

CANADA / JUDGMENT

R. v. Pawar

2020 BCCA 251

COURT

British Columbia Court of Appeal

DECIDED

15 September 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 251 R. v. Pawar

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pawar,

2020 BCCA 251

Date: 20200915

Docket: CA46168

Between:

Regina

Respondent

And

Jasbir Singh Pawar

Appellant

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

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

February 1, 2019 (conviction) (R. v. Pawar, 2019 BCSC 340,

Williams Lake Docket 33213-2).

Counsel for the Appellant

(via videoconference):

S.J. Tessmer

Counsel for the Respondent

(via videoconference):

C.W. Greenwood

Place and Date of Hearing:

Vancouver, British Columbia

June 16, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 15, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

Summary:

After arresting the appellant on drug-related charges, police officers conducted a warrantless search of his residence to clear its occupants in order to preserve evidence. A substantial quantity of drugs was later seized upon the execution of a warrant. The trial judge found that there were no exigent circumstances justifying the initial warrantless search. In assessing the seriousness of the Charter breach under s. 24(2), the judge found that the officer who authorized the warrantless entry acted in good faith. She also found that the presence of the appellant's family members in the residence gave rise to a reasonable concern that evidence might be moved or destroyed. The judge admitted the evidence obtained during the warranted search and convicted the appellant of four counts of possession for the purpose of trafficking. The appellant challenges those convictions on the basis that the trial judge erred in her s. 24(2) analysis. Held: Appeal allowed and acquittals entered on all counts. The judge's ruling reflects error in principle and an unreasonable factual finding on issues material to her assessment of the seriousness of the breach. Having concluded that there were no exigent circumstances justifying the warrantless search, it was not open to the judge to then rely on the officer's 'good faith' as an extenuating circumstance that mitigated the seriousness of the breach. Nor was it consistent for the judge to

conclude that the presence of the appellant's family members in the residence gave rise to a reasonable concern that evidence might be moved or destroyed. Conducting the s. 24(2) analysis afresh, both the breach and its impact were serious. In all the circumstances, it is necessary for the Court to disassociate itself from the breach to preserve the repute of the administration of justice.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. OVERVIEW

- [1] This is an appeal from convictions for possession of cocaine, MDMA, psilocybin and marihuana for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. What lies at the heart of the appeal is a ruling made by the trial judge pursuant to s. 24(2) 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 [Charter], admitting evidence obtained in connection with a breach of the appellant's right under s. 8 not to be subject to unreasonable search or seizure.
- [2] Briefly, the appellant was arrested on the drug charges two or three kilometers away from the home he shared with his family. Shortly thereafter, the police entered the appellant's home without a warrant, removed the appellant's mother and brother, and secured the residence. The Crown did not dispute at trial or on appeal that the warrantless entry was a form of search not authorized by law. A similar concession was noted to be properly made in *R. v. Silveira*, [1995] 2 S.C.R. 297 at para. 140; see also *R. v. Hunter*, 2015 BCCA 428.
- [3] The officer-in-charge subjectively believed that exigent circumstances, arising from the need to preserve evidence, justified the warrantless entry.
- [4] Later that evening, the police obtained and executed a search warrant on the residence. A substantial quantity of drugs, with a street value in excess of \$120,000, was seized.
- [5] The trial judge found that exigent circumstances did not exist as the subjective belief of the officer-in-charge was not shown to be objectively reasonable. The warrantless entry was therefore found to be in breach of the appellant's s. 8 Charter rights. Given the close temporal connection between the warrantless entry and the discovery of the drugs, the Crown conceded the evidence seized pursuant to the search warrant was obtained in a manner that infringed the appellant's constitutional rights. The judge admitted the evidence pursuant to s. 24(2) of the Charter and found the appellant guilty of four counts of possession of a controlled substance for the purpose of trafficking.
- [6] In conducting the s. 24(2) analysis set out in *R. v. Grant*, 2009 SCC 32, the judge found the breach to be serious but noted that the officers entered the residence for the limited purpose of clearing the premises of its occupants in order to preserve evidence. She concluded that the warrantless entry did not involve a search for evidence. Although exigent circumstances did not exist, she found that the officer who authorized the warrantless entry subjectively

believed they did. She concluded, therefore, that the officer "acted in good faith." Despite finding the absence of an objective basis for the officer's belief in the existence of exigent circumstances, the judge found that the presence of the appellant's mother and brother in the residence gave rise "to a reasonable concern that evidence might be moved or destroyed."

- [7] The judge found that the initial warrantless search of the appellant's residence had a serious impact on his Charter-protected interests, but was attenuated by the brevity of the warrantless entry and the relatively non-intrusive nature of the search.
- [8] The judge concluded that society's interest in the adjudication of the case on its merits weighed heavily in favour of admission of the evidence. She noted that the evidence discovered in the warranted search was real evidence, both reliable and essential to the prosecution. The judge found that a reasonable person informed of the circumstances of the breach and the values protected by the Charter would not find that the admission of the evidence would bring the administration of justice into disrepute.
- [9] The appellant challenges his convictions on the ground that the trial judge erred in admitting the evidence pursuant to s. 24(2) of the Charter. For the reasons that follow, I agree.
- [10] In my respectful view, the judge's s. 24(2) ruling reflects error in principle and an unreasonable factual finding, both of which are material to her assessment of the seriousness of the breach. Accordingly, I would not defer to her ultimate conclusion. Conducting the analysis afresh, with due deference to the judge's findings of fact untainted by error in principle, I have come to the conclusion that admission of the evidence would bring the administration of justice into disrepute. I would allow the appeal. As there is no other admissible evidence that could support these convictions, I would direct that an acquittal be entered on all four counts.

II. BACKGROUND

- [11] In August 2016, the police received a tip from a confidential informant that someone who matched the appellant's description was trafficking in cocaine and heroin in Williams Lake, British Columbia. Following the tip, the police conducted surveillance of the appellant and observed transactions and behaviours they believed to be consistent with a dial-a-dope operation.
- [12] The appellant was arrested shortly before 10:00 p.m. on October 13, 2016, in a bank parking lot in the downtown core of Williams Lake. The arrest was made after the police witnessed what they believed to be another drug transaction. On this occasion, the police observed a female person speak to the appellant through the passenger-side window of his vehicle, run to the vestibule of the bank where she accessed an ATM, and then return to the appellant's vehicle as a front-seat passenger. She was arrested at the same time as the appellant. A small quantity of cocaine was found on the appellant during a search conducted incidental to his

arrest. The appellant's cellphone was seized on arrest.

- [13] Following the arrests, the police applied for a search warrant in relation to the appellant's residence--a home they knew the appellant shared with his parents and his brother. After the appellant's arrest but before they had obtained the warrant, the police attended at the residence. Corporal Daines--the officer-in-charge at the time of the arrest--was aware, from previous surveillance of the house, that the appellant's mother was home at the time. He was unsure if there were other occupants inside the residence. Fearing that evidence could be destroyed or moved before the search warrant was obtained, Cpl. Daines decided to authorize entry into the residence without a warrant, to clear the home of its occupants and secure the scene.
- [14] Corporal Daines relied on s. 11(7) of the CDSA in authorizing and conducting the warrantless entry. This provision authorizes a peace officer to search for and seize evidence "without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one."
- [15] That the police had grounds to obtain a search warrant when the warrantless entry occurred is not in issue on appeal.
- [16] Corporal Daines offered three grounds in support of his belief that exigent circumstances justified the warrantless entry. First, he was aware that at least one other person--the appellant's mother--was in the residence at the time of the arrest. Second, the arrest took place in a public area of the downtown core. He testified that if someone had witnessed the arrest, they could potentially alert the occupants of the house and direct them to move or destroy evidence. Third, Cpl. Daines was concerned that the appellant was trying to contact his mother to instruct her to move or destroy evidence. Corporal Daines formed this suspicion because he had been advised by another officer (who was not called to testify on the voir dire) that the appellant said his mother was not at home--which Cpl. Daines knew or believed to be untrue. In addition, Cpl. Daines had been advised by the same officer that the appellant had asked to contact his mother or brother to get the name of a lawyer. This information appears to have been the source of Cpl. Daines' concern that the appellant might have been seeking to make contact with family members to instruct them to dispose of evidence.
- [17] In cross-examination, Cpl. Daines conceded there was no evidence that any members of the appellant's family were aware of his drug-dealing activities. He also conceded that he could not recall if there were any pedestrians or vehicles that passed by the scene of the arrest. Finally, there was no evidence that the appellant had been given permission to call his family after he had been taken into police custody. He acknowledged in cross-examination on the voir dire that his decision to authorize the warrantless entry was based, in part, on his experience in past cases:

Q So really what we're talking about is the -- you cleared the residence because of the possibility that evidence could get tampered with, is that correct?

A Given what's happened in the past, absolutely.

[18] Corporal Daines testified that the warrantless entry of a private dwelling-house to preserve evidence in drug cases pending an application for a search warrant does not happen all the time. He testified, however, that if the same circumstances arose again in the future, he would authorize the warrantless entry of a private dwelling-house before obtaining a search warrant:

Q And what's your authority for removing people from their residence before -- or indeed at any time when there's a search warrant being prepared? Let's start out with before there's a search warrant, what's your authority to remove people, an elderly woman and her son from a residence that they appear to be lawfully in?

A I believe it's s. 11 of the CDSA, specifically subsection (7).

Q Do you mean to say exigent circumstances?

A Yes.

Q So you believe exigent circumstances gives you the power to remove people from there?

A I believe it's -- I believe that exigent circumstances existed in this circum -- in this occurrence.

Q My question was you believe that if you think there's exigent circumstances, you have the power to remove people from their residence?

A Yes, I do.

Q And have you done that before, or is this the first time?

A I've done it before.

Q And I assume you will continue to do it?

A If circumstances dictate.

Q If the circumstances were like they are here?

A I'm sorry?

Q If the circumstances are the same as this case, you would act the same --

A I would -- sorry, yes, I would do it again.

[Emphasis added.]

[19] Corporal Daines testified that following the appellant's arrest, he took up a position outside the appellant's residence at approximately 10:35 p.m. He remained there for approximately eight minutes waiting for other police officers to arrive. He then approached the door of the

residence in the company of three other officers and knocked. Corporal Daines testified that, "then the lights came on, and Mrs. Pawar came to the door." While the judge made no specific finding on the issue, I infer from Cpl. Daines' evidence that the house was in darkness and that no observable movement was occurring inside at the time of the warrantless entry.

- [20] Corporal Daines advised the appellant's mother of her son's arrest and said the police were seeking to obtain a warrant to search the premises. The appellant's mother was told she would have to leave her residence until after the warrant had been obtained and executed. Corporal Daines acknowledged that, at the time of the warrantless entry, he had no idea how long it would take to apply for and obtain a search warrant. The appellant's mother told Cpl. Daines that the only other occupant of the house was the appellant's brother, who was asleep upstairs. Corporal Daines went upstairs, roused the appellant's brother, and waited for him to get dressed and leave the house with his mother.
- [21] Corporal Daines testified that the residence was cleared and secured in approximately eight minutes. To his knowledge, nothing was opened or examined during the warrantless entry. Corporal Chapman, the only other officer involved in the initial warrantless search who was called by the Crown on the voir dire, testified to the same effect. The judge found that the only purpose of entering the residence was to look for occupants and remove them. Once this was accomplished, the officers immediately left the residence and waited outside until the search warrant arrived. She found that the warrantless entry did not involve a search for evidence.
- [22] The officers did not re-enter the house again until they executed the search warrant at 3:43 a.m. on October 14, 2016. The appellant's mother and brother were permitted to re-enter their home at 6:28 a.m., about eight hours after their removal.

III. THE SECTION 8 AND 24(2) RULINGS

1. The Absence of Exigent Circumstances

- [23] In oral reasons for judgment indexed as 2019 BCSC 343, the judge noted that the burden was on the Crown to establish on a balance of probabilities that Cpl. Daines subjectively believed that exigent circumstances existed and that there was an objective basis for his belief.
- [24] The trial judge cited *R. v. Paterson*, 2017 SCC 15, in which Justice Brown, writing for the majority of the Court, noted that:
- [37] [I]n order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

- [25] The trial judge was not persuaded there was an objective basis for Cpl. Daines' subjective belief that exigent circumstances existed. Her conclusion on this issue was expressed in these terms:
- [72] While the grounds existed for a search warrant when Corporal Daines and other officers entered [the appellant's residence], in my view the evidence falls short of establishing that exigent circumstances were present that rendered it impracticable to obtain a warrant before they entered. Although Corporal Daines' evidence was that he held the subjective belief that exigent circumstances existed, I cannot find that his subjective belief was objectively sustainable.
- [73] When Corporal Daines decided to make a warrantless entry into [the appellant's residence], he had nothing more than a general concern that evidence inside the residence might be moved or destroyed if, by some means, the occupants learned that Mr. Pawar had been arrested. There was no indication that anyone associated with Mr. Pawar had witnessed the arrest and police had seized his cellphone on arrest.
- [74] Corporal Daines admitted under cross-examination that there was no evidence that any members of Mr. Pawar's family were aware of his activities. In my view, Corporal Daines' subjective belief that evidence might be moved or destroyed prior to receipt of the search warrant was more in the nature of speculation, and such speculation, in my view, cannot be used as rationale for circumventing the requirement of judicial preauthorization to enter a private dwelling house.
- [75] I find that there were no exigent circumstances amounting to lawful justification for a warrantless search of the dwelling house in question. Thus, the Crown has failed to discharge the burden of establishing that the search was authorized by law. The warrantless search of Mr. Pawar's residence infringed his s. 8 Charter rights.

[Emphasis added.]

- [26] Having found there were no exigent circumstances to justify the conduct of the police, the judge concluded that the warrantless entry of the dwelling-house infringed the appellant's rights under s. 8 of the Charter.

2. The Section 24(2) Analysis

- [27] The judge proceeded to conduct a Grant analysis to determine if the evidence obtained from the warranted search, but in violation of the appellant's s. 8 Charter rights, should be admitted. This framework requires an inquiry into the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and society's interest in the adjudication of the case on its merits: Grant at para. 71.
- (a) The seriousness of the Charter-infringing state conduct

- [28] The trial judge characterized the warrantless entry into the appellant's home as "a serious breach of his privacy interest." She noted that the breach was committed in relation to a private dwelling-house which has long been recognized in law as a personal sanctuary where the right to be left alone attracts the highest degree of privacy protection.
- [29] However, the trial judge found there were "extenuating circumstances" in that the officers entered the residence for "a very limited purpose of clearing the premises of any occupants and preserving potential evidence until the officers returned with the search warrant." She concluded that the officers did not search for evidence during the warrantless entry and left immediately after the residence was secured.
- [30] In this respect, the judge likened the case at bar to this Court's judgment in *R. v. Crocker*, 2009 BCCA 388, leave to appeal ref'd [2009] S.C.C.A. No. 466. In *Crocker*, as in this case, there were no exigent circumstances justifying the warrantless entry of a private dwelling-house but the seriousness of the breach was found to be attenuated by the fact that the initial warrantless search was conducted solely for the purpose of clearing the residence--it similarly did not include a search for evidence. In *Crocker*, the impact of the breach on the accused's Charter-protected interests was also found to be serious but attenuated by the relatively non-intrusive and brief nature of the initial warrantless search. This Court concluded that the admission of real evidence obtained from a subsequent warranted search would not bring the administration of justice into disrepute.
- [31] In the case at bar, the judge also held that Cpl. Daines "acted in good faith" in relying on the doctrine of exigent circumstances. On this point, she said:
- [81] Although I found that exigent circumstances did not exist objectively, I am satisfied that Corporal Daines had a subjective belief that they did and that he honestly believed that he was acting lawfully in directing officers to enter the residence. In doing so, he acted in good faith.
- [Emphasis added.]
- [32] While still addressing the seriousness of the breach, the judge made this further comment about the conduct of the police:
- [83] They were aware that Mr. Pawar's mother and brother were in the residence, giving rise to a reasonable concern that evidence might be moved or destroyed.
- [Emphasis added.]
- [33] Noting that the police could have taken steps to confine the appellant's mother and brother to certain areas of the house, as was done in *Silveira*, she wrote:
- [84] [I]n my view it was not unreasonable for officers to take steps to remove Mr. Pawar's mother and brother from the residence in order to limit the officers' intrusion into the residence pending receipt of the search warrant.

[Emphasis added.]

(b) The impact of the breach on the appellant's Charter-protected interests

[34] The trial judge found that the impact of the breach on the appellant's Charter-protected interests "was serious." However, she found the impact to be "attenuated somewhat by the relative brevity of the warrantless entry and the relatively non-intrusive nature of the search of the premises."

(c) Society's interest in the adjudication of the case on its merits

[35] The trial judge noted that the evidence obtained pursuant to the search warrant was reliable. She also noted that the evidence was essential to the prosecution. She found that this factor weighed heavily in favour of the admission of the evidence.

(d) Conclusion

[36] Balancing these factors, the trial judge concluded that admission of the evidence would not bring the administration of justice into disrepute.

[37] The evidence adduced on the Charter voir dire was, with the agreement of counsel, admitted on the trial proper. It was effectively conceded that this evidence proved the essential elements of each of the offences charged. In the result, the judge convicted the appellant of four counts of unlawfully possessing a controlled substance (cocaine, MDMA, marihuana in an amount exceeding three kilograms, and psilocybin) for the purpose of trafficking.

IV. GROUNDS OF APPEAL

[38] The appellant challenges his convictions on the ground that the trial judge erred in her s. 24(2) analysis and in her decision to admit the evidence.

[39] The appellant's argument has a number of discrete components, including that the judge erred in law by:

1. failing to consider whether the first and second of the Grant factors favoured exclusion of the evidence;
2. failing to consider whether admission of the evidence would negatively impact the overall reputation of the justice system, viewed in the long term;
3. failing to consider "all the circumstances" as mandated under s. 24(2), including the appellant's contention that the police "wrongfully arrested" the female person who was in his company in the bank parking lot, exhibited carelessness in the preparation of the information to obtain the search warrant, and would continue in the future to engage in warrantless entries of private dwelling-houses in like circumstances;
4. concluding that the warrantless entry did not include a search for evidence in the absence of the evidence of two officers who participated in this initial search; and

5. concluding that Cpl. Daines' subjective and honest belief in the existence of exigent circumstances justified a finding that he was "act[ing] in good faith"--a finding relied on by the judge in her assessment of the seriousness of the Charter breach.
- [40] The appellant does not challenge the lawfulness of his arrest or the validity of the search warrant. He does, however, submit that the affiant's carelessness in preparing the information to obtain the search warrant should have been considered as a circumstance relevant to the application of s. 24(2).
- [41] For its part, the Crown does not challenge the judge's conclusion that Cpl. Daines' subjective belief in the existence of exigent circumstances was not objectively supported. Further, the Crown does not challenge the judge's conclusions that the breach was serious and that it had a serious impact on the appellant's Charter-protected interests. Finally, the Crown does not suggest in this case that a remedy under s. 24(1), short of excluding the evidence, should be considered.

V. ANALYSIS

1. Standard of Review

- [42] The standard of review to be applied to a determination under s. 24(2) that the admission or exclusion of unconstitutionally obtained evidence would bring the administration of justice into disrepute is well-settled. Where the proper factors have been considered and where no unreasonable findings have been made, the conclusion of a trial judge is owed considerable deference on appeal: Grant at para. 86; R. v. Beaulieu, 2010 SCC 7 at para. 5; R. v. Côté, 2011 SCC 46 at para. 44; R. v. Mian, 2014 SCC 54 at para. 88. In addition, the factual findings of the judge on which the determination is based must be respected absent palpable and overriding error: Grant at para. 129; Beaulieu at para. 5.

2. Summary Determination of Grounds of Appeal 1-4

- [43] As I see no merit in most of the appellant's particularized complaints about the judge's approach to the s. 24(2) inquiry, I find it convenient to deal with the bulk of these grounds together and in relatively brief compass.
- [44] The judge conducted an assessment of both the seriousness of the breach and the impact of the breach on the Charter-protected interests of the appellant. While she did not explicitly say that these two factors favoured exclusion of the evidence, she was not required to state the obvious to appease a reviewing court. It is apparent from her reasons as a whole, as it would be to anyone remotely familiar with the Grant framework and its application in subsequent cases, that a serious breach that has a serious impact on the rights of a Charter-claimant pulls the analysis towards exclusion of the evidence.
- [45] Similarly, I see no merit in the appellant's contention that the judge erred by failing to consider whether admission of the evidence would negatively impact the overall repute of the justice system, viewed in the long term. The judge began her analysis by noting that s.

24(2) mandates an assessment of the impact the admission of unconstitutionally obtained evidence would have on society's confidence in the justice system. In my view, the judge must be taken in this passage to have had her eye on whether admission of the evidence would tend to undermine the long-term repute of the administration of justice.

- [46] The appellant alleges that the judge failed to consider as part of the circumstances informing the s. 24(2) inquiry the unconstitutional manner in which the police dealt with the female person who was in the appellant's company when the arrests were made. This person was also arrested for possessing a controlled substance for the purpose of trafficking. The appellant asserts there was no evidence justifying her arrest on this charge and nothing to justify the four hours she appears to have spent in police custody following that arrest. Relying on this Court's judgments in cases like *R. v. Lauriente*, 2010 BCCA 72 at para. 27; *R. v. Fan*, 2017 BCCA 99 at paras. 72, 78; and *R. v. Robertson*, 2019 BCCA 116 at paras. 7, 52, 60-61, the appellant submits that the judge failed to consider the police conduct in relation to the female arrestee, whether that conduct formed part of a pattern of disregard for constitutional rights and, if it did, whether the court should have excluded the evidence against him in order to maintain the good repute of the administration of justice.
- [47] I see no merit in this ground of appeal. It would appear that the appellant's counsel gave no notice that this issue would be a live one on the voir dire and the particulars of the female person's arrest and subsequent detention were not developed in the evidence. While the arresting officer testified that both the appellant and the female person were arrested in the bank parking lot for possession for the purpose of trafficking, he had very little contact with the female person thereafter. Another officer, who was not called to give evidence on the voir dire, dealt with her from the time of her arrest until her release from custody. A booking sheet put to the arresting officer in cross-examination suggested that the female person was subsequently re-arrested for simple possession. No evidence was led on the voir dire about her background or why she was held in the post-arrest detention for four hours. The onus was on the appellant to lay an evidentiary foundation sufficient to ground the conclusion that the conduct of the police as a whole evinced a pattern of disregard for constitutional rights. He failed to do so. In my view, there is no basis upon which the judge could have concluded on the record before her that the police breached the female person's constitutional rights and were thereby engaged in a pattern of abusive behaviour. In these circumstances, the judge committed no error in principle by failing to treat this as a circumstance favouring exclusion of the evidence.
- [48] I would also not give effect to the appellant's submission that factual errors made by the officer who prepared the information to obtain in support of the search warrant--errors the judge attributed to inadvertence rather than a deliberate lack of candour or an attempt to mislead--should have been considered by the judge as part of her s. 24(2) analysis. These relatively minor errors were remedied by the judge as part of the s. 8 inquiry into the validity of the search warrant. The warrant was upheld. The judge was not obliged to consider this as a circumstance informing resolution of the s. 24(2) analysis.

- [49] I will address the appellant's contention that the judge erred by failing to consider how Cpl. Daines' evidence that he would authorize a warrantless entry into a private dwelling-house in like circumstances in the future ought to have been factored into the s. 24(2) analysis later in these reasons.
- [50] Finally, it was open to the judge on the evidence of Cpl. Daines and Cpl. Chapman to make a factual finding that the warrantless entry did not include a search for evidence. I see no error in the judge's approach to this issue and the appellant cited no authority in support of the proposition he advanced on appeal that the judge's finding rests on an insufficient factual foundation. In my view, the finding was supported by the evidence led on this issue--evidence that was not contradicted by the appellant. I see no basis upon which this Court could properly interfere.
3. Errors in the Judge's Assessment of the Seriousness of the Breach
- (a) The "good faith" finding
- [51] The appellant says it was not open to the judge to find that Cpl. Daines acted "in good faith" because he subjectively and honestly believed exigent circumstances authorized the warrantless entry in circumstances where she found no objective basis for that belief. The Crown concedes this point, noting that the judge equated good faith with the honesty of Cpl. Daines' subjective belief in exigent circumstances when more was required--specifically, that his subjective belief be objectively reasonable. The Crown argues, however, that the error was not material to the judge's assessment of the seriousness of the breach or her ultimate conclusion that the evidence should be admitted under s. 24(2).
- [52] I agree that the judge erred in principle by finding that Cpl. Daines acted in good faith when he authorized the warrantless entry of the appellant's residence. Having concluded that Cpl. Daines' reliance on exigent circumstances to justify the warrantless entry was not objectively reasonable, it was not open to the judge to then rely on the officer's "good faith" as an extenuating circumstance that mitigated the seriousness of the breach.
- [53] A finding of "good faith"--a term of art when used in this context--requires that an officer's belief in the lawfulness of their conduct must be both honestly and reasonably held. In Paterson, Brown J. succinctly summarized the law in this area in the following passage:
- [44] While "[g]ood faith' on the part of the police will . . . reduce the need for the court to disassociate itself from the police conduct" (Grant 2009, at para. 75), good faith errors must be reasonable (R. v. Buhay, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59). This Court has cautioned that negligence in meeting Charter standards cannot be equated to good faith (Grant 2009, at para. 75). Even where the Charter infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct (R. v. Harrison, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 24-25).

[*Italic emphasis in original; underline emphasis added.*]

[54] A similar point was made in *Fan*, where Justice Dickson explained that a finding of good faith cannot be sourced in negligent police conduct:

[70] Where the police act in good faith, it may attenuate the seriousness of a Charter breach and reduce the court's need to disassociate itself from the conduct. However, ignorance of Charter standards will not be rewarded or encouraged, and good faith will not be found where police conduct is negligent or wilfully blind. For example, while police are not expected to have an immediate understanding of judicial decisions affecting their powers, they do not act in good faith when they know or should know that their actions are unlawful. Deliberate conduct in knowing violation of established Charter standards amounts to bad faith and tends to support exclusion: *Grant* at para. 75; *Caron* [2011 BCCA 56] at para. 41.

[71] "Good faith" and "bad faith" are terms of art which connote mental states at the opposite poles of a spectrum. As Frankel J.A. stated in *Caron*, a finding that a police officer acted in good or bad faith is not a factual finding per se but, rather, a legal characterization of the facts: para. 33. Importantly, the absence of bad faith does not equate to good faith, nor does the absence of good faith equate to bad faith: *Caron* at para. 38. In *R. v. Smith*, 2005 BCCA 334, Ryan J.A. explained:

[61] ... good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong.

[*Emphasis added.*]

[55] In the result, for state misconduct to be characterized as a "good faith" error indicative of a less serious infringement of Charter rights, the state must show that the police "conducted themselves in [a] manner consistent with what they subjectively, reasonably, and non-negligently believe[d] to be the law": *R. v. Le*, 2019 SCC 34 at para. 147, citing *R. v. Washington*, 2007 BCCA 540 at para. 78. In my view, the judge's factual finding that Cpl. Daines' subjective belief in exigent circumstances was not reasonably held precluded a finding by her that he was acting in good faith.

[56] I am unable to agree with the Crown that this error in principle did not taint the judge's s. 24(2) analysis. I can only read the judge's reasons as including among the "extenuating circumstances" that mitigated the seriousness of the breach, her conclusion that Cpl. Daines acted in good faith. The case at bar is, in this respect, distinguishable from *Fan*, where this Court (at para. 81) concluded that a similarly improper characterization of police conduct as having been undertaken in good faith was not used by the judge to attenuate the seriousness of the breach. It follows that the judge's assessment of the first Grant factor was tainted by this error in principle.

(b) Inconsistent findings on matters pertaining to the seriousness of the breach

[57] In addition, I am troubled and perplexed by the judge's conclusion that awareness on the part of the police that other members of the appellant's family were in the residence after the arrest had been made gave rise "to a reasonable concern that evidence might be moved or destroyed." This finding cannot stand with the judge's conclusion that Cpl. Daines' subjective belief in the existence of exigent circumstances was not objectively reasonable.

[58] In my view, it was unreasonable for the judge to conclude in the context of her s. 24(2) analysis that police concerns about the destruction of evidence were reasonable when the s. 8 breach was premised on the absence of reasonable grounds to believe that exigent circumstances justified the warrantless entry of the appellant's residence. Despite the internal inconsistency in her s. 24(2) ruling, I am driven to the conclusion that the judge highlighted this finding because she somehow regarded it as being part of the extenuating circumstances that served to lessen the seriousness of the breach.

(c) The need for a fresh s. 24(2) analysis

[59] In my respectful view, the judge's s. 24(2) analysis reflects both error in principle and an unreasonable factual finding on issues material to the judge's evaluation of the seriousness of the breach and where the police conduct underlying the breach should be placed on the "fault line."

[60] In these circumstances, I am unable to defer to the judge's s. 24(2) determination. A fresh analysis is necessary: *R. v. Cole*, 2012 SCC 53 at para. 82. In undertaking this analysis, I am required to defer to the judge's factual findings that are untainted by these errors: *R. v. Vu*, 2013 SCC 60 at para. 67; *R. v. Pipping*, 2020 BCCA 104 at para. 66, leave to appeal requested [2020] S.C.C.A. No. 179.

4. Application of the Grant Factors to the Case at Bar

(a) The seriousness of the breach

[61] An assessment of the seriousness of the Charter-infringing state conduct requires that I situate the conduct of the police along a scale of culpability that ranges from inadvertent or minor infringements, to negligent conduct that gives rise to more serious infringements, to conduct that reflects a wilful or reckless disregard of Charter rights: *R. v. Harrison*, 2009 SCC 34 at para. 23, where Chief Justice McLachlin, writing for the majority, cited with approval Justice Doherty's reasons in *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 at para. 41 (Ont. C.A.); Paterson at para. 43. Admitting evidence obtained through inadvertent constitutional violations may minimally undermine public confidence in the rule of law. On the other hand, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on public confidence in the rule of law and will risk bringing the administration of justice into disrepute: *Grant* at para. 74.

- [62] That individuals have a strong expectation of privacy in their homes is a fundamental principle of s. 8 jurisprudence. In *Silveira*, Justice Cory, writing for the majority of the Court, observed that "[i]t is hard to imagine a more serious infringement of an individual's right to privacy": at para. 148. He emphasized that "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'": at para. 140. Justice La Forest (in dissent, but not on this point) echoed this principle, writing that security of the home from state intrusion is "a bulwark for the protection of the individual against the state" which "affords the individual a measure of privacy and tranquillity against the overwhelming power of the state": at para. 41. And, as Brown J. noted in *Paterson*:
- [46] The presumptive unreasonableness of warrantless searches, and the high privacy interest attaching to a person's residence have long been fundamental to our understanding of the proper relationship between citizen and state.
- [63] Corporal Daines justified the warrantless entry on the ground that the circumstances necessitated immediate action to preserve evidence pending judicial authorization to search the residence. Exigent circumstances arise where there is an imminent danger of the loss, removal, destruction or disappearance of evidence if a search or seizure is delayed: *Paterson* at para. 32; *R. v. Grant*, [1993] 3 S.C.R. 223 at 243 [*Grant* 1993]; *R. v. Feeney*, [1997] 2 S.C.R. 13 at para. 153 (per L'Heureux-Dubé J., in dissent); *Silveira* at para. 51 (per La Forest J., in dissent). The information available to the police must demonstrate an urgency calling for immediate action to preserve evidence: *Paterson* at para. 37. Exigent circumstances must make it impracticable to obtain a warrant: *Paterson* at paras. 34, 36-37.
- [64] The judge concluded that Cpl. Daines' subjective belief there was an imminent risk of evidence being lost unless the warrantless entry was undertaken was not objectively reasonable. She found that Cpl. Daines had "nothing more than a general concern" about the potential for evidence to be lost that was rooted in little more than "speculation."
- [65] I can identify no evidence specific to this case capable of supporting an objectively reasonable belief that exigent circumstances required the warrantless entry of the appellant's private dwelling-house. There was no evidence that anyone witnessed the arrests. There was no evidence that the appellant was being assisted by anyone else in running the drug line. There was no evidence that the appellant's mother or brother were aware of his drug-dealing activities. There was no evidence that the appellant had the ability to contact any family member following his arrest. His cellphone had been seized and the appellant was, throughout the relevant period of time, in the custody and control of the police. The female person suspected of purchasing drugs from the appellant in the bank parking lot was also in police custody. There was no evidence of any movement within the appellant's home after the arrest. There was no evidence that anyone attempted to enter the appellant's residence after the appellant's arrest. Indeed, the residence appears to have been in total darkness before the warrantless entry occurred.

- [66] Theoretically speaking, there will always be a risk when the police make a public arrest in a case of this kind that drugs being kept by the arrestee at a "stash house" may be moved or destroyed. There is nothing about this case that raised this risk from the general to the particular. If exigent circumstances existed in this case, they would exist in every case of this kind and warrantless entries into private dwelling-houses to preserve the scene would become the rule, not the exception.
- [67] I accept that uncertainty in the law can attenuate the seriousness of a Charter breach, including an unjustified warrantless entry of a residence: see *R. v. Clarke*, 2017 BCCA 453 at para. 74, leave to appeal ref'd [2018] S.C.C.A. No. 65. I also accept that judges should take care in conducting a s. 24(2) analysis not to overstate clarity in the law or lose sight of the fact that conceptual certainty on a point of law will not always give rise to certainty in the application of the law in the complex and time-sensitive dynamic in which the law enforcement community operates: see the discussion of Justice Brown, dissenting in *R. v. Omar*, 2018 ONCA 975 at paras. 74-97, 102 [Omar CA], on the lack of certainty in the application of s. 9 Charter jurisprudence in the context of community policing interactions. A further appeal by the Crown to the Supreme Court of Canada was allowed, substantially for the reasons of Brown J.A.: 2019 SCC 32.
- [68] With this cautionary note in mind, I nevertheless conclude that in authorizing the warrantless entry, Cpl. Daines was not operating in unknown legal territory. As Brown J. observed in *Paterson* at para. 46, the legal principles governing the authority of the police to enter a residence without a warrant are "well-established." There is a long line of judgments from the Supreme Court of Canada considering the circumstances in which exigent circumstances may justify the warrantless entry of a private dwelling-house. To justify such an entry, the Crown must show some case-specific urgency in the pursuit of an investigative imperative--in this case the preservation of evidence--and a serious risk that waiting for a warrant would frustrate achievement of that imperative: see *Grant* 1993; *Silveira*; *Feeney*.
- [69] Indeed, the jurisprudence of this and other appellate courts provides considerable guidance on the kind of information that may give rise to exigent circumstances justifying the warrantless entry of a private dwelling-house to preserve evidence.
- [70] In *R. v. McCormack*, 2000 BCCA 57, leave to appeal ref'd [2000] S.C.C.A. No. 111, there was evidence that the arrest had been witnessed by the appellant's girlfriend--a person known to be supportive of his involvement in the drug trade and in possession of a key to his apartment. A woman believed to be the girlfriend was seen leaving the scene of the appellant's arrest and heading in the direction of his apartment building. In addition, the appellant was known to have associates in the drug trade: at paras. 4, 25. In *R. v. Webster*, 2015 BCCA 286, leave to appeal ref'd [2015] S.C.C.A. No. 376, there was evidence that the appellant was only expected to be gone for a short period of time, and the long absence caused by his arrest would raise suspicions: at para. 89. In *R. v. Hunter*, 2015 BCCA 428, there was evidence that the house in question was used by members of a criminal organization, giving rise to a reasonable concern that the appellant's confederates might

learn of the public arrest and take steps to destroy evidence: at para. 21. In *R. v. Phoummasak*, 2016 ONCA 46, the arrest occurred in plain view of the apartment building in question and the arrestee received repeated phone calls immediately following his arrest from an individual believed to be his supplier: at paras. 19-20. In *Silveira*, the trial judge found that the public arrest of several accused jointly engaged in drug trafficking in close proximity to the residence they were suspected of using as a stash house gave rise to a serious risk that others would become aware of the arrest and take steps to remove evidence: per Cory J. at paras. 150-151, 166. In this case, the appellant was arrested several kilometres from his home and there was no evidence that anyone other than the appellant was involved in the drug line.

[71] These cases also demonstrate that the risk evidence might be moved or destroyed must be grounded in the evidence. Vague and speculative concerns regarding the destruction of evidence do not rise to the required level. The point was emphasized in *Crocker* which was decided seven years before the warrantless entry in the case at bar. In *Crocker*, Justice D. Smith, writing for the Court, stressed the point that:

[94] [A] vague and speculative basis for a warrantless entry by the police into a private residence cannot be lawful. While Cst. Johnson may have subjectively believed in the potential loss of evidence from the penthouse there was no objective basis for that belief. The officer's concerns could not be said to have risen to the level of "imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed" or to a situation where "immediate action is required ... to secure and protect evidence of a crime".

[Emphasis added.]

[72] As was the case in *Crocker*, the concern here was general, speculative, and vague. There was nothing specific to this investigation to objectively support Cpl. Daines' subjective belief that delay would give rise to a serious risk evidence would be lost.

[73] The requirement that exigent circumstances be objectively grounded in the circumstances of the case is designed to achieve a proper balance between the maintenance of individual privacy, particularly in private dwelling-houses, and the legitimate interest of the community in ensuring that the police have sufficient tools to enforce laws designed to address the devastating individual and social consequences of trafficking in harmful and addictive drugs: see on this point, the observations of Cory J. in *Silveira* at paras. 141-142, 161.

[74] With respect, I do not see this case as being close to the line. In my view, this is a case, like *Paterson*, where the circumstances "did not remotely approach s. 11(7)'s threshold of exigency": at para. 39. Further, on the state of law that existed at the time of the warrantless entry, the police ought to have known they could not rely on vague and speculative concerns about the preservation of evidence to enter a private dwelling-house without a warrant. They ought to have known that the investigative information available to them did not justify

the warrantless entry of residential premises.

[75] The seriousness of the breach was, as the judge found, attenuated to some extent by the brevity of the warrantless entry. I do not regard the fact that the warrantless entry did not involve a search for evidence as mitigating per se. While I accept that it is a circumstance relevant to the calibration of the seriousness of the breach, it is more properly characterized as the absence of an aggravating circumstance. Had the police purported to use the exigent circumstances doctrine to search for evidence in the absence of a warrant, their conduct would have reflected a flagrant disregard for Charter rights--a factor that would almost certainly have led to the exclusion of the evidence.

[76] The unjustified intrusion into the appellant's home also had a serious impact on the appellant's mother and brother who were removed from their home late in the evening and not permitted to return until the following morning. While the point was not argued by counsel on appeal, except in response to a question from the bench during oral argument, I am inclined to the view that this aggravates the seriousness of the breach and is properly considered at the first stage of the Grant inquiry.

[77] The view was forcefully expressed by La Forest J. (dissenting in the result) in *Silveira*. In that case, a majority of the Ontario Court of Appeal seemed to accept the proposition that the impact of an unlawful warrantless entry of a private dwelling-house on innocent third-party occupants was not relevant to an assessment of the seriousness of the breach: see (1994), 16 O.R. (3d) 786 at 801-802 (C.A.). Justice La Forest disagreed. In his view, one measure of the seriousness of the breach is the seriousness of the consequences that flow from it:

47 Nor do I agree with the majority's view that the violation of the Charter rights of the appellant's family is irrelevant. It may, I suppose, be argued that, in strictness, only the appellant's privacy rights are directly raised, though I would have thought one's privacy interest extended to one's family. More generally, the broader impact of the Charter breach cannot be ignored. It is relevant to the serious consequences of the breach and points to the fact that the danger from breaches of Charter rights extends beyond the particular individual. The Charter guarantees exist for the protection of all of us.

[Emphasis added.]

[78] The issue was not addressed by the majority of the Supreme Court of Canada in *Silveira* and we were not taken to any other case in which the issue was considered. As the disposition I propose does not turn on this point and we did not have the benefit of the considered positions of counsel, I would prefer to leave further consideration of the issue to another day.

[79] I accept, of course, the judge's conclusion that Cpl. Daines honestly believed the exigent circumstances doctrine justified the warrantless entry of the appellant's residence. However, his belief was not objectively grounded in any evidence specific to this investigation. His decision to authorize the warrantless entry reflects a serious misunderstanding of a

well-established body of law. Although the breach was not committed in bad faith and did not reflect a flagrant disregard for constitutional norms, it engaged the appellant's elevated expectation of privacy in his home and, in my view, is properly placed towards the more serious end of the culpability spectrum.

[80] In short, I conclude that the breach in this case was very serious and that this factor pulls strongly in favour of the exclusion of the evidence.

(b) The impact of the breach on the appellant's Charter-protected interests

[81] Application of the second Grant factor calls for an evaluation of the impact of the breach on the Charter-protected interests of the accused. As the majority noted in Grant:

[76] The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[113] The jurisprudence offers guidance in evaluating the extent to which the accused's reasonable expectation of privacy was infringed. For example, a dwelling house attracts a higher expectation of privacy than a place of business or an automobile. An illegal search of a house will therefore be seen as more serious at this stage of the analysis.

[Emphasis added.]

[82] It is sufficient for the purposes of this appeal to simply note that the greater the expectation of privacy, the more intrusive the unauthorized search will have been: *Côté* at para. 73.

[83] In the case at bar, the judge found that the breach had a serious impact on the appellant's Charter-protected privacy interest in his home, "attenuated somewhat by the relative brevity of the warrantless entry and the relatively non-intrusive nature of the search." The Crown does not dispute this finding on appeal. I have come to the same conclusion.

[84] The judge did not address the doctrine of discoverability in her application of the second Grant factor. On appeal, the Crown calls upon the doctrine in aid of its submission that as the police had grounds to obtain a search warrant following the appellant's arrest, the inevitable discovery of the drugs in his residence serves to diminish the impact of the initial warrantless search. In oral argument, the Crown characterized the inevitable discovery of the drugs as a relevant but non-determinative factor in the s. 24(2) analysis.

[85] Discoverability may be a relevant factor under the first and second branches of the Grant test. In the case at bar, the Crown relies on the fact that the evidence would inevitably have been discovered as a circumstance relevant to the second Grant factor.

[86] As Justice Cromwell (for the majority of the Court) explained in *Côté*:

- [72] [T]he fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search will tend to lessen the impact of the illegal search on the accused's privacy and dignity interests protected by the Charter.
- [87] At the same time, Cromwell J. was careful in *Côté* to note that a finding of discoverability should not invariably lead to the admission of unconstitutionally obtained evidence: at para. 70. Giving the discoverability doctrine a long leash in cases of this kind risks judicial condonation of serious privacy breaches resulting from unacceptable conduct by investigatory agencies: see *Le* at para. 158, quoting from *R. v. Collins*, [1987] 1 S.C.R. 265 at 281. If no remedy is available for unjustified warrantless entries of private dwelling-houses in cases where grounds to obtain a warrant existed at the time of the unlawful entry, there will be little incentive for the police to adopt Charter-compliant behaviour. More importantly, the administration of justice may fall into disrepute in the long term if remedies are not granted for the violation of well-established constitutional precepts.
- [88] While I agree that discoverability is a relevant and available analytical tool in assessing the second prong of the Grant test, I would not accord it significant weight in the circumstances of this case. In any event, the Crown does not challenge the judge's conclusion that the initial warrantless search had a serious impact on the appellant's Charter-protected interests.
- [89] I conclude, therefore, that both the first and second Grant factors pull the analysis strongly towards exclusion of the evidence.
- (c) Society's interest in the adjudication of the case on its merits
- [90] An analysis of this factor requires an inquiry into whether the truth-seeking function of the criminal trial process would be better served by the admission or exclusion of the evidence obtained in connection to the breach: *Grant* at para. 79.
- [91] I agree with the trial judge that the highly reliable evidence obtained here--evidence that was essential to the prosecution of these serious offences--weighs heavily in favour of admitting the evidence.
5. Conclusion
- [92] Section 24(2) provides that where evidence was obtained in a manner that infringed a Charter right, that evidence shall be excluded if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. The factors set out in *Grant* are applied in answering that inquiry.

- [93] 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": Grant at para. 68. The focus of the inquiry is not directed to the impact of state misconduct upon the criminal trial, but upon the administration of justice: Le at paras. 139-40.
- [94] Where both the breach and its impact are serious, and the violation is inexplicable in the sense that it occurs against the background of well-established constitutional rules prohibiting the impugned conduct, courts may more readily conclude that it is necessary to disassociate the administration of justice from the conduct to preserve the reputation of the justice system. In such a case, exclusion of the evidence also serves to reinforce the point that courts take violations of individual rights and freedoms seriously: Le at para. 140.
- [95] To be sure, judges are reluctant to exclude reliable evidence in serious cases where doing so effectively "guts" the Crown's case. But this unpalatable result may be required to distance the administration of justice from unconstitutional conduct. That is particularly so where, as here, there is a risk that the unconstitutional conduct will be repeated in future cases where concerns about the potential loss of evidence are general, not based in a case-specific assessment of the urgency of the situation, and extrapolated from the experience of the police in past cases about which nothing is known. That risk is apparent from the evidence adduced on the voir dire and from the failure of the police in this case to incorporate into their investigative practices the law in this area as set out in Crocker.
- [96] As the Supreme Court of Canada emphasized in Paterson, it is important not to allow the third Grant factor--which will typically pull towards inclusion of the evidence--to trump all other considerations, particularly where the impugned conduct is serious and has a substantial impact on an individual's Charter-protected interests: at para. 56.
- [97] It is also important to note that s. 24(2) jurisprudence has developed significantly in the decade since Crocker was decided. The interplay between the Grant factors has received more probing judicial consideration. In *R. v. McGuffie*, 2016 ONCA 365 at para. 63, Doherty J.A., writing for a unanimous court, expressed the view that if the first and second Grant factors make a strong case for exclusion, the third inquiry will rarely tip the balance in favour of admissibility. The proposition was endorsed in Paterson at para. 56 and, more recently, in Le:
- [142] The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction -- that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34), we emphasize that the third line of inquiry cannot turn into a rubber stamp where all evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the

first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility (Paterson, at para. 56). Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.

[*Italic emphasis in original; underline emphasis added.*]

[98] Weighing the relevant factors in the context of an inquiry under s. 24(2) is not an exercise that involves mathematical precision: Grant at para. 86. I do not understand the Court in Le to suggest otherwise. Section 24(2) requires a nuanced, case-specific assessment of whether the admission of unconstitutionally obtained evidence would bring the administration of justice into disrepute. I agree with the view expressed by Brown J.A. in Omar CA that McGuffie did not purport to establish an inflexible "two-strikes-and-the-evidence-is-out" rule: at paras. 119, 121. Nevertheless, the predictive observation endorsed by the Supreme Court of Canada in Paterson and in Le is useful if regarded as a general analytical tool or rule of thumb.

[99] Having weighed the Grant factors, I conclude that the admission of the evidence, rather than its exclusion, would bring the administration of justice into disrepute. The violation reflects a serious breach of established constitutional principles. It resulted in the unjustified warrantless entry of the appellant's private dwelling-house and, as a result, undermined a privacy interest that attracts the highest degree of Charter protection. There is a concern, rooted in Cpl. Daines' approach, that indiscriminate use of the exigent circumstances doctrine will give rise to unconstitutional privacy breaches in like cases in the future. To admit the evidence would, in my respectful view, be using s. 24(2) to excuse conduct which has in the past been found to be unlawful: see Crocker, and the remarks of Cory J. in Silveira at para. 162. In my view, this is a case where it is necessary for the Court to disassociate itself from the breach to preserve the reputation of the administration of justice in the long term.

VI. DISPOSITION

[100] I would allow the appeal and quash the convictions. For the foregoing reasons, I have determined that the evidence obtained during the warranted search of the appellant's home should have been excluded. Following this determination, the Crown concedes there is no evidence that could support a conviction on any of the counts. Accordingly, I would direct that acquittals be entered on all four counts.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0251.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-pawar-2020>

Prepared on 25 October 2026 · Esheria