

CANADA / JUDGMENT

## R. v. Pipping

2020 BCCA 104

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 104 R. v. Pipping

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pipping,

2020 BCCA 104

Date: 20200407

Docket: CA45478; CA45479

Docket: CA45478

Between:

Regina

Respondent

And

Scott Theodor Pipping

Appellant

- and -

Docket: CA45479

Between:

Regina

Respondent

And

Adam Ross Summers

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Garson

## **The Honourable Mr. Justice Butler**

On appeal from: An order of the Provincial Court of British Columbia, dated May 11, 2018 (R. v. Pipping and Summers, Surrey Docket 213677-3-C).

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Place and Date of Hearing:

Vancouver, British Columbia

October 17-18, 2019

Place and Date of Judgment:

Vancouver, British Columbia

April 7, 2020

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Butler

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### Summary:

The appellants challenge their convictions for drug- and firearms-related offences on the grounds that (1) a general warrant used by the police was invalid because it lacked a notice provision as required by the Criminal Code and (2) the delay between the date of the charge and the conviction violated their s. 11(b) Charter rights to trial within a reasonable time. Held: Appeals dismissed. The general warrant used by the police in this case was invalid as it authorized a covert search but lacked a provision for notice as required by the Code. Nevertheless, the evidence should not be excluded under s. 24(2) of the Charter. Further, the determination of the trial judge that the delay in this case could be attributed to the conduct of the defence is entitled to deference on appeal. There are no reversible errors in his analysis.

Reasons for Judgment of the Honourable Madam Justice Garson:

## I. Introduction

- [1] The co-appellants challenge their convictions for drug- and firearm-related offences. Scott Theodor Pipping appeals his convictions on two grounds. First, Mr. Pipping says that the general warrant pursuant to which the police entered a condominium complex in order to determine which unit was associated with Mr. Pipping was not lawfully issued because it failed to contain the requisite statutory notice provision. Second, Mr. Pipping says that the delay between the date of his charge and that of his conviction was a breach of his right to a trial within the 18 months specified in *R. v. Jordan*, 2016 SCC 27, in breach of s. 11(b) of the Charter. He asks that a stay of proceedings be entered on all counts.
- [2] The co-accused and co-appellant, Adam Ross Summers, also contends that a stay of proceedings should be entered on the basis that his s. 11(b) right to a trial within a reasonable time was violated. Mr. Summers adopts Mr. Pipping's argument concerning the general warrant, though the evidence obtained pursuant to the general warrant did not form the basis for any of Mr. Summers' convictions.
- [3] With respect to Mr. Pipping's first ground of appeal, the Crown contends that entry to the building did not require a warrant. Even if one was necessary, the Crown submits that the judge did not err in admitting the evidence derived from the general warrant, because a notice provision pursuant to s. 487.01(5.1) of the Criminal Code of Canada, R.S.C. 1985, c. C-46 was not required in this case. The Crown contends, in the alternative, that the evidence should be admitted pursuant to s. 24(2) of the Charter. As to the second ground of appeal, the Crown says that any delay in excess of the Jordan ceiling was attributable to the defence.

## II. General Warrant

## A) Background facts

- [4] In March of 2015, the Delta Police department commenced an investigation into a suspected dial-a-dope operation in the South Delta area. A number of people were eventually identified as being associated with the operation along with a particular telephone number. Police officers, posing in an undercover capacity and making use of the identified telephone number, made a number of drug purchases from some of these individuals between the months of September 2015 and March 2016.
- [5] In the course of their undercover operation, police eventually came to meet the appellant Mr. Summers, who identified himself as the manager of the dial-a-dope line. They subsequently met the appellant Mr. Pipping, who, they came to believe, was Mr. Summers' "boss". Having identified Mr. Pipping and Mr. Summers as key targets, the police set out to discover where they might be keeping their drugs and cash. To that end, the police followed the two men after a meeting between them and undercover officers. The men were seen entering a condominium complex in Burnaby (the "Burnaby Property"). The building is a four-level condominium building containing 96 units, with key access to outside entrances, open access once inside, and no video surveillance. The police wanted to identify which unit in the Burnaby Property the accused might be using. The police attempted to obtain this information voluntarily from Remax Property Management Services, the entity responsible for managing the property. Remax informed the police that in order to obtain the tenant information, they would need a production order.
- [6] On March 10, the police obtained a general warrant pursuant to s. 487.01 of the Criminal Code. It authorized a search of the common areas of the Burnaby Property, which the police believed Mr. Pipping was using in some capacity. It provided, in part, as follows:

THIS COURT ORDERS that Remax Property Management Services permit access to the common area of [the Burnaby Property] to Cst. Scott Formby, or any person acting under the direction thereof, participating in this investigation. The common areas are to include the foyer, entrance way, stairwells, hallways, elevators, access / egress point as well as the underground parking of the [Burnaby Property].

THIS COURT ORDERS that in accordance with subsection 487.02 of the Criminal Code, that Remax Property Management Services provide a key to facilitate the access to the common areas of the [Burnaby Property] to Cst. Scott Formby, or any person acting under the direction thereof, participating in this investigation.

**ASSISTANCE ORDER**

THIS COURT ORDERS that the Remax Property Management Services are hereby ordered to provide such assistance as reasonably may be required for the purpose of giving effect to this General Warrant. Specifically by providing a key to Cst. Formby, or any person acting under the direction thereof, participating in this investigation, and to permit access to the common area of the [Burnaby Property].

- [7] Pursuant to the warrant, the police entered the building in order to determine which unit Mr. Pipping was accessing. Four undercover officers entered the building and spread out over the four floors. One of these officers was able to surreptitiously observe Mr. Pipping entering unit 407 with a key. The police then used the observation of Mr. Pipping entering unit 407 as the basis to seek and obtain a search warrant for that unit.
- [8] On March 17 the police executed the search warrant for unit 407 and discovered the narcotics, cash, and firearms that formed the basis of a number of the charges laid against Mr. Pipping.
- [9] Mr. Pipping was charged and convicted of a number of counts of drug- and firearm-related charges. Specifically, he was convicted of the production of fentanyl and possession for the purpose of trafficking in fentanyl, in cocaine, in methamphetamine, and in heroin. He was also convicted of possession of a loaded restricted firearm and possession of a prohibited device, a silencer. These convictions are based on evidence obtained in the search of the Burnaby Property.
- [10] Mr. Summers was charged and convicted of trafficking in cocaine and possession for the purposes of trafficking in cocaine, in heroin, in fentanyl, in methamphetamine, and in oxycodone. These convictions are based on drug purchases by undercover officers as well as evidence obtained in the search of another property.
- [11] The co-appellants were jointly convicted of trafficking in cocaine and in heroin/fentanyl. These convictions are based on drug purchases by undercover officers.
- [12] Mr. Pipping was sentenced to a total term of 15 years' incarceration less time served. Mr. Summers was sentenced to a total term of five years' incarceration less time served.
- [13] On appeal, Mr. Pipping seeks a stay of proceedings on all counts or, in the alternative, acquittal on the counts based on the evidence obtained in the search of the Burnaby Property or, in the further alternative, a new trial on those counts. Mr. Summers seeks a stay of proceedings or a new trial.

B) Was the general warrant defective, and if so, should the evidence be excluded?

- [14] I now turn to Mr. Pipping's first ground of appeal.
- [15] Section 487.01 of the Criminal Code authorizes the use of general warrants. The provision is as follows:

487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

- (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
- (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
- (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

#### Limitation

- (2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

#### Search or seizure to be reasonable

- (3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

...

#### Notice after covert entry

(5.1) A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require, as part of the terms and conditions referred to in subsection (3), that notice of the entry and search be given within any time after the execution of the warrant that the judge considers reasonable in the circumstances.

#### Extension of period for giving notice

(5.2) Where the judge who issues a warrant under subsection (1) or any other judge having jurisdiction to issue such a warrant is, on the basis of an affidavit submitted in support of an application to vary the period within which the notice referred to in subsection (5.1) is to be given, is satisfied that the interests of justice warrant the granting of the application, the judge may grant an extension, or a subsequent extension, of the period, but no extension may exceed three years.

[Emphasis added.]

- [16] The appellants assert that the general warrant is defective because it does not include a notice provision as provided for at s. 487.01(5.1), set out above.
- [17] At trial, the judge found that Mr. Pipping had a reasonable expectation of privacy in the common areas of the Burnaby Property, and, as such, had standing to challenge the general warrant. Mr. Pipping objected to the validity of the search warrant on numerous grounds at trial, but on appeal he argues only one ground, namely, that the warrant is invalid owing to the absence of the s. 487.01(5.1) notice provision.
- [18] On this point, the trial judge considered a number of authorities on the interrelated issues of whether the search was covert and whether a notice provision was required: *R. v. Mero*, 2003 BCSC 964; *R. v. Coderre*, 2016 ONCA 276; *R. v. Hill*, [2013] O.J. No. 3176 (Ont. S.C.J.); *R. v. Welsh* (1977), 32 C.C.C. (2d) 363 (O.N.C.A.); and *R. v. Tran*, 2013 ABQB 266. The judge found that the actions of the police did constitute a covert search as contemplated by s. 487.01(5.1), and so a warrant was required. However, he held that the absence of a notice provision did not affect the validity of the general warrant. Alternatively, the judge held that the absence of a notice provision could be dealt with later in an application to exclude evidence under s. 24(2) of the Charter.
- [19] On appeal, the issues to be resolved concerning the validity of the general warrant can be stated as follows:
- Did Mr. Pipping have a reasonable expectation of privacy in the common areas of the Burnaby Property?
  - Was the search covert?
  - Does the absence of a notice provision in the general warrant invalidate the warrant?
  - If Mr. Pipping does have a privacy interest, the search was covert, and notice is mandatory, is the police search of the common areas of the building a breach of s. 8 of the Charter?
  - May the evidence be admitted pursuant to s. 24(2)?
- 1) Did Mr. Pipping have a reasonable expectation of privacy in the common areas of the building?
- [20] Whether a general warrant was required and whether the search of the common areas was covert are both issues related to the question of whether Mr. Pipping had a reasonable expectation of privacy in the common area. If he did have a reasonable expectation of privacy in the common area, then the police required a warrant to search that area.
- [21] The Crown says that Mr. Pipping did not have a reasonable expectation of privacy in the common hallway of the Burnaby Property. It follows from this proposition, and the Crown contends, that it was unnecessary for the police to have obtained a general warrant.

- [22] On February 10, 2017, the judge issued a ruling on Mr. Pipping's application for standing to challenge the general warrant and a search warrant relating to the Burnaby Property, ("the Standing Ruling"). The ruling can be found at 2017 BCPC 96. At paras. 23 and 24, the judge held that Mr. Pipping had a reasonable expectation of privacy in the hallway leading to the unit he used; therefore, he had standing to challenge the validity of the general warrant.
- [23] In the Standing Ruling, the judge made reference to *R. v. Edwards*, [1996] 1 S.C.R. 128, and *R. v. White*, 2015 ONCA 508, in considering whether Mr. Pipping had a reasonable expectation of privacy in the hallway. He made the following important findings relevant to the question of Mr. Pipping's privacy rights in the hallway:
- [13] Applying these broad principles to the privacy interests of the accused, Pipping, in connection with the [Burnaby Property], yields the following additional observations:
1. It is clear that Pipping is neither the registered owner nor, within the sphere of knowledge of the owner of unit 407, the tenant to whom he thought he rented the premises. Indeed, the landlord did not recognize Pipping, or for that matter, Summers, at all. No one asserting a tenancy interest in the unit was called as a witness.
  2. The condo building in question contains 96 units within a total of four floors. The complex has a parkade and a front entrance, secured and accessible only by key. There is no video surveillance on the premises.
  3. There is no register of owners or occupants as is sometimes seen near the entrance of these types of buildings.
  4. Once inside the building, all common areas are accessible without any further need of a key, and this includes elevators, the lobby, stairwells and the hallways from which the units would be accessed on each floor. Anyone standing in a hallway would therefore be able to readily ascertain people entering or leaving any apartment unit located on that segment of the hallway.
- [15] At the same time, it should be noted that the 96 units involved in the present case are spread out over a total of four floors. While on a straight mathematical basis, this results in an average of 22 [sic] units per floor, there was no direct evidence with respect to how the units were distributed on each floor or, for example, how many hallways might branch out on each floor. However, given my understanding that unit 407 was at the end of a hallway, I infer that there is likely more than one branch of hallways per floor. From that I would also infer that someone at such a location as unit 407 being at the end of a hallway might reasonably have an expectation of less traffic and therefore somewhat more privacy than, for example, as compared to a unit closer to an elevator or a stairwell, and certainly a higher expectation than as compared to the building's elevator or lobby.
- [18] Applying the Edwards criteria to the foregoing situation, it is clear that Pipping is present at the time the general warrant is executed when he is seen using the key to enter unit 407. Furthermore, he has demonstrated to have, by virtue of that key, and possibly the only key, a

right of possession and means of access to that unit and indeed, as far as can be ascertained, quite possibly exclusive possession. There is also a pattern of attendance by him at that location that includes the taking of items valuable to him both into and out of that place. By virtue of his possession of a key to that unit, it is clear that he has an ability to regulate who attends that particular unit, and further ability, albeit somewhat less so, to regulate access to the building generally and to the common areas within . As noted in *White*, anyone with keyed access to a building with a locked entrance could at least assume that the locked entrance would exclude uninvited persons, including police, from entering common areas without prior permission or authority.

- [19] The condominium complex is itself accessed by a locked entrance and locked parkade. As earlier noted, there is no video surveillance on the premises and there are no names nor any register of owners and/or occupants displayed at the entrance, each of these elements thereby conceivably adding to the environment of privacy. Other than a quick walk-through while personally accompanied by the manager of the premises, the manager or caretaker of the building refused the police permission to attend within the building for the purpose of conducting surveillance, even from the common areas.
- [24] Given Pipping has not established any legal right of ownership or access to the premises on a legal footing, I would characterize his subjective expectation of privacy to that unit to not be at the highest end of the scale and for it to be even lower with respect to the hallways outside that unit. But nonetheless, to be objectively reasonably based and sufficient to allow standing to challenge both the general warrant and the search warrant on the [Burnaby Property].
- [24] The judge relied on *White* to conclude that Mr. Pipping did have standing to challenge the general warrant, on the basis of a subjective expectation of privacy (albeit at the low end) in the hallway that was objectively reasonably based. In *White*, the Ontario Court of Appeal upheld the finding of a trial judge that an accused had a reasonable expectation of privacy in the common areas of a multi-unit building.
- [25] In *White*, the accused owned a unit in a relatively small building. The building security system operated to exclude strangers from entering the common areas of the building. The police surreptitiously entered the building three times. They looked at the accused's storage unit and hid in the stairwell and overheard drug-related conversations emanating from the accused's unit. In discussing the question of whether the accused had a privacy interest in the common areas, at paras. 31-32, citing *R. v. Edwards*, Huscroft J.A. for the court said:
- [31] The right to be secure from unreasonable search or seizure protects reasonable expectations of privacy, and the reasonableness of an expectation is determined having regard to all of the relevant circumstances in a particular case. Justice Cory enumerated several relevant considerations in *Edwards*, at para. 45:
- (i) presence at the time of the search;

- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

[32] Justice Cory emphasized that these considerations are a guide to the question. There is no requirement that each of the Edwards factors be considered in a mechanical fashion in order to render a valid decision.

[48] In any event, the fact that a relatively large number of people may have access to a building's common areas need not operate to eliminate a reasonable expectation of privacy. It is one thing to contemplate that neighbours and their guests, all of whom may be strangers to another resident, might be present in the common areas of a building, but another to say that a resident has no reasonable expectation of privacy as a result. An expectation of privacy may be attenuated in particular circumstances without being eliminated.

[49] The appellant submits what it describes as a strong policy justification for finding that there was no reasonable expectation of privacy. Noting that an ever-increasing number of Canadians live in multi-unit buildings, the appellant contends that it would be perverse to make the common areas of their homes "a zone of protection for criminal activity which diminishes their safety and quality of life".

[50] I think this overstates things considerably. The reasonable expectation of privacy does not establish a zone for the protection of criminal activity in the common areas of multi-unit buildings, but neither does it permit the police to enter common areas of those buildings at any time and for any reason. The reasonable expectation of privacy is a concept which protects those interests that courts think ought to be protected having regard to the interests at stake in particular circumstances: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42. Some limits on police activity are necessary if privacy is to be protected.

[51] There is nothing "perverse" about providing a measure of privacy protection to the many Canadians who live in multi-unit dwellings. They, no less than those who live in detached homes, are entitled to the protection against unreasonable search and seizure the Charter provides. In any event, it is not an all or nothing choice. A balance must be struck between law enforcement objectives and privacy in modern urban life. Cases such as *Laurin and Thomsen* demonstrate that the police have considerable ability to investigate crime in multi-unit buildings. But they do not have carte blanche.

[52] In my view, the trial judge's conclusion that the respondent had a reasonable expectation of privacy in the common areas of his condominium building is correct. It follows that Detective Hill conducted a search when he entered the respondent's building surreptitiously on December 10, 2010, January 20, 2011 and January 21, 2011.

[Emphasis in original.]

[26] In the case at bar, the Crown says Mr. Pipping's connection to the Burnaby Property was tenuous. He was neither the owner nor the registered tenant, and the hallway was a public space once entry to the building was gained. The Crown relies on *R. v. Webster*, 2015 BCCA 286, leave ref'd (2015) SCC Docket 36635, in which this court upheld the finding of a trial judge that an accused did not have a reasonable expectation of privacy in the common areas of a multi-unit building.

[27] In *Webster*, Chiasson J.A. said, in respect to the question of privacy interests in the common areas of an apartment building:

[73] The appellant's third ground of appeal is that his rights under s. 8 of the Charter were violated when the police entered the common areas of the building in which he lived without a warrant.

[74] The appellant concedes that his s. 8 Charter rights were engaged only if "he had a reasonable expectation of privacy to the common areas of his condominium complex". The appellant states that the building doors require a key or pass to open. In his factum he states:

the presence of security features that enable tenants to control who entered the building and [the appellant's] absence of consent authorizing police entry demonstrate he had a reasonable expectation of privacy in the building's common areas.

[75] The Crown notes that the expectation is a reasonable, not absolute, expectation of privacy. The judge stated that, "the investigator who resided in this complex testified that non-occupants of the building are routinely in the hallway of the complex". She added that there was evidence police officers had followed the appellant into the building, but the Crown concedes that this evidence was not admissible on the point.

[76] In my view, the issue is not how secure the building was, but how exclusive occupation of the common areas was. The evidence was that members of the public generally, and tradespeople in particular, regularly were in the common areas:

Q Okay. The whole point being, that you expected your unit to -- and the premises surrounding your unit and the corridors, not to be open to members of the general public. Correct?

MR. BURNETT: Well --

A I expect that members of the general public, being if they are visitors or guests --

MR. SMITH:

Q Yes.

A -- of -- of someone else in that building. There are workers in that building, there are cleaning staff in that building, there's landscaping staff in that building. All of those people, to me, are members of the general public; and, yes, I expect them to be in the hallways and common areas and parking garages.

Q Sure. Obviously let in by the management, right?

A Or someone that is -- resides at that building

or --

[77] I conclude that there was ample evidence to support the judge's finding that "common areas of this particular residential complex were fairly accessible to the public ." In my view, she was correct in concluding that the appellant did not have a reasonable expectation of privacy in the common areas of the building and that a warrant was not required for the police to enter.

[78] I would not accede to the appellant's third ground of appeal.

[28] Another recent case provides further guidance on this point. In *R. v. Yu*, 2019 ONCA 942, the Ontario Court of Appeal overturned the finding of the trial judge that the accused did not have a reasonable expectation of privacy in the common areas of two multi-unit buildings. In *Yu*, the police accessed the common areas of several condominium buildings without warrants in order to conduct surveillance. Most of the warrantless entries involved the police accessing underground parking garages, but the police also accessed hallways and stairwells on several occasions.

[29] In *Yu*, Tulloch J.A. held that the accused did not have a reasonable expectation of privacy in the parking garages of the buildings because the garages were large and the appellants had limited control over them. With respect to the existence of a reasonable expectation of privacy in the hallways, however, Tulloch J.A. wrote:

[81] The hallways are a different story. Under the White framework, in my view, the appellants had a reasonable expectation of privacy in the hallways of their respective buildings, although it was at the low end of the spectrum. White establishes that a contextual approach is required when applying the reasonable expectation of privacy analysis, and there is no categorical bar to a reasonable expectation of privacy in shared common areas.

[82] Once inside an access-controlled condominium building, residents are entitled to expect a degree of privacy greater than what, for instance, they would expect when approaching the building from the outside. This results from the fact that anyone can view the building from the outside, but there is some level of control over who enters the building.

- [83] The level of expectation of privacy inside a condominium building will vary. The level of expectation of privacy is dependent on the likelihood that someone might enter a certain area of the building, and whether a person might reasonably expect a certain area to be subject to camera surveillance.
- [84] Some areas of condominium buildings are routinely accessed by all condominium residents, such as the parking garage or elevator lobby. The level of expectation of privacy in those areas is low, albeit remaining greater than would be expected outside of the building. The level of expectation of privacy increases the closer the area comes to a person's residence, such as the end of a particular hallway of a particular floor of the building. Even in those less-frequented areas the level of expectation of privacy is low, but not as low as in the more commonly used areas.
- [87] On balance, the factors listed above establish a low, but reasonable expectation of privacy in these common areas. The buildings had strict security features designed to exclude outsiders, and the condominium rules at [one of the buildings] barred non-owners and non-occupants from accessing the common areas unless accompanied by an owner or occupant. It was thus reasonable for the appellants to believe that the buildings' security systems would operate to exclude the police from entering the common areas of the building multiple times without permission. At [one of the buildings], security cameras are installed in the lobby, the ramp to the parking garage, at the elevator lobby, and in the elevators - but not in the hallways outside units. The appellants had some limited reasonable expectation of privacy in those areas.
- [89] However, the appellants' reasonable expectation of privacy in these areas was low. Both condominium buildings in this case were much larger than the ten-unit building in *White*. Each had over 300 units. The police observations in this case - the subject matter of the search - were also narrower. Unlike in *White*, the officers did not make or attempt to make any observations about things happening within the units or enter private areas such as storage lockers.
- [30] In my view, *Edwards*, *Webster*, *White* and *Yu* are consistent in their focus on the manner in which the control of public access to the common areas of a building is key to the assessment of a reasonable expectation of privacy. The focus is on "the ability to regulate access, including the right to admit or exclude others from the place": *Edwards* at para. 45 as cited in *White* at para. 31. Other important factors include the exclusivity of occupation, the size of the building, whether property management or a condominium board has consented to the police presence, the breadth of the observations being made by the police, the ownership of the property, and the frequency with which a particular area is used.

- [31] The important facts in the case before me include the property manager's refusal to grant the police access to the building without a warrant, the secured access to the building, the lack of video surveillance, that unit 407 is at the end of a hallway, and the narrow breadth of the observations made by the police. In my view, the facts of this case are more similar to White and Yu than Webster.
- [32] The application of the legal test for establishing a reasonable expectation of privacy to the facts of the case is a question of law, reviewable on a standard of correctness: *R. v. Felger*, 2014 BCCA 34, leave ref'd (2014) SCC Docket 35795, at para. 30. In my view, the judge was correct to find that the occupants of the building reasonably expected that entry to the building would be limited to invitees and otherwise members of the public would be excluded.
- [33] In sum, I agree with the trial judge that Mr. Pipping had a reasonable expectation of privacy in the hallway outside unit 407 of the Burnaby Property.
- 2) Was the search covert?
- [34] Pursuant to s. 487.01(5.1) of the Code, a general warrant that authorizes a covert search must provide that notice of the search be given after the fact. For convenience I repeat the section:
- (5.1) A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require that notice of the entry and search be given .
- [Emphasis added.]
- [35] Mr. Pipping says that as he had a reasonable privacy interest in the hallway outside his apartment, it follows that the police surveillance in his hallway is a search and necessarily a covert one. As a result, he argues, a notice provision is required. Mr. Pipping submits that the language of s. 487.01(5.1) is mandatory.
- [36] The Crown contends that even if a general warrant were necessary to access the common areas of the building, there was no requirement that it contain a notice provision pursuant to s. 487.01(5.1) because the search was not covert.
- [37] In support of its position that the warrant did not authorize a covert search, the Crown notes that the general warrant was directed to the property management company that was the representative of the owners of the common areas. It authorized observation from the common area. The Crown argues that observation from a common area is not a covert search. As there was no surreptitious entry, the Crown submits, there could be no covert search. The Crown says only those warrants that authorize a significant invasion of privacy require after-the-fact notice.
- [38] In response to the Crown's submission, Mr. Pipping says in his reply factum:

- 7) The first point to note is that, in the language of s.487.01(1), the entire point of getting a general warrant is so that the police be permitted to carry out investigative techniques "that would, if not authorized, constitute an unreasonable search or seizure". In short, the police applied for and were granted permission to carry out a "search" -covertly- and it is wrong for the Crown to now try to re-characterize their actions as something other than a covert search.
- 8) The second point to note is that in its decision in *R. v. Evans*, [1996] 1 SCR 8, the Supreme Court of Canada provided a compendious definition of what constitutes a "search", and there is no doubt that the police activities in the instant case fit within that definition. In his reasons for the majority in *Evans* Justice Sopinka said this:
- 4 ... As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of s. 8. (emphasis added)
- 9) In the instant case, making observations of the appellant constituted a "search" for the simple reason that those actions were carried out in a place over which Mr. Pipping had a reasonable expectation of privacy. In the language of *Evans*, the police "intruded" on Mr. Pipping's expectation of privacy, and it is that intrusion, rather than the precise nature of the police actions, which made it a search.

[Emphasis in original.]

- [39] On March 3, 2017, the trial judge issued a ruling on the validity of the general warrant: *R. v. Pipping and Summers* (3 March 2017), Surrey 213677-3-C (B.C.P.C) ("the General Warrant Ruling"). The judge held at para. 65 of the General Warrant Ruling:
- [65] Based on the foregoing case authorities, and having regard to the particular investigative technique at issue and how it was here applied, I conclude that the undercover surveillance, authorized by a general warrant, and performed in the common hallway outside a suite accessed by the accused in a condominium complex having a locked main door, did constitute a covert search as contemplated by s. 487.01(5.1), albeit one of a minimally intrusive nature.
- [40] The issue is whether it was open to the judge to find that the actions of the police in the hallway of the Burnaby Property constituted a covert search. This finding attracts multiple standards of review. First, the judge decided what it means for the search to be done "covertly". This is a question of statutory interpretation that should be reviewed on a standard of correctness: *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, [1956] 1 D.L.R. (2d) 497 (S.C.C.), as cited in *Deputy Minister of National Revenue for Customs and Excise v. Research-Cottrell (Canada) Limited et al.*, [1968] S.C.R. 684 at 693.

- [41] In *R. v. Mero* at para. 23, Parrett J. cites the dictionary definition of "covert", which includes the terms "[c]overed, hidden; sheltered" and "[c]oncealed, secret; disguised." While the trial judge did not define "covert search" explicitly, he described what occurred in the Burnaby Property as: "the undercover surveillance performed in the common hallway outside a suite accessed by the accused in a condominium complex having a locked main door": the General Warrant Ruling at para. 65. He held that this amounted to a covert search.
- [42] The Supreme Court of Canada has held that the term "search" should be broadly construed. Whenever police activity invades a reasonable expectation of privacy, then the activity is a search: *R. v. Wise*, [1992] 1 S.C.R. 527 at 533; *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 11. Given my determination above that the trial judge was correct to find that Mr. Pipping had a reasonable expectation of privacy in the hallways outside his unit, I conclude that the trial judge was correct to find that the police surveillance in the hallways was a search.
- [43] The second aspect of his finding is an application of law to the facts--was this search covert--which is a question of mixed fact and law reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26-32.
- [44] No appellate authority on this point has been brought to this court's attention. Given that the search in this case was conducted by undercover officers seeking to avoid detection, in my view the trial judge committed no palpable and overriding error by finding that the police surveillance here constituted a covert search.
- [45] While the Crown is correct to note that the warrant was directed to the property manager, who is the agent of the owners of the condominium units, and that the warrant itself makes no mention of a covert search, in my view this misses the point. The inquiry must focus not on the words of the warrant but on what the police sought to do. The police sought to covertly observe Mr. Pipping in the hallway. This conclusion is supported by the language used in the Information to Obtain the general warrant, which reads in material part:
- 175) This General Warrant involves allowing the police to have access to the common areas of the [Burnaby Property] to make observations of what suite(s) [the appellants] are accessing and using for their drug trafficking operation.
- 176) Given the nature of this investigation, covertly being able to confirm which suite(s) [the appellants] are accessing without arousing their suspicions will assist police in identifying which suite(s) to target for a CDSA search warrant.
- [Emphasis added.]
- [46] I conclude that the judge did not err in finding that the actions of the police constituted a covert search.
- 3) Does the absence of a notice provision in the general warrant invalidate the warrant?
- [47] At para. 66 of the General Warrant Ruling, the trial judge held:

- [66] On the basis of the foregoing, I am of the view that the absence of notice and disclosure provisions in the general warrant pursuant to ss. 487.01(5.1) and 487.0191, does not affect the validity of the general warrant. If I am wrong in this conclusion, these omissions would be more appropriately addressed subsequently in these proceedings in connection [with] any application for exclusion of evidence pursuant to s. 8 and s. 24(2) of the Charter.
- [48] The judge decided as a matter of law that the warrant was not invalid despite the absence of notice. This is an application of the law to the facts and may be reviewed on a correctness standard: *R. v. Araujo*, 2000 SCC 65 at para. 18; *R. v. Biniaris*, 2000 SCC 15 at para. 23.
- [49] Mr. Pipping correctly observes that the judge did not explain why, given his finding that the conduct of the police authorized by the general warrant did constitute a covert search, the warrant was nevertheless valid. Mr. Pipping says a plain reading of the legislation means that the notice provision is mandatory and that it has been found to be mandatory in several trial court decisions: *R. v. Hill*; *R. v. Mero*; *R. v. Blizzard*, 2006 NBQB 155; and *R. v. Gerrard*, 56 W.C.B. (2d) 564 (Ont. S.C.J.).
- [50] It is reasonable to interpret s. 487.01(5.1) as imposing a mandatory notice requirement after the fact because the anticipated search is covert or unknown to the individual whose privacy rights are being intruded upon.
- [51] In *R. v. Tse*, 2012 SCC 16 (a constitutional challenge to s. 184.4 of the Criminal Code on the basis that it did not permit oversight of the police use of this wiretap power because it lacked any notice provision), the Supreme Court of Canada held that notice provisions such as the one found in s. 487.01(5.1) provide important constitutional safeguards to the potential misuse of police search powers (see para. 11 of *Tse*). I cite *Tse* as explanatory of the necessity for notice provisions.
- [52] In *Tse*, the court explained the rationale for after-the-fact notice requirements (though in relation to s. 184.4) at paras. 81-84:
- (1) The Lack of a Notice Requirement
- [81] Persons who have been targeted under s. 184.4, including victims and suspected perpetrators, may never become aware that their private communications have been intercepted. Section 184.4, in its present form, contains no "after-the-fact" notice requirement. That distinguishes s. 184.4 emergencies from other emergency situations where a lack of prior judicial authorization has not proved fatal for s. 8 purposes. Davies J. recognized this distinction, correctly in our view, at para. 218 of his reasons:

The interception of private communications in exigent circumstances is not like situations of hot pursuit, entry into a dwelling place to respond to a 9-1-1 call, or searches incidental to arrest when public safety is engaged. In those circumstances, the person who has been the subject of a search will immediately be aware of both the circumstances and consequences of police action. The invasion of privacy by interception of private communications will, however, be undetectable, unknown and undiscoverable by those targeted unless the state seeks to rely on the

results of its intentionally secretive activities in a subsequent prosecution.

[82] Accountability for police use of wiretapping without judicial authorization is important for s. 8 purposes. In *Hunter v. Southam*, Dickson J. explained that "[a] provision authorizing . . . an unreviewable power would clearly be inconsistent with s. 8 of the Charter" (p. 166). In the context of Part VI of the Code, apart from interceptions authorized under s. 184.1, accountability is achieved by means of after-the-fact notice and reporting.

[83] After-the-fact notice should not be viewed as irrelevant or of little value for s. 8 purposes. In this regard, we agree with the observations of the intervener Criminal Lawyers' Association (Ontario):

. . . notice is neither irrelevant to s. 8 protection, nor is it a "weak" way of protecting s. 8 rights, simply because it occurs after the invasion of privacy. A requirement of after-the-fact notice casts a constitutionally important light back on the statutorily authorised intrusion. The right to privacy implies not just freedom from unreasonable search and seizure, but also the ability to identify and challenge such invasions, and to seek a meaningful remedy. Notice would enhance all these interests. In the case of a secret warrantless wiretap, notice to intercepted person stands almost alone as an external safeguard. [Emphasis in original; footnote omitted; *Factum*, at para. 31.]

[84] The jurisprudence is clear that an important objective of the prior authorization requirement is to prevent unreasonable searches. In those exceptional cases in which prior authorization is not essential to a reasonable search, additional safeguards may be necessary, in order to help ensure that the extraordinary power is not being abused. Challenges to the authorizations at trial provide some safeguards, but are not adequate as they will only address instances in which charges are laid and pursued to trial. Thus, the notice requirement, which is practical in these circumstances, provides some additional transparency and serves as a further check that the extraordinary power is not being abused.

[53] I recognize that a different statutory scheme was under consideration in *Tse*, but I find *Tse* helpful in explaining the constitutional necessity for an after-the-fact notice requirement. It is necessary where the authorized activity may not otherwise come to light.

[54] The failure to abide by a statutorily-mandated requirement to provide notice fails to give effect to s. 8 protections and infringes the Charter: *R. v. Coderre* at para. 13. In my view, the trial judge erred in finding that the lack of notice provision did not affect the validity of the general warrant. I conclude that the lack of a provision requiring the police to give notice of their covert entry rendered the general warrant invalid.

4) If Mr. Pipping did have a privacy interest, the search was covert, and notice is mandatory, is the police search of the common areas of the building a breach of s. 8?

[55] It follows from the foregoing reasons that I conclude that the general warrant was invalid. The covert search conducted by the police in the hallway of the Burnaby Property and the subsequent search of the unit thus constituted a breach of Mr. Pipping's s. 8 rights. I will discuss the consequences of this breach below.

5) In the alternative, may the evidence be admitted under s. 24(2)?

[56] Section 24(2) of the Charter provides:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[57] Pursuant to the Supreme Court of Canada's decision in *R. v. Grant*, 2009 SCC 32, whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry: 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.

[58] On January 12, 2018, the trial judge issued an omnibus s. 24(2) ruling applicable to several orders he made excluding or admitting evidence: 2018 BCPC 10. He addressed a s. 8 breach found in connection with the search of another property in Surrey. In a previous ruling, he had determined that the Information to Obtain for the Surrey search warrant did not set out a credibly-based probability on which the warrant could have issued, rendering the search of the Surrey residence warrantless.

[59] The trial judge cited *Grant* for the proposition that a s. 24(2) analysis requires a consideration of the privacy interests involved. He then considered *R. v. Silveira*, [1995] 2 S.C.R. 297, in which the Court held that the unauthorized search of a private home was the ultimate invasion of privacy. The trial judge concluded that the evidence from the search of the Surrey residence should be excluded at para. 32:

Notwithstanding good faith in the obtaining and execution of this search warrant, and the narcotics, firearms and large amount of cash found pursuant to it, I agree with the submissions of all counsel that this evidence, clearly collected in a manner that seriously infringed Mr. Pipping's privacy interests protected by s. 8 of the Charter, must be excluded to preserve the long term public confidence in the rule of law. I conclude that to admit it, even in support of what are serious charges faced by the accused, would bring the administration of justice into disrepute.

[60] In the omnibus s. 24(2) ruling, the trial judge also considered the search of the Burnaby Property. He described the evidence gathered from this search at para. 24:

Evidence gathered from the [Burnaby Property] included the narcotics furanyl fentanyl, fentanyl, fentanyl/heroin, heroin, cocaine, W18 and methamphetamine having a total estimated street value of \$1,366,160. There was also a collection of cutting agents and other chemicals such as

acetone, acetic acid and dimethyl sulfoxide and a number of firearms, a firearm silencer, and ammunition. Some of the firearms were loaded. There were also a number of kitchen blenders, bottles of flavoring and food coloring, a discoloured kitchen stove containing a fry pan of white material in the oven, and a large press that could be used to make kilogram sized bricks. Photographs of the [Burnaby Property] depict what is essentially a drug manufacturing, storage and assembly lab in a residential complex, and having sufficient health and safety concerns associated to toxicity of some of the items that police were required to take special precautions, including consultations with Health Canada in the course of handling them.

- [61] At para. 73 of the ruling, the judge noted that he had ruled that the general warrant was valid and the evidence seized in reliance on the information derived from the general warrant was admissible. In the event that he was wrong, he said, he would also consider if the evidence should be excluded under s. 24(2). He considered *Blizzard*, *Mero*, *Coderre*, and *R. v. Whipple*, 2016 ABCA 232, and then said, at paras. 80-85:
- [80] In my view, the facts in the present case are significantly less serious and impactful than those in the above-cited cases. In terms of seriousness, even if the police presence in the hallway were to be regarded as warrantless, it occurred in circumstances where the privacy interests of the accused, in a hallway of a condominium complex, were very low.
- [81] The lack of a notice clause, even if it were to have been required, is also attenuated in a number of ways. Firstly, the very requirement of a notice clause, which was in this case connected to my finding the search to have been "covert" pursuant to s.487.01(1)(c), did not appear to have been directly considered in any prior cases and may well be subject to further development in the case law.
- [82] I consider the police in this respect to have proceeded in good faith, not believing their hallway presence to be covert. And finally the impact was minimal, given the low privacy interests protected, and given that both accused were provided actual notice of the general warrant within days after its execution via disclosure by Crown counsel provided the day after they were taken into custody.
- [83] The search was conducted entirely within the parameters sought, restricted to a momentary, non-recorded, visual observation during reasonable hours. It is entirely possible that during this time Mr. Pipping could have been seen by anyone in that portion of the building.
- [84] I do not see any of the police conduct referenced above as constituting bad faith. They submitted information before a Justice to obtain permission to conduct a very limited search, were granted such permission and proceeded entirely in good faith within the confines of what they sought to do, and not more.
- [85] Overall, I would characterize the seriousness as well as the impact of any breaches, if they occurred, associated with the General Warrant to be fleeting and falling at the lowest end of the range, involving privacy interests sufficient to qualify for standing to challenge, but little more.

- [62] Mr. Pipping submits that the trial judge was wrong to consider only the invalidity of the general warrant in the s. 24(2) analysis. Mr. Pipping contends that the remedy he seeks is "excision", not exclusion. He asks this court to find the general warrant invalid and thereafter excise the illegally obtained surveillance evidence that formed the basis of the specific warrant authorizing the search of unit 407. As a result, he submits, the search warrant for unit 407 of the Burnaby Property would not have issued. It follows that the subsequent search of unit 407 was warrantless and the evidence found therein was obtained in breach of Mr. Pipping's s. 8 rights.
- [63] Mr. Pipping's argument turns on the fact that the warrantless search of a private condominium, where Mr. Pipping had a strong privacy interest, is a much more impactful s. 8 breach than the warrantless search of a common hallway, where Mr. Pipping had only a weak privacy interest. As a result, Mr. Pipping submits that the trial judge erred in his s. 24(2) analysis and the evidence obtained in the unit should be excluded under s. 24(2).
- [64] Mr. Pipping submits that the cumulative effect of this Charter breach when combined with the other breaches in this case--particularly the s. 8 breach in relation to the search of the Surrey residence--demonstrates a "pattern of abuse" on the part of the police that weighs heavily in favour of the exclusion of the evidence. He also says that the failure to include a notice provision is not merely a minor or technical breach because there was no uncertainty about the requirement to include one: the legislation is clear and it is intended to protect Charter rights.
- [65] The Crown concedes that if the general warrant was invalid, the subsequent search warrant could not have issued because the Information to Obtain would have lacked the crucial observation of Mr. Pipping accessing the specific unit. It follows that the search of the unit and the evidence obtained therein was in breach of Mr. Pipping's s. 8 Charter rights. Nevertheless, the Crown contends that having regard to the factors set out in *Grant*, the evidence from the Burnaby Property should be admitted because its admission would not bring the administration of justice into disrepute.
- [66] A trial judge's determination of whether the admission of evidence would bring the administration of justice into disrepute, where the proper factors have been considered and where no unreasonable findings have been made, is owed considerable deference on appellate review: *Grant* at para. 86; *R. v. Côté*, 2011 SCC 46 at para. 44. This deference falls away, however, where an appellate court reaches a different conclusion with respect to the Charter rights breached: *Grant* at para. 129; *R. v. Reddy*, 2010 BCCA 11 at para. 89. Nevertheless, the trial judge's factual findings must be respected if they are untainted by error.

- [67] As I have come to a different conclusion about the validity of the general warrant, I agree with the parties that the unit 407 observation must be excised from the Information to Obtain for the search warrant: *R. v. Grant*, [1993] 3 SCR 223 at 251. It follows that the search of unit 407 was warrantless and in breach of Mr. Pipping's s. 8 rights. As the trial judge did not consider this breach in his s. 24(2) analysis, I must conduct a s. 24(2) analysis anew.
- i) The seriousness of the Charter-infringing state conduct
- [68] This line of inquiry focuses on the actions of the police. The police conduct in carrying out a warrantless search of a unit is undoubtedly more serious than a warrantless search of a common-area hallway. However, in my view the technical nature of the Charter breach cannot be overlooked. I agree with the trial judge that the seriousness of the police conduct is attenuated because, although the general warrant lacked a required notice provision, actual notice of the search was provided within days of Mr. Pipping's arrest in the form of disclosure. Further, the trial judge found that the police operated in good faith throughout the investigation.
- [69] The conduct of the police with respect to the Burnaby Property can be distinguished from their conduct with respect to the Surrey residence. Though both searches were warrantless searches of a private residence, the trial judge found the Surrey warrant to be invalid because the Information to Obtain did not set out a credibly-based probability on which the search warrant could have issued. In my view, the sufficiency of grounds to issue a warrant goes to the heart of the requirement for prior authorization to prevent unjustified searches: *Hunter v. Southam Inc.*, [1984] 2 SCR 145 at 160.
- [70] With respect to the Burnaby Property, however, the police committed a technical breach. The police did not commit any real misconduct. The technicality of the breach is even more evident from the fact that the General Warrant was directed to the agency that managed the Burnaby Property. That the agency did not receive notice of the covert search cannot be said to affect Mr. Pipping's rights. Aside from the observation that Mr. Pipping accessed unit 407, the police had sufficient grounds to apply for a warrant. As the trial judge noted, "unquestionably, one or more units within [the Burnaby Property] were being used for illicit drug activity by the accused": 2017 BCPC 373 at para. 116.
- [71] Mr. Pipping says that the breach was more serious than a technical breach because there was no uncertainty that the police required a notice provision. I am of a different view. While I have concluded that the police conducted a covert search in this case, this was not a foregone conclusion. The text of the warrant itself, which is addressed to the property manager and reads like an assistance order, demonstrates that it was not clear to the police that they were seeking a general warrant that authorized a covert search. Section 487.01 of the Code allows a general warrant to issue without a notice provision if the search it authorizes is not covert. In short, that a notice provision was required was far from certain.

- [72] There are two related cases to note. First, in *R. v. Spencer*, 2014 SCC 43, the police had identified the Internet Protocol (IP) address of a computer being used to access child pornography. Without a warrant, the police obtained the personal information associated with the IP address, including a physical address. This formed the basis of an Information to Obtain a search warrant for the residence of the accused. The accused was convicted of possessing child pornography but acquitted of making child pornography available. The Court of Appeal upheld the conviction and ordered a new trial on the making available charge. The Supreme Court of Canada excised the personal information from the Information to Obtain, leading to the conclusion that the search of the residence was warrantless and in breach of the Charter: at para. 74. Nevertheless, Cromwell J.'s s. 24(2) analysis, in which he determined that the evidence should be admitted, focused on the police conduct in obtaining the excised information, not the search of the residence itself: at para. 77.
- [73] Second, in *R. v. Orlandis-Habsburgo*, 2017 ONCA 649, the two accused operated a grow-op in their basement. Their energy provider noted a pattern of electricity use consistent with the operation of a grow-op and forwarded that information to the police. The police applied for a search warrant using, among other things, the information provided by the energy provider. Following *Spencer*, the Ontario Court of Appeal concluded that the accused had a reasonable expectation of privacy in their energy consumption data and that the police use of that data breached the accused's s. 8 rights. Similar to the facts in this case, Doherty J.A. writing for the court found that the subsequent search of the house was warrantless and conducted a s. 24(2) analysis at paras. 126-131:
- [126] The police entered the appellants' residence under the authority of a warrant. The police seized the marihuana plants and the cash pursuant to that warrant. The ITO contained the information provided to the police by Horizon, both in the initial email, and as a result of subsequent requests by the police. The ITO also included evidence gathered from the observations of the residence on various occasions.
- [127] The evidence obtained from Horizon by the police is constitutionally tainted by virtue of the breach of the appellants' s. 8 rights. The validity of the warrant depends on whether a justice, acting reasonably, could have granted the warrant without the information provided by Horizon. I am satisfied that without that evidence, there was no basis upon which the warrant could have been issued. The warrant is invalid and the search of the residence must be treated as a warrantless search and consequently a violation of the appellants' s. 8 rights: *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 251-52; and *Spencer*, at para. 74. The marihuana and the money seized by the police was "obtained in a manner that infringed" s. 8.
- [128] Having found no breach of s. 8, the trial judge did not consider the operation of s. 24(2) of the Charter. On this record, this court can properly address s. 24(2).

- [129] Evidence obtained in a manner that infringes a Charter right must be excluded under s. 24(2) if the appellants can establish that "having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute". In determining whether evidence should be excluded under s. 24(2), the court considers the seriousness of the Charter-infringing state conduct, the impact of the infringement on the appellants' Charter-protected interests, and society's interest in an adjudication of the allegation on the merits: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 72-82.
- [130] The seriousness of the Charter-infringing state conduct focuses on the actions of the police. Setting aside the police examination and use of the energy consumption data, I see nothing in the police conduct that would justify any criticism. The police took the information received from Horizon and made their own independent investigation. They applied for a warrant before entering the residence. The disclosure in the ITO was complete and accurate. There is no suggestion that the warrant was not executed in a proper manner, or that anything seized by the police was not properly seized under the terms of the warrant. I see nothing to indicate that the police did not honestly and reasonably believe that they were lawfully entitled to enter and search the appellants' residence.
- [131] I come to the police use of the information obtained from Horizon. The police proceeded on the basis that they were entitled to examine and use the data provided by Horizon without first obtaining any judicial authorization. I have concluded that they were wrong in doing so. It is, however, difficult to criticize their actions, given the state of the law at the time of the search. Under the existing case law (*Gomboc and Plant*), the police understanding that they were entitled to use the data was reasonable. Indeed, this court's analysis in *Ward*, which post-dated the search, supports that understanding. The error in that viewpoint became apparent only after *Spencer*, decided long after the relevant events.
- [74] Like in *Spencer* and *Orlandis-Habsburgo*, the police conduct here is reasonable.
- [75] Mr. Pipping says that the cumulative effect of the breaches in this case weighs heavily in favour of exclusion, and that the police conduct in this case amounted to a "pattern of abuse". However, with the exception of the Surrey search, the trial judge did not consider the other breaches to be serious. He found that each of the instances of impugned police conduct arose independently from one another and was explained. Importantly, he also held that, having excluded the evidence from the Surrey search, that breach should not weigh significantly in favour of the exclusion of any other evidence. I agree. The finding that the police operated in good faith throughout the investigation, without intent to deceive or mislead, is entitled to deference on appeal. The police conduct in this case does not amount to a pattern of abuse.
- [76] In my view, the nature of the state conduct does not favour exclusion of the evidence.
- ii) The impact of the breach on the Charter-protected interests of the accused

- [77] This line of inquiry focuses on the impact on Mr. Pipping's privacy interests. Mr. Pipping's privacy interest in the condominium unit is stronger than his privacy interest in the hallway. This must be factored into the analysis. However, as the trial judge found, Mr. Pipping's privacy interest in the unit was attenuated by the fact that he had not established any right of ownership or access to the premises on a legal footing. The owner of the unit was under the impression that the unit was being rented by someone else. This led the trial judge to conclude that Mr. Pipping's expectation of privacy with respect to the unit to "not be at the highest end of the scale": the Standing Ruling at para. 24.
- [78] Nevertheless, the police conducted a warrantless search of a private residence. This search had a serious impact on the Charter rights of Mr. Pipping. This factor weighs in favour of the exclusion of the evidence.

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

- [79] The evidence obtained from the search of the Burnaby Property was reliable and determinative of seven of the ten convictions Mr. Pipping received. Without this evidence, there could be no conviction on these counts. The evidence supported convictions for serious drug offences, including the production of fentanyl. This factor weighs in favour of the admission of the evidence. Society has a strong interest in the prosecution of offences of this type on the merits.

iv) Conclusion

- [80] Though the unconstitutional search of a residence strikes at the heart of the privacy interests protected by s. 8, in my view the exclusion of the evidence, rather than its admission, would bring the administration of justice into disrepute. To hold otherwise would be to overemphasize the seriousness of what was in reality a minor technical breach.

### C) Conclusion on the general warrant

- [81] While I agree with Mr. Pipping that the general warrant was invalid, in my view the evidence should not be excluded under s. 24(2) of the Charter. In the result, I would not accede to this ground of appeal.

### III. Trial Delay

A. Was Mr. Pipping and Mr. Summers' right to a trial within a reasonable time breached?

- [82] At trial and on appeal, there was no differentiation between Mr. Pipping's and Mr. Summers' arguments in respect of the delay. In addition, Mr. Pipping adopts Mr. Summers' submissions on this issue.

- [83] At the hearing of the s. 11(b) application (the "Delay Application") all parties agreed that the then-expected completion date of the trial exceeded the Jordan limit of 18 months (*R. v. Jordan*, 2016 SCC 27). There was no question of waiver by the defence. Consequently, the issue at the hearing was the question of who should bear responsibility for the various delays and adjournments.
- [84] It is convenient to consider the way in which the trial unfolded in the following blocks of time:
- The January 24-27, 2017, adjournment: Defence counsel applied to adjourn these first four days of the voir dire on the basis of the late disclosure of 1,100 hours of surveillance video and cell phone extraction reports. The Crown argued the video was irrelevant to the voir dire since the video concerned Mr. Pipping's Surrey property, which was not the subject of the General Warrant. In addition, the Crown argued the cell phone extraction reports, related to the cell phones seized incident to arrest, had no reasonable connection to the General Warrant.
  - The March 7, 10 and 31, 2017, adjournments: Defence counsel requested an adjournment on March 7 to review the ruling on the first voir dire, released March 3. Defence counsel also requested a half day on March 10. Both parties agreed to the adjournment of March 31 in order to prepare their closing submissions on the second voir dire.
  - The subsequent scheduling delays: After the hearings in July 2017, the next dates were to be set for October. The three defence lawyers were unavailable for the October dates offered and, as there was no available court time in November, the hearings resumed in December 2017.
- [85] The judge found that the January and March adjournments were the responsibility of the defence, and that had the trial proceeded as scheduled, it would have completed within 18 months. Alternatively, he found that the inability to marry the calendars of all parties in the July-December period was an exceptional circumstance outside the control of the Crown.
- [86] Before I turn to a detailed review of the history of these adjournments, I shall review the Jordan framework as amplified in *R. v. Cody*, 2017 SCC 31.
- [87] In *Jordan*, the Supreme Court of Canada introduced a new framework for section 11(b) of the Charter. The section provides that any person charged with an offence has the right to be tried within a reasonable time. In *Jordan*, the Court criticized the culture of delay and complacency that had come to pervade the criminal justice system and sought to encourage all participants to cooperate to achieve reasonably prompt justice.
- [88] To this end, *Jordan* established a presumptive ceiling of 18 months from the date of the charge to the anticipated end of a trial for matters tried in provincial courts. Above this ceiling, the delay is presumptively unreasonable. Unless this presumption can be rebutted, a stay of proceedings must be imposed. Under the *Jordan* framework, delay that can be attributed to the deliberate, calculated or illegitimate tactics of the defence does not count toward the total. If the total delay is above 18 months, the Crown may establish the presence of exceptional circumstances to rebut the presumption that the delay is unreasonable.

- [89] In *Jordan* at paras. 63-65, the Court describes the types of defence delay that will be considered the responsibility of the defence:
- [63] The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.
- [64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).
- [65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.
- [90] In *Cody*, the Court amplified its guidance on the treatment of defence conduct at paras. 28-33:
- (2) Delay Caused by Defence Conduct
- (a) Deducting Delay
- [28] In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from "its own delay-causing action or inaction" (*Jordan*, at para. 113). It applies to any situation where the defence conduct has "solely or directly" caused the delay (*Jordan*, at para. 66).
- [29] However, not all delay caused by defence conduct should be deducted under this component. In setting the presumptive ceilings, this Court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18

months have "already accounted for [the] procedural requirements" of an accused person's case (Jordan, at para. 65; see also paras. 53 and 83). For this reason, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and should not be deducted (Jordan, at para. 65).

- [30] The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate inasmuch as it is not taken to respond to the charges. As we said in Jordan, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (Jordan, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (Jordan, at para. 64). These examples were, however, just that -- examples. They were not stated in Jordan, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in Jordan, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction (para. 64).
- [31] The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (Jordan, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
- [32] Defence conduct encompasses both substance and procedure -- the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the Jordan ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11 (b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
- [33] As well, inaction may amount to defence conduct that is not legitimate (Jordan, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, R. v. Dixon, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(b) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to "actively advocat[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently" (Jordan, at para. 138).

[Emphasis in original.]

[91] It follows that the crucial task of the trial judge under this framework is to characterize the cause of any delay in the proceedings before them. If the delay can be characterized as solely attributable to the defence, or caused by deliberate or illegitimate conduct designed to slow the proceedings, it will be deducted from the total delay. However, defence actions legitimately taken to respond to the charges will not be deducted.

#### 1. Standard of Review

[92] The post-Jordan s. 11(b) framework invokes different standards of review at three different stages: (1) findings of fact relevant to defence conduct; (2) the characterization of delay and the attribution of responsibility; and (3) the determination of whether the total delay is unreasonable and the decision to impose a stay.

[93] At the first stage, the findings of fact of a trial judge that are relevant to defence conduct are afforded deference on review, and subject to a standard of palpable and overriding error: *R. v. Horner*, 2012 BCCA 7 at para. 70; *R. v. K.N.*, 2018 BCCA 246 at para. 13.

[94] At the second stage, first instance judges are uniquely positioned to gauge responsibility for delay: *Jordan* at para. 65. The determination of whether defence conduct is legitimate or illegitimate is highly discretionary, and appellate courts must show a high level of deference on review: *Cody* at para. 31; *R. v. S.C.W.*, 2018 BCCA 346, leave ref'd (2019) SCC Docket 38403, at para. 38.

[95] At the third stage, the ultimate determination of whether the total delay is unreasonable and the decision to impose a stay is a question of law subject to a correctness standard: *K.N.* at para. 13; *R. v. Christurajah*, 2019 BCCA 210 at para. 113.

[96] To the extent that recent cases of this court suggest that a correctness standard also applies to the second stage, they rely on jurisprudence that, in my view, has been overtaken by *Jordan* and *Cody*: see, for example, *K.N.*, *Christurajah*, and *R. v. Millar*, 2019 BCCA 298.

[97] As I will describe, the characterization of the responsibility for certain discrete adjournments as legitimate or not is at issue under this ground of appeal. The trial judge made important findings of fact underlying his characterization of the adjournments, and those findings will factor into my analysis. Applying *Cody* and *Jordan* requires a high level of deference as to the assignment of responsibility for the various adjournments.

### B. The trial judge's s. 11(b) ruling

[98] On March 15, 2018, the trial judge dismissed the appellants' application for a judicial stay of proceedings based on unreasonable delay. His reasons are indexed as *R. v. Pipping and Summers*, 2018 BCPC 73 (the "Section 11(b) Ruling").

- [99] In his ruling, the judge reviewed the various adjournments granted throughout the proceedings that ultimately led to the delay exceeding the 18-month ceiling. (I note that all the parties agreed that the delay would be reviewed under the post-Jordan framework with a presumptive ceiling of 18 months.)
- [100] The information was sworn on March 18, 2016. The presumptive 18-month ceiling thus arrived on September 18, 2017. At the time of the ruling, the anticipated conclusion of the trial was March 22, 2018, a total period of 24 months. (At trial and on appeal, no party suggested a date other than March 18, 2016, was the relevant start date.)
- [101] The defence argued that no portion of the 24-month delay was attributable to the defence and that the Crown could not establish any exceptional circumstances relating to the case. The Crown argued that the delay should be attributed to the defence and that exceptional circumstances existed.
- [102] For ease of reference, the following table summarizes the various adjournment applications referred to by the judge:

Dates

Use

Loss (days)

Initially scheduled dates

January 24-27, 2017

Adjourned due to late disclosure

4\*

February 7-10

Voir dire 1

March 7

Adjourned to review March 3 ruling on voir dire 1

1\*

March 8-10

Voir dire 2. March 10 was a half day following a defence request for adjournment.

½\*

March 28-29

Voir dire 2

March 30

Defence application for mistrial in the morning. The court adjourned for half a day for preparation of reasons.

½

### March 31

The court delivered the ruling on mistrial. The parties advised that they did not have enough time to complete their submissions on voir dire 2 and proceedings were adjourned just before noon.

½

Subsequently scheduled dates

July 17-18

Closing submissions on voir dire 2

December 6-7

Section 24(2) submissions by the parties following the findings on voir dire 2

February 26-27, 2018

Section 11(b) application

March 22

Anticipated conclusion of the trial

\* Attributed to the defence by the trial judge

1. January 24-27 adjournment

[103] The first four days of the first voir dire were initially scheduled for January 24-27, 2017. On January 13, 2017, the defence applied to adjourn these four days on the basis of late disclosure of 1,100 hours of video from a home security system at the Surrey property used by Mr. Pipping, as well as cellphone extraction reports.

[104] At the time, the Crown explained that the video was seized pursuant to the search and therefore could not possibly be relevant to the judicial authorizations being challenged in the first voir dire. The Crown also noted that the defence was provided with a concise written synopsis of the recordings. Further, the Crown argued that the possibility that the cellphone extraction data related to the authorizations being challenged in the first voir dire was slim and this could be determined with minimal analysis.

[105] In his Section 11(b) Ruling, the judge concluded that the defence took a calculated risk in requesting an adjournment when the late disclosure did not readily reveal any connection to the upcoming voir dire. As the Crown correctly argued at the time, there was nothing in the material that had any bearing on the first four days of court time.

[106] The trial judge therefore concluded that the four days were adjourned unnecessarily and solely by the conduct of the defence.

## 2. March 7, 10 and 31 adjournments

[107] The loss of the half day on March 30 was required by the court to respond to the mistrial application of the defence. The judge held that this should not be attributed to the defence. This left two days of court time for the judge to consider: a full day on March 7, a half day on March 10, and a half day on March 31.

[108] The judge held in his Section 11(b) Ruling that the defence-requested adjournment on March 7, 2017, was of particular concern. The defence requested the adjournment to review the ruling on the first voir dire that had been released on March 3. The judge reasoned that the defence could have reviewed this ruling prior to March 7, and that it should not have required a full day to review. The judge noted that the half day lost on March 10 was also requested by the defence to continue reviewing the ruling, and it was not required due to any lack of readiness on the part of the Crown. As a result, the judge attributed the loss of the full day on March 7 and the half day on March 10 to the defence.

[109] The judge found that the half day adjournment requested on March 31, 2017, was in the nature of a request jointly agreed to in order to facilitate the parties' closing submissions on the second voir dire. This was therefore not attributable to the defence.

## 3. Subsequent scheduling delays

[110] After the hearings scheduled for July 17-18, 2017, the parties were referred to the Judicial Case Managers (JCMs) to set the next dates for October. The court learned that although October dates had been offered to the parties, the matter ended up being scheduled for dates in the first week of December. Emails between counsel and the JCMs subsequently revealed that the three defence lawyers involved (two for Mr. Pipping and one for Mr. Summers) were not available for the October dates offered, and there was no court time available in November.

[111] The trial judge did not find the defence to be solely or directly responsible for the challenges associated with finding compatible dates.

[112] However, the judge noted that a total of five and a half days of the six and a half days lost could be directly attributed to the defence. He also noted that after March 31, 2017, the matter required five more days to conclude (July 17-18 and December 6-7, 2017, and March 22, 2018). The judge held that but for the defence-caused delay arising from the early adjournments, the matter would have likely concluded within the presumptive 18-month

ceiling. He concluded that the net delay in this case was therefore under 18 months: at para. 81.

[113] In the event he was wrong about the net delay, the judge went on to consider whether exceptional circumstances were present in the case.

#### 4. Exceptional circumstances

[114] The judge did not find that the issues in the case were so complex as to constitute an exceptional circumstance that warranted a departure from the presumptive 18-month ceiling.

[115] The judge then considered whether the scheduling-related complexities in this case could be considered exceptional circumstances. He noted the difficulty in trying to marry five separate calendars (three defence lawyers, Crown counsel, and the court) to seek out additional dates subsequent to March 31, 2017. He found that everyone was making their best efforts to be available for earlier dates being offered by the case managers.

[116] The judge found that the Crown was able to establish that scheduling-related complexities were an exceptional circumstance outside the Crown's ability to avoid, control or remedy. As a result, the judge held that the delay accruing after March 31 and again after mid-July 2017 should be deducted from the overall delay. This would bring the net delay within the presumptive ceiling.

[117] The trial judge ultimately concluded that he was unable to find that the defence made a sustained effort to expedite the proceedings. He found the case took markedly longer than it reasonably should have. Accordingly, he dismissed the application for a judicial stay of proceedings.

### C. Analysis

[118] I now turn to a more detailed scrutiny of the record of proceedings, and the parties' submissions as to responsibility for the adjournments.

#### 1. January 24-27 adjournment

[119] On January 13, 2017, counsel for Mr. Pipping (also speaking for Mr. Summers' counsel) applied to adjourn the January 24-27 dates. Those dates had been reserved for a voir dire on the General Warrant. Counsel complained about late disclosure from the Crown. He said he had just received disclosure of "1100 hours of video". He described the disclosure as "extremely significant evidence." He said he believed the video surveillance was done under a general warrant that they would be challenging and that he was therefore not in a position to use the court dates. As he stated in his submissions:

But more importantly, the video surveillance on one of the two crucial residences that cover several of the counts in the indictment was done under a predecessor warrant. We'll be starting with the predecessor warrants and whether the information the police garnered from those were

lawfully in the subsequently-drafted ITOs. So we're not, strictly speaking, waiving delay at this point in time, but as an officer of the court, I'm telling you that there's no way we can comply with our obligations to give proper notice to the court and the Crown in time, to make any use of the dates, January 24 to 27 . So we may down the road indicate that it turned out, as a matter of course, that this information was such that we could have gone ahead and made some use of the court time, and the resultant loss of a couple of weeks might not be that significant, such that it could be waived, but at this juncture, it's simply a question of we're not in a position to make the proper use of the court time or to comply with our obligations to give the Crown and the court timely notice of the application we expect to make when the voir dires get underway. So that's why we're here today.

I'm in court, by the way, not just this week, but all week next week, in Supreme Court, on another matter. So I'm not quite sure when I was supposed to get the time to watch or review with Mr. Pipping, who's in custody, 1100 hours of videotape featuring him, largely, going in and out of a significant crime scene . I just want the court to know that we -- as we alluded to last day, all three defence counsel are extremely busy, and in fact, I'm in court every single day between now and the 24th, and that impacts my ability to process the material. If [Crown counsel] could give us six binders worth of data downloads from the four phones today, I wouldn't have a meaningful opportunity to go through it.

My respectful submission is we can sort out the sequelae and the fallout from the loss of the four days, but I'm just telling you as an officer of the court with the commitments I've had to date, and the timing of this and the other disclosure, including materials we received eight days ago, we're not going to be in a position to do our duty to the court, or our client, on the 24th of January and conduct a proper hearing, keeping this on the record. My remarks are extant now, on the record. If they amount to defence delay on the analysis of Jordan and are to be subtracted from whatever total we end up with, so be it. I'm simply telling you as an officer of the court, who does a couple of hundred days of search warrant and wire-tap work a year for decades, I feel myself at sea. I feel myself struggling to catch up in circumstances where it hasn't been explained why were are - 'cause this material has to be digested, and that takes away from the time on other files and the time to prepare the Charter notice and the application that will be starting the trial off. So that's the reason why we're making it, with the greatest of reluctance.

[Emphasis added.]

[120] The Crown opposed the adjournment application. She explained that the late disclosure complained of related to Mr. Pipping's Surrey residence. The records were his own private video surveillance, obtained as a result of executing a search warrant at Mr. Pipping's Surrey residence. The scheduled voir dire concerned the warrants for the Burnaby Property. Crown counsel also advised that the evidence that was forthcoming with regard to the cellphone extractions (expected later that day) had no bearing on any challenge to the Burnaby search warrants because they were obtained after the search warrants were executed.

[121] Defence counsel's submissions at trial, cited above, reveal that he seemed not to appreciate that the recently disclosed footage had nothing to do with the Burnaby Property. He also emphasized numerous times that he was in other trials and had no time to look at it anyway. He alluded several times to questions of delay and whether or not this might be considered defence delay, but he did not explicitly waive delay. Rather, he vociferously complained about the delayed disclosure.

[122] The trial judge granted the adjournment. In granting the adjournment he said:

THE COURT: Right. Well, I think, on balance, I'm not prepared to conclude that the information that's outstanding bears no relevance to the challenge. It may not be information that was available to the officers at the time, but I think it could well go to some of the issues on the voir dire. And my other concern is that, you know, you've still got two of these cell phone extractions. You don't even know when they're coming.

THE COURT: -- and this is the application before me. So I think all things considered, I am going to accede to the request to adjourn the first segment. I make no comments with respect to ultimately any impact on delay. That will be perhaps determined if and when needed, having regard to all of the circumstances, including perhaps looking back in hindsight with respect to the need for --

THE COURT: -- this application.

THE COURT: Which isn't entirely known right now, but I think -- on balance, I think the safer course is to adjourn the first segment.

[123] In the Section 11(b) Ruling summarized above, the trial judge found, with respect to this adjournment, that the issue was whether the late disclosure had any realistic bearing on the application to adjourn the commencement of the voir dieres. At paras. 49-51 the judge said:

[49] At the time of making the application, defence candidly admitted that it was difficult to know with precision whether or to what extent this recent disclosure would bear on matters arising in the first week of the hearing and accepted the risk that any resulting delay might be found to rest at the feet of the defence, but that if necessary, that question could always be addressed by the court at a later date. This, of course is now that date.

[50] In assessing the matter, it would appear that defence took a calculated risk that late disclosed material that did not readily reveal any connection to the upcoming Voir Dire, and indeed which Crown argued, correctly at the time, did not have any such bearing, merited an adjournment application even if the resulting delay might be later determined to have been unfounded and caused by the defence.

- [51] On the basis of the submissions in their totality, the Court allowed the adjournment of the first week of hearing time. As it turns out and as already noted, there was nothing in the material that was pointed out to the Court as having any bearing on the first week's hearing time, or indeed, at all and nor was there any basis pointed out to strengthen the case for the adjournment application having to be made.
- [124] In other words, the whole basis for the adjournment was misconceived. In the result, the court agreed with the Crown that the late disclosed material was only remotely connected to the then-upcoming voir dire and should not have delayed the commencement of the hearing. He attributed this loss of four court days to defence.
- [125] On appeal, the appellants say that the judge engaged in ex post facto analysis of the need for the adjournment. They argue that the late disclosure was potentially relevant to the first voir dire, and that trial counsel could not possibly discharge their professional obligations to their clients without knowledge of what was in the video footage and the cellphone data.
- [126] As already noted, Jordan and Cody would suggest that determining the legitimacy of defence conduct is a matter over which the trial judge is entitled to deference. The underlying findings of fact also attract deference on review. This is so because it is the trial judge who is in the best position to understand and appreciate the issues that were at play, the context in which those issues arose, and the nature of counsel's submissions as a whole in the trial as it unfolded.
- [127] Here the judge found that the defence had to bear responsibility for insisting on the adjournment, even in the face of Crown's assertion that the disclosure was irrelevant to the pending voir dire concerning the Burnaby warrants. This is not ex post facto reasoning. The judge found as a fact that the late disclosed video surveillance was of the Surrey residence and was irrelevant to the voir dire related to the Burnaby Property. Essentially, he held that the lack of connection as was revealed over the course of the proceedings should have been known earlier, thus avoiding the adjournment. If defence counsel had performed even a cursory review of the material, the lack of connection would have been clear. The exhibit is prominently titled on its first page "Video Surveillance Review from [Mr. Pipping's address] Surrey, BC."
- [128] The judge's determination is entitled to deference. There was ample evidence to support his factual findings that the video surveillance and the cellphone extractions were irrelevant to the voir dire related to the Burnaby warrants. I would not interfere with his characterization of the adjournment as attributable to the defence. I cannot identify any error in this conclusion.
2. March 7, 10 and 31 adjournments

- [129] As noted above, the judge attributed the loss of the full day on March 7 and the half day on March 10 to the defence. He said that the defence had requested these adjournments to review the March 3 ruling, which concerned the general warrant for the common areas in the Burnaby Property.
- [130] On appeal, the appellants say the adjournments were necessary. With respect to the March 7 adjournment, as Mr. Pipping's counsel stated at trial, he was returning from an out-of-town trial over the weekend of March 4 and 5 and had had only a limited opportunity to review the March 3 ruling. In addition, he had placed a call to Mr. Pipping, who was in custody, but had not heard back from him. Further, counsel for Mr. Pipping stated that "We'd like to have the day in order to prepare for [submissions on the search warrants for the three residential properties]".
- [131] The appellants argue that the March 7 adjournment was particularly necessary because the March 3 ruling was broader in scope than expected. The judge was under the mistaken impression that counsel intended the first voir dire to deal with the validity of both the general warrant and the search warrant, when in fact counsel had only intended to deal with the validity of the general warrant. After the ruling was released, the judge's mistake was discovered. (This then formed the basis for a defence application for a mistrial, which the judge dismissed. Once the parties conducted another voir dire, the judge issued a further ruling on the validity of this search warrant along with two others, indexed at 2017 BCPC 373.) The appellants argue that the March 7 adjournment was necessary for defence counsel to understand the full impact of the ruling.
- [132] The voir dire continued over March 8, 9, and 10, but was adjourned halfway through the day on March 10. Defence counsel requested this adjournment on the basis that the parties would be able to finish the evidence and the submissions in the remaining time scheduled:
- What we'd like to do is to adjourn now, at our request, to the 28th when next we're back before you and finish up those witnesses on that day, with the expectation that we'll be making argument to you later. We have four days set, 28, 29, 30 and 31 of March, and we'd like to finish the evidence on the first of those days and argue over the remaining days set that last week, if that meets with the court's approval.
- [Emphasis added.]
- [133] Defence counsel further advised the court that there was "plenty of time" to finish the evidence on the next day scheduled.
- [134] The judge made the following findings of fact about the necessity for these adjournments at paras. 64-66 of the Section 11(b) Ruling:
- [64] This is a difficult matter to adjudicate. I believe there to be some merit to the Crown's submission herein. No one wants to see every request by any counsel to take a moment, or to stand down early, to turn into a contest. These are often handled by way of professional or collegial deference, and have little impact on trials. There is no question that the defence

assertion that the proceedings would not be unduly delayed thereby was one made entirely in good faith and based on the information then at hand. However, where the cumulative amount of time lost starts to approach the time lost in this case, it becomes significant.

- [65] The adjournment requested by defence on March 7 is of particular concern. This was the first day of that week's block of time. Defence sought the adjournment principally to review my Ruling, on Voir Dire No. 1, handed down March 3. I am not sure, despite the brief explanation offered by the defence, why this ruling could not have been reviewed in the days prior to March 7 or why an entire day was required on March 7 for that purpose but regardless, this adjournment contributed to delay caused solely by the defence.
- [66] The afternoon adjournment on March 10th appears not to have been required due to any lack of readiness by Crown, but rather again at the defence request, mostly on the basis that the March 10th [sic] ruling had still not been reviewed and that there would be sufficient time to complete all matters in the final week of blocked time commencing March 28th.
- [135] I pause here to note that the judge appears to have misconstrued which ruling defence counsel said they had not yet read by March 10. An examination of the record reveals that on March 10, defence counsel stated that they had not reviewed the transcript of the standing ruling that had been provided to him the previous evening. I note, however, that this ruling was given orally in the presence of defence counsel one month before. Further, this apparent misstatement by the trial judge does not, in my view, undermine his findings that defence counsel requested the adjournment, that there was no lack of readiness on the part of the Crown, and that the defence appeared to have no other compelling reason for the delay.
- [136] In total, the trial judge attributed five and a half days of delay to the defence, including the loss of four days of hearing time from January 24-27, as well as the one day on March 7 and the half day on March 10.
- [137] He then noted the cascading effect of the loss of these days as follows at para. 80 of the Section 11(b) Ruling:

The particularly important point to here note is that after March 31, 2017, the extra days needed for the hearing of this matter would also have been 5 days, comprising July 17 and 18, for submissions on Voir Dire No. 2, December 6 and 7 for submissions on s. 24(2), and March 22, 2018 to conclude the trial. In other words, but for the defence caused delay arising from the early adjournments and down time, the matter would have likely concluded well within the presumptive ceiling prescribed in Jordan, in this case expiring on September 18, 2017.

- [138] At para. 101 the judge concluded:

the defence-caused delay that I have found earlier in these Reasons also deserves consideration. While by no means suggesting this delay was in any way intentional, it is the sole and direct reason this case did not conclude within the constitutionally mandated timeframe expiring on September 18, 2017.

[139] As stated in Cody, the determination of whether defence conduct was legitimate is not an exact science. The trial judge is uniquely positioned to gauge the necessity for an adjournment. With respect to the adjournments of the first week and the one and a half days in March 2017, he found the justification wanting. The judge, as I have already stated, is entitled to deference on his factual findings about the underlying reasons for the adjournment, as well as the characterization of the delay and the attribution of responsibility. A review of the transcript amply supports his conclusions about the March 2017 adjournments and the cascading effect it had on the further course of the proceedings.

3. & 4. Subsequent scheduling delays and exceptional circumstances

[140] The judge went on to say that in the event he was wrong, he would characterize the inability of the court, the Crown, and defence counsel to marry their five separate calendars to be an exceptional circumstance. I find it unnecessary to consider this alternative basis for denying the application for a stay of proceedings.

[141] I would dismiss this second ground of appeal.

#### IV. Disposition

[142] I would dismiss Mr. Pipping's and Mr. Summers' appeals.

"The Honourable Madam Justice Garson"

I AGREE

"The Honourable Madam Justice Saunders"

I AGREE

"The Honourable Mr. Justice Butler"

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