ascencio was using in October 2010:

18:18.14

CM: Does this whole thing gotta come off?

TA: Yeah, this piece. These pieces, that piece have to come off.

CM: Even those three springs have to come off?

TA: Which springs?

CM: Those have to come off.

TA: Yeah. We got to completely fuckin' gut this thing. (Chuckles)

CM: Are you fuckin' kidding me?

TA: Obviously Sal knows what he is doing, right? Right? [Referring to Mr. Ascencio.]

[SAC]: (Laughs)

TA: Sal?

CM: Do you know what you're doing?

[SAC]: Yeah, I will. (Laughs)

CM: (Laughs) Oh, oh, oh, fuck here we go.

TA: (Laughs)

[SAC]: (Laughs)

TA: This ought to be good.

CM: Do you think we can do this like, right here like, how we're doing it or what?

18:19:18

TA: (Laughs) That's why I'm fuck look for the key, I'll start tearing it apart (laughing)

CM: So, these have to come off, right? These big white things?

TA: He said inside those white things is another cylinder.

CM: Yeah

TA: Oh, fuck.

18:20:05 (Laughter)

[SAC]: I know exactly how to take the, the cylinder out of that.

CM: But they don't know how to

[SAC]: they say. But, (laughs) I don't see anything move.

CM: That ain't gonna do fuckin'-

TA: -

CM: -a damn thing.

TA: -a sledge hammer, you're supposed to use that hammer?

[SAC]: Uh, uh, some things are not meant, uh, like uh, yeah.

CM: No, a rubber, a mallet.

TA: Yeah, you gotta bang 'em hard, man.

CM: Give me that mallet.

[SAC]: Let me ask the maybe

CM: That's not doing a fuckin' thing.

[SAC]: No. ..

TA: I don't know but what does Antonio say?

18:20: 53 (Intermittent beeping)

CM: in further.

[384] From the next transcript, which Mr. Ascencio does not refer to in his factum, the judge quoted the words I have underlined:

18:21:07

TA: It's okay if I take off through this, this stuff, right?

[SAC]: Yes, yes.

TA: Yeah.

[SAC]: Yeah, we have to take this out.

TA: Yeah, but before, I don't know if you have stuff to take now first than this and

CM: No,

[SAC]: No, I think there's only two. To take that the, the other cylinder out. We have to put it in, stand up

TA: Can't we just stand up with this then 'cause this side you said opens, right?

[SAC]: Yes.

TA: Okay, so, we don't really have to take that off.

[SAC]: Yeah, to take it out, uh, to make it, well

TA: Can we try?

[SAC]: Well, well, what-

CM: Whatever was

TA: that's what I'm saying we gotta pop these pins off.

[SAC]: Yeah.

TA: and take these out.

CM: Okay, what do you want me to do?

TA: Pop the pins out, and just uh, slide a screwdriver and pop those pins and fuckin' slam the

18:21:54 (Banging)

[385] The trial judge made no impermissible use of what was said during the dismantling of the machine. What each appellant said, either directly or by adopting what was said by one of the others, was admissible against that appellant at all steps of Carter. The words each of them spoke and the words they adopted support the judge's finding that they jointly participated in dismantling the machine for the purpose of gaining access to the large quantity of cocaine they believed to be hidden inside: para. 120. Further, what Mr. Ascencio said directly or by adoption supports the judge's finding that he knew how to access the drugs inside the machine, an indication that he had prior knowledge of how those drugs had been hidden.

[386] As for Mr. Montgomery, the judge was entitled to consider that while dismantling the machine Mr. Montgomery said things that indicated he not only knew there was cocaine hidden in the machine, but also that he knew the approximate weight of the drugs in each cylinder: para. 143.

Unreasonable Verdict: Conspiracy to Import

[387] Mr. Montgomery and Mr. Ascencio contend their convictions on the charge of conspiracy to import are unreasonable and unsupported by the evidence. Mr. Montgomery says that like Mr. Aslam, who was acquitted of that charge, there is nothing to link him to anything that occurred before the importation of the fruit-grinding machine was complete. Mr. Ascencio says the Crown's case against him was entirely circumstantial and that an equally rational inference is that he purchased the machine from Mr. Diaz after it arrived in Canada. I would not give effect to these arguments.

[388] In arriving at her verdicts the trial judge instructed herself that as the fruit-grinding machine had been imported into Canada in September 2010, any conspiracy with respect to it had come to an end before the events that took place in Kelowna in October 2010. The judge further instructed herself that because the conspiracy to import was at an end by the time the machine reached Kelowna, post-importation hearsay acts and declarations were not admissible under the Carter rule with respect to that charge. As a result, the judge only considered the acts and declaration of each appellant as against that appellant: paras. 132–134.

[389] In finding Mr. Ascencio guilty the judge said this:

[140] I turn now to Mr. Ascencio-Chavez. The Crown's case against him is much more compelling [than the case against Mr. Aslam]. In addition to his actions with respect to picking up, transporting and dismantling the machine, he arrived in Canada on September 25, 2010, the day after Staff Sergeant Gately [sic] had called Mr. Szucs to tell him the machine had cleared customs and would be picked up for delivery on September 27, 2010. He used a false name to enter Canada, to rent the silver Jeep, and to conduct his calls and meetings with Mr. Szucs. He was in communication with Mr. Diaz about the pick-up of the machine and in his first dealings with Mr. Szucs introduced himself as Fer's friend. He paid \$5,000 cash to Mr. Szucs to secure release of the machine to him. While he was dealing with Mr. Szucs, he had a telephone conversation with Mr. Diaz. Mr. Ascencio-Chavez inspected the waybill attached to the plastic wrapped around the machine. After meeting with Mr. Szucs, I find that Mr. Ascencio-Chavez went to meet with Mr. Montgomery, calling him on the way, and then returned with Mr. Montgomery to further inspect the machine, including taking measurements of it. Once the machine was at the Aspen Hills Ranch, Mr. Ascencio-Chavez provided information to Mr. Aslam and to Mr. Montgomery about how to access the contents of the machine, and had the following significant exchanges, and for ease of reference I will refer to the clip number of the audio recordings in Exhibit 17.

[Excerpts omitted.]

[141] Considering just the words and actions of Mr. Ascencio-Chavez, but as understood in the context of what was transpiring at the time and what was being said by others, and considering all of the evidence properly admissible against him, I am satisfied beyond a reasonable doubt that Mr. Ascencio-Chavez was a member of the conspiracy to import cocaine. I find him guilty of Count 2 on the indictment.

[390] With respect to Mr. Montgomery, the judge said this:

[143] Finally, I turn to Mr. Montgomery and the evidence directly admissible against him. The telephone subscribed to by Mr. Montgomery and found in his possession when he was arrested on October 4, 2010, was in communication with a telephone associated with Mr. Diaz, who provided instructions, documents and money to Mr. Szucs to enable Mr. Szucs to facilitate the importation of the machine into Canada. Although I am unable to conclude, on the evidence before me, whether Mr. Diaz was a member of the conspiracy or a dupe like Mr. Szucs, it is clear that Mr. Diaz played a role in facilitating the importation, as described earlier. Mr. Montgomery clearly knew, in advance, what was inside the machine. He actively participated in the loading of the machine, the transportation of the machine and the immediate steps taken to dismantle the machine, directing that the machine would be left for scrap. He was actively involved in discussing and determining, together with Mr. Ascencio-Chavez, where the contents of the machine would go. He knew the approximate weight of product in each cylinder, telling Mr. Aslam "30 , 32, 34". He spoke of "his driver" and "his guys" with respect to what I find were discussions concerning the trafficking of cocaine, including but not limited to that he expected to find inside the machine, using expressions such as "cases" and "on the cuff", which I accept are commonly used expressions in the drug trade to mean kilograms and fronting, or providing goods without immediate payment, respectively. He made the statement that Mr. Ascencio-Chavez needed to tell "them" to do a better job, in reference I find to the quality of the machine, and made reference to Canada clearing the machine, clearly in relation to the importation.

[144] I have considered the evidence of the expert, Staff Sergeant Woodworth with respect to the different roles that may be played by different individuals in a conspiracy to import cocaine. Much of that evidence is nothing more than common sense, and would apply with respect to the export/import of most goods, as observed by the Court of Criminal Appeal of the Supreme Court of Australia in *R. v. Toe*, [2010] SASC 39. It is not necessary that I determine the specific role played by any particular individual member of the conspiracy, nor that every member of the conspiracy played an equal role.

[145] On all of the evidence, I find that the only rational inference to be drawn from all of the evidence admissible against Mr. Montgomery is that he was a member of the conspiracy to import cocaine into Canada and I find him guilty on Count 2.

[391] By virtue of s. 686(1)(a)(i) of the Criminal Code, an appellate court has the power to set aside a conviction on the basis that the verdict "is unreasonable or cannot be supported by the evidence". In discussing the principles that apply to that provision in *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, Madam Justice Deschamps stated:

[9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19–21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

[392] Further, as Mr. Justice Harris recently reiterated in *R. v. Vickers*, 2016 BCCA 98 at para. 22:

In reviewing the verdict, this Court may engage in a re-examination and reweighing of the evidence, through the lens of judicial experience, for the limited purpose of deciding whether the verdict is reasonable. We do not substitute our view of the evidence for that of the trial judge. We defer to the trial judge's findings of fact and factual inferences, interfering only if the judge made a palpable and overriding error. The analysis is the same whether the case is based on direct or circumstantial evidence: [citations omitted].

[393] In the present case, a substantial body of evidence supports the inferences drawn by the trial judge that Mr. Ascencio and Mr. Montgomery were parties to an agreement to import the cocaine hidden in the fruit-grinding machine into Canada. Accordingly, their convictions cannot be said to be unreasonable.

DISPOSITION

[394] I would dismiss these appeals.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Fenlon"

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