

CANADA / JUDGMENT

R. v. Reilly

2020 BCCA 369

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 369 R. v. Reilly

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Reilly,

2020 BCCA 369

Date: 20201217

Docket: CA46220

Between:

Regina

Respondent

And

Liam Reilly

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 162 on December 21, 2020.

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Griffin

On appeal from: An order of the Provincial Court of British Columbia, dated January 3, 2019 (R. v. Reilly, Vancouver Docket 249342-3-C).

Counsel for the Appellant (via videoconference):

W. Jessop

Counsel for the Respondent (via videoconference):

M.K. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

November 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 17, 2020

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Madam Justice Fenlon

Dissenting Reasons by:

The Honourable Mr. Justice Willcock (page 41, para. 154)

Summary:

Appeal from conviction on six counts of robbery and firearms-related offences. While investigating two armed robberies, the police attended at the appellant's residence to arrest him. When the appellant did not present himself at the door for a curfew check as required by a probation order, the police entered through an unlocked rear sliding door. The police knocked on the appellant's bedroom door and arrested him. The police then performed a clearing search of the residence and observed evidence related to the robberies. The police obtained a search warrant in part based on observations from the clearing search. The appellant appeals on the basis the trial judge erred by: (i) finding that reasonable grounds existed for the issuance of the search warrant; and (ii) not excluding the evidence seized, pursuant to s. 24(2) of the Charter. Held: Appeal allowed, Willcock J.A. dissenting. The trial judge did not err in upholding the search warrant. The trial judge did err in principle in treating the Charter-compliant police conduct as mitigating the Charter-infringing conduct. He also erred in compartmentalizing the analysis of the Grant factors and failing to conduct an overall assessment of whether the administration of justice would be brought into disrepute by admission of the evidence. Despite a compelling interest in the adjudication of the case on its merits, admitting the evidence would bring the administration of justice into disrepute.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] Section 24(2) of the Canadian Charter of Rights and Freedoms requires the courts to exclude evidence obtained by police in a manner that would bring the administration of justice into disrepute. This constitutional requirement serves to keep police conduct within the reasonable boundaries expected in our free and democratic society and preserves the public respect for the administration of justice.
- [2] One of a person's most private spaces is their home. More than twenty years ago, in the case of *R. v. Feeney*, [1997] 2 S.C.R. 13, the Supreme Court of Canada made it clear that police are prohibited from entering a private home without a warrant for the purpose of arrest, absent exigent circumstances. The requirement of a warrant before police enter a home avoids after-the-fact rationalizations of the police intrusion. This requirement has since been codified in the Criminal Code, R.S.C. 1985, c. C-46, s. 529.
- [3] In this case, the police entered the home of a suspect, entered his closed bedroom, tackled and arrested him, all without a warrant and without exigent circumstances. They conducted a clearing search of the home during which they saw evidence useful to their investigation. This conduct breached the appellant's Charter rights. The police then used the information seen in their search, together with other evidence, to obtain a search warrant. Warrant in hand, they searched the home again and seized the items of interest to their investigation.
- [4] The items seized from the home were admitted into evidence at trial. The appellant, Liam Michael Reilly, was then convicted of two counts of robbery (Criminal Code, s. 344(1)(b)), two counts of using an imitation firearm while committing robbery (Criminal Code, s. 85(2)), and two counts of having his face masked with intent to commit an indictable offence (Criminal Code, s. 351(2)).
- [5] The appellant appeals from his convictions.
- [6] This appeal engages two questions: whether the warrant obtained after the Charter-infringing police conduct was valid, and whether items seized upon exercise of the warrant were admissible in evidence or ought to have been excluded under s. 24(2) of the Charter. The trial judge ruled the warrant valid and the evidence admissible.
- [7] For the reasons that follow, I agree with the trial judge's conclusion that the warrant was valid but I disagree that the evidence was admissible. I am of the view that the judge erred in his s. 24(2) analysis. I would exclude the evidence, allow the appeal, quash the convictions and direct a new trial.

Background Facts

- [8] On November 3 and 16, 2017, respectively, Boss Vapes store (an e-cigarette business) and Deer Lake Market (a convenience store) in Burnaby, British Columbia, were robbed.
- [9] Members of the Royal Canadian Mounted Police ("RCMP") and a member of the Metro Vancouver Transit Police ("MVTP") were advised on November 17, 2017, that the appellant was "arrestable" for both robberies after one Timothy Duliepre, arrested for the Boss Vapes store robbery, gave a warned statement to the police identifying the appellant as one of the four masked perpetrators of that robbery. Mr. Duliepre identified the appellant as having a gun.
- [10] On observing surveillance footage and speaking with witnesses, investigators determined that one of the perpetrators of the Boss Vapes store robbery and the Deer Lake Market robber had similar "identifiers", including: a slim build; a black "Under Armour" hoodie; a black mask with a white skull logo; and the brandishing of a handgun. The surveillance footage of the Boss Vapes robbery showed the perpetrator wearing grey sweatpants and grey Nike running shoes. The surveillance footage of the similar Deer Lake robber suggested the person was wearing black jogging pants and grey running shoes.
- [11] At the time, the appellant was on probation. His probation order required him to present himself to a peace officer to ensure compliance with his curfew set from 7:00 p.m. to 6:00 a.m. seven days a week. Constable Adzijaj, a member of the MVTP, who had previous dealings with the appellant and could identify him, contacted one of the appellant's probation officers. The probation officer provided the appellant's address and described the probation officer's practice of conducting curfew checks. The probation officer would generally contact the appellant by cell phone to have him come to either the back door or back sliding glass door of the residence.
- [12] The probation officer also advised that people unaffiliated with the appellant lived in the residence. Discretion was therefore important in performing a curfew check to avoid disturbing the other occupants. Constable Adzijaj relayed this information to members of the RCMP at a pre-arrest meeting convened by Sergeant Aitken on the afternoon of November 17, 2017. Constable Sinclair, a police officer for approximately three years at the time in question, formed part of the "team" of RCMP and MVTP officers investigating the appellant's involvement in the robberies. Constable Sinclair attended the pre-arrest meeting.
- [13] At their pre-arrest meeting, the police developed a plan for the appellant's arrest. Various officers were to establish surveillance at the residence. Constables Sinclair and Adzijaj were to go to the rear door of the residence. They were to perform a curfew check by knocking and announcing themselves at the door. When the appellant came to the door, the officers were to arrest him for the armed robberies.
- [14] There was no attempt to obtain a warrant first.

The Warrantless Entry and Arrest

- [15] Approximately eight officers, including Constables Adzijaj, Sinclair, and Pare and Corporal Chen, attended the appellant's residence shortly after 8:00 p.m. on November 17, 2017. Some were stationed in the yard and others went to the door. Constables Adzijaj and Sinclair knocked on the rear door of the residence and announced themselves, but there was no response. They could hear loud music and a dog barking inside.
- [16] Constable Sinclair tried the sliding glass door next to the rear door. Finding it unsecured, and without consultation with Constable Adzijaj or any senior officers (all the police officers at the scene were connected by radio transmitters), Constable Sinclair entered the residence. Although Constable Adzijaj was uncomfortable deviating from the arrest plan, he followed Constable Sinclair out of concern for safety. Corporal Chen and Constable Pare followed into the residence shortly after Constables Sinclair and Adzijaj.
- [17] Inside the residence, Constable Sinclair went directly to a door he believed provided access to the appellant's room. He knocked and announced his presence. The appellant opened the door and Constable Sinclair, a large and imposing officer, tackled and arrested him for robbery. Other officers entered to assist. The arrest occurred in the appellant's bedroom.

The Warrantless Clearing Search

- [18] After the arrest, officers conducted a cursory clearing search of the residence. Constable Adzijaj searched the upper level of the residence to see whether there was anyone present who might have access to firearms. He asked a male found upstairs who was not associated with the appellant to leave the residence. During the clearing search, Constable Adzijaj saw what he believed to be "vape juice" in an open closet. Constable Pare, who had been stationed outside the rear of the residence, also entered to look for other occupants. He saw a black mask in plain view during his search.
- [19] The clearing search took approximately 10 minutes. The police secured the residence while they awaited the issuance of a search warrant.
- [20] Constable Emond of the RCMP drafted the Information to Obtain ("ITO"). The search warrant was issued by a Judicial Justice of the Peace authorizing the RCMP to search the residence between 9:00 a.m. and 3:00 p.m. on November 18, 2017.
- [21] The day after the warrantless entry and warrantless arrest, on November 18, 2017, at 12:40 p.m., the police executed the search warrant and seized the following items: several packages of "Belmont" cigarettes; various "vape" products; a pair of grey sweatpants; a black mask with a white skull logo; a pair of black gloves; a black Under Armour hoodie; two pairs of Nike running shoes; a CZ 858 model rifle; and a loaded magazine.

The Voir Dire

- [22] On November 26, 2018, the appellant filed notice that pursuant to ss. 8 and 24(2) of the Charter, he was seeking an order excluding the evidence seized in his residence on the basis that the ITO was facially invalid and the search warrant could not have issued. The trial therefore began with a voir dire to determine the admissibility of the evidence. Constables Adzijaj, Sinclair, and Pare and Corporal Chen testified on the voir dire.
- [23] The judge began his voir dire ruling (*R. v. Reilly* (24 December 2018), 249342-3-C Vancouver (B.C. Prov. Ct.)) by setting out the circumstances of the unlawful entry, warrantless arrest, clearing search, issuance of the search warrant, and ensuing search of the residence. I will address the judge's reasons in more detail shortly.
- [24] In summary, the judge discussed the applicable legal principles, including that where an applicant attacks the facial validity of an ITO, the court is required to examine the entire ITO to determine whether the issuing justice could have issued the search warrant based on the contents of the ITO.
- [25] The judge further noted that when information obtained by unconstitutional means is excised from the ITO, the court must assess whether the remaining information would have been sufficient to support the issuance of the search warrant. He concluded that the warrant was valid.
- [26] The judge then discussed the approach to s. 24(2) applications as set out in *R. v. Grant*, 2009 SCC 32 [Grant]. Based on his s. 24(2) analysis, he concluded the evidence obtained in the execution of the search warrant was admissible at trial. In discussing the two issues raised on this appeal, I will address both the judge's review of the validity of the search warrant and his s. 24(2) analysis.
- [27] Following the voir dire ruling, and based on an agreed statement of facts, the appellant invited the judge to convict him of the offences in question.

Issues on Appeal

- [28] The appellant advances two overall grounds of appeal:
- (1) that the judge erred by concluding the warrant was facially valid after excising the information obtained by Charter breaches;
 - (2) that the judge erred in not excluding the evidence obtained upon execution of the search warrant based on the earlier Charter breaches. More particularly, the thrust of the appellant's arguments on this ground is that the judge erred in his s. 24(2) analysis:
 - (a) by considering the Charter-compliant conduct of the police as mitigating the seriousness of the breach;

- (b) by failing to take into account wrongful conduct of police officers other than Constable Sinclair; and
- (c) by improperly applying the factors in *Grant* by compartmentalizing the question of whether admitting the evidence would bring the administration of justice into disrepute.

[29] The Crown submits that the judge made no such errors.

[30] I turn to address the grounds of appeal.

First Issue: Did the trial judge err by concluding the search warrant was facially valid after excision of certain material from the ITO, including the unconstitutionally obtained evidence?

The Judge's Analysis of the ITO and Search Warrant

- [31] The Crown admitted the police breached the appellant's s. 8 Charter right to be free from unreasonable search or seizure when they unlawfully entered his residence and bedroom and arrested him without a warrant and then conducted the clearing search. The Crown submitted that "anything" related to the arrest should be excised from the ITO, including the evidence the police observed during the clearing search. But the Crown argued the ITO nonetheless remained sufficient to sustain the facial validity of the search warrant.
- [32] In considering the facial validity of the ITO, the judge first rejected the appellant's contention that Constable Emond's statement--that he believed the same person committed both robberies--was uncorroborated and conclusory, noting that the statement was based on distinctive clothing and the brandishing of a handgun. The judge reviewed the statements of several other RCMP officers giving similar descriptions of the two perpetrators from the two robberies, as outlined in the ITO. Based on this material, the judge held that the paragraphs in the ITO describing Constable Emond's belief were objectively supported by other evidence in the ITO and should not be excised (at paras. 67-77).
- [33] The judge agreed with the appellant that a paragraph in the ITO stating that certain cards and property not located or reported to the police as found property would likely be found in the appellant's residence was unsupported and should be excised (at para. 78).
- [34] Next, the judge rejected the appellant's contention that the information provided by Mr. Duliepre was unreliable and that he was acting in an informant capacity. The judge concluded Mr. Duliepre was not an informant, but a co-perpetrator of the Boss Vapes store robbery, and much of what he told the police was corroborated. Thus, the judge held the paragraphs in the ITO setting out Mr. Duliepre's statement should not be excised (at paras. 79-89).
- [35] Considering what remained in the ITO after the excisions, the judge concluded the ITO was facially valid and the Judicial Justice of the Peace could have issued the warrant to search the appellant's residence for the items listed in the warrant, aside from certain property of a person identified as "M.G." (at para. 90).

The Standard of Review of a Trial Judge's Review of a Search Warrant

- [36] On review of a trial judge's review of a search warrant, an appellate court owes deference to the findings of the reviewing judge in the assessment of the record as amplified on the review and the disposition of the s. 8 application. Absent an error of law, a misapprehension of evidence, or a failure to consider relevant evidence, an appellate court should decline to interfere with the reviewing judge's decision: *R. v. Sadikov*, 2014 ONCA 72 at para. 89; *R. v. Slemko*, 2020 BCCA 207 at para. 53.

Legal Principles Applicable to Validity of Warrant

- [37] Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search or seizure. Search or seizure conducted on the basis of an invalid search warrant infringes or denies these s. 8 rights.
- [38] The sufficiency of the grounds for the issuance of a search warrant may be attacked in two ways: (1) a challenge to the facial validity of the affidavit in support of the search warrant or the ITO; and (2) a sub-facial challenge to the reliability of the content of the affidavit or the ITO. Whether the challenge is facial, sub-facial or both, the role of the reviewing judge remains the same: *R. v. Frederickson*, 2018 BCCA 2 at para. 28, citing *R. v. Araujo*, 2000 SCC 65; *R. v. McKinnon*, 2013 BCSC 2212 at para. 11. In this case, the appellant challenged the facial validity of the search warrant.
- [39] A review of a search warrant is not a de novo hearing. In *Slemko* at para. 53, this Court adopted the standard for the issuance of a warrant set out in *Sadikov*:
- [84] The scope of warrant review is narrow. The review is not a de novo hearing of the ex parte application. The reviewing judge does not substitute his or her view for that of the issuing judge: *Garofoli* [*R. v. Garofoli*, [1990] 2 S.C.R. 1421], at p. 1452; *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 20, leave to appeal to S.C.C. refused, [2010] 1 S.C.R. ix; and *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40. The standard is whether there is sufficient credible and reliable evidence to permit a justice to find reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at the specified time and place of search: *Morelli*, at para. 40. Said in another way, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the warrant could - not would - have issued: *Morelli*, at para. 40; *Araujo*, at para. 54; and *Garofoli*, at p. 1452.
- [40] In this case, the judge relied on *R. v. Liu*, 2014 BCCA 166, as a summary of the jurisprudence relating to judicial review of the validity of a search warrant, where this Court said:
- [39] I would summarize the main points from this jurisprudence in the following way:

- The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant.
- The trial judge should examine the information in its totality, not on a piecemeal basis, in a "practical, non-technical, and common sense basis".
- The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.
- The appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.
- Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".

[Emphasis in original.]

[41] Those principles are consistent with those in Slemko and Sadikov.

Discussion on the Validity of the Search Warrant

[42] I am satisfied the judge identified and correctly applied the relevant legal principles in assessing the validity of the search warrant. I agree with the Crown's submissions and conclude as follows.

[43] The appellant did not dispute that the ITO as excised established reasonable grounds to believe he was one of the perpetrators of the Boss Vapes store robbery. But he appears to challenge the conclusion that there was sufficient information in the ITO to establish he was the perpetrator of the Deer Lake Market robbery, arguing there was no credibly-based probability that the two robbers in the two robberies were the same person based simply on their clothing. He says Mr. Duliepre did not identify the clothing the appellant wore during the Boss Vapes store robbery. However, the Crown correctly says this submission takes a piecemeal approach to the information, improperly parsing it rather than examining the information in the ITO in its totality. The information came not just from Mr. Duliepre, but also from eyewitnesses and video surveillance of the two robberies. There was a credibly-based probability that the appellant was the person with the handgun and was wearing the same distinctive clothing in both robberies.

[44] Next, there was sufficient information remaining in the ITO from which the justice could infer that items connected to the robberies would be located in the appellant's residence. Again, the appellant erroneously focusses on omission, rather than the sufficiency of the evidence in support of the warrant. On a consideration of the information as a whole, there was a credibly-based probability the appellant lived at the residence to be searched. This information was provided by Mr. Duliepre and a probation officer.

- [45] Also, a reasonable inference from all the information set out in the ITO was that personal property such as the distinctive clothing the appellant wore at both robberies would be found in his residence. The issuing justice could reasonably infer the appellant kept the clothing between the two robberies and it would be found in his residence just two days after the Deer Lake Market robbery, when the warrant was to be executed. The reviewing judge, like the issuing justice, was entitled to draw reasonable inferences from the contents of the ITO. Given the close temporal proximity of the last robbery, the justice could also reasonably infer that other robbery-related items could be found in his residence, including a handgun and the packages of Belmont cigarettes from the Deer Lake Market robbery.
- [46] It was unnecessary for the deponent of the ITO to explicitly state whether evidence of the robberies would be found in the appellant's residence because this was the common sense inference from all the information. Like the issuing justice, the reviewing judge was entitled to draw reasonable inferences from the contents of the ITO. The inquiry begins and ends with an assessment of whether the ITO contains reliable evidence that might reasonably be believed, on the basis of which the warrant or order could have issued: *R. v. Nero*, 2016 ONCA 160 at para. 71, leave to appeal ref'd [2016] S.C.C.A. No. 184, citing *R. v. Morelli*, 2010 SCC 8, at para. 40; *Sadikov* at para. 88.
- [47] The appellant relies on *Liu* and *R. v. Sunner*, 2017 BCSC 2445, to submit there was only a tenuous connection to the items the police sought to seize and the location of the seizure. But the outcomes in both those cases depended on their particular facts, which are different from this case. As the Crown says, the warrant in *Liu* was to seize drugs from a residence of people believed to be involved in drug trafficking, but there was no information in the ITO that drugs were brought to that residence before being delivered elsewhere.
- [48] In *Sunner*, the warrant was to seize drugs from the residence of a dial-a-dope dealer. The probability the person might be involved in the drug trade and might reside at the residence was held to be insufficient to support a credibly-based probability that the accused used his residence to store drugs. However, in this case, the issuing justice could reasonably infer the appellant would keep the clothing he wore at both robberies in his residence. After all, the Deer Lake Market robbery occurred just two days before the warrant was issued.
- [49] Upon examining the excised ITO in its totality, there was reliable information from which the issuing justice could infer the appellant was one of the perpetrators of the Boss Vapes store robbery and was the perpetrator of the Deer Lake Market robbery. There was also reliable information from which the issuing justice could infer items connected to the robberies, including the clothing the appellant wore while committing the robberies, would be found in his residence. The judge's findings on this issue were open to him on the material before him. He correctly identified and applied the relevant principles. In my view, the appellant has failed to identify any material error in law or principal in the judge's review of the search warrant.

[50] I would not give effect to this ground of appeal. However, as I will explain under the s. 24(2) analysis, in my view, the validity or invalidity of the search warrant in this case has little effect on the s. 24(2) analysis.

Second Issue: Did the trial judge err in admitting the search warrant evidence in light of the earlier Charter breaches?

The Judge's s. 24(2) Analysis

- [51] After determining there were reasonable grounds to support the search warrant, the judge concluded the police had breached the appellant's s. 8 Charter rights on three occasions: (i) when Constable Sinclair entered the residence; (ii) when Constable Sinclair entered the appellant's bedroom to arrest him; and (iii) when the police conducted the clearing search following the appellant's arrest (at para. 91). The Crown conceded these three Charter violations.
- [52] The judge then turned to the three inquiries relevant to s. 24(2) as required by the framework in *Grant*, ultimately finding the evidence seized under the search warrant to be admissible.
- [53] First, as to the seriousness of the Charter-infringing conduct, the judge concluded this factor favoured inclusion of the evidence. Despite observing that there was no question the conduct of Constable Sinclair resulted in a serious violation of the appellant's s. 8 Charter rights, the judge then considered the "totality of the police conduct" when the violations occurred. Constable Sinclair's unlawful entry into the residence and unlawful arrest of the appellant resulted in "the necessity of the police conducting a clearing search to ensure there was no one else in the residence" (at para. 93).
- [54] The judge also found the police neither moved nor removed any property during the approximately 10-minute clearing search. The residence was then secured and the police awaited the issuance of a warrant to search, pursuant to which they searched the residence. At all times, the police believed the warrant was valid (at para. 94).
- [55] Aside from Constable Sinclair, the judge found that the police conducted themselves in a professional manner. The judge said, "In particular, I find Constable Adzijaj conducted himself professionally. His rejected suggestion that they contact the [appellant] by cell phone and request that he present himself at the door of his residence would have been a far preferable, and safer, strategy" (at para. 95).
- [56] The judge's characterization and findings as to the seriousness of the unconstitutional police conduct is significant both as to the errors identified in his s. 24(2) analysis, and to this Court's fresh and independent analysis under s. 24(2). I therefore reproduce his ruling as follows:

- [96] I find that Constable Sinclair acted unilaterally and contrary to senior officers' directions by entering the residence through the patio door. This was not part of the plan. His entry into the residence, while opportunistic, was potentially dangerous. Not only did he endanger himself, but he also endangered Constable Adzijaj.
- [97] Constable Sinclair is physically an imposing individual. In fact, he testified that he is often used in curfew checks because of his size. However, I had a clear impression as he testified that he is not particularly sophisticated when it comes to strategic planning. In addition, he appeared to lack insight into the importance of warrants and the importance of the right guaranteed by s. 8 of the Charter.
- [98] It is the conduct of Constable Sinclair that calls into question whether the court ought to disassociate itself from the police conduct at the time of the s. 8 Charter breaches.
- [99] In my assessment, I note that, while not the best plan, the curfew check was not illegal. The applicant was subject to a court-ordered curfew.
- [100] In addition, I take into account that there was a sense of urgency in planning the arrest of the applicant. Two robberies had taken place involving a firearm allegedly brandished by the applicant. The most recent robbery, of the Deer Lake Market, had occurred one day prior to the arrest of the applicant.
- [101] I find that Constable Sinclair's conduct while opportunistic, was not wilful. He tried the patio door and found that it was not secure. Constable Sinclair did not have to apply any significant force to open the door. While I am dubious, I am not prepared to reject Constable Sinclair's evidence that he entered through the patio door to give the applicant the opportunity to present himself at the door of his suite to confirm curfew compliance.
- [102] I find that, while unlawful, Constable Sinclair's entry into the applicant's room and his subsequent arrest of the applicant did not entail conduct that was inhumane or degrading.
- [103] I do not find that Constable Sinclair's conduct is indicative of a pattern of systemic or institutional police disregard of constitutional rights. In Constable Sinclair's mind he believed his conduct was appropriate. His conduct was negligent and therefore cannot be equated to good faith. I am supported in this finding from his evidence in cross-examination that he would not do anything differently under similar circumstances.
- [104] In conclusion, Constable Sinclair's Charter-infringing conduct was serious. It impacted on the privacy interests of the applicant. Constable Sinclair acted contrary to, or without, senior officers' directions. Had Constable Sinclair's conduct in entering the residence had the approval, either implicitly or expressly, of a senior officer, then the overall state conduct would fall at the serious end of spectrum and would likely result in the court having to disassociate itself from the state conduct by excluding the evidence obtained from the search of the residence.

- [105] When assessing the totality of the state conduct in this case, I am not prepared to find that the admission of evidence obtained from the search of the residence will likely have a negative impact on the public's confidence in the rule of law and will, thereby, risk bringing the administration of justice into disrepute.
- [106] This factor favours inclusion.
- [57] As to the impact of the Charter violations on the appellant's Charter-protected interests (the second Grant factor), the judge recognized the Crown had essentially conceded that the unwarranted police intrusion into the appellant's residence was significant and unjustified. He recognized the jurisprudence universally recognizes an individual is entitled to a high expectation of privacy in their home.
- [58] The judge noted, however, that the appellant was alone in his room, so the presence of other family members and an impact on his relationship with them was not a factor. Further, the police did not seize any property until the search warrant was issued. The judge also found that apart from the intrusion on the appellant's privacy interests, there was no evidence of any further impact on his dignity.
- [59] Thus, the judge concluded the unwarranted police intrusion into the residence was not "profoundly intrusive" to the extent of establishing the state conduct would bring the administration of justice into disrepute. In his view, this factor favoured admitting the evidence.
- [60] Turning to society's interest in having the dispute resolved on its merits (the third Grant factor), the judge noted the evidence was real, highly reliable, and existed independently of the s. 8 Charter breaches. He also noted that the seriousness of the charges favoured admitting the evidence, particularly where it was reliable. The judge said, "[a]t the same time, I do not allow this conclusion to overwhelm the s. 24(2) analysis. I recognize that the third line of the Grant inquiry requires that I take into account the 'long-term implication for the repute of the administration of justice, and not the public's short-term desire for a conviction'" (citing *R. v. Vanhorn*, 2017 BCSC 379 at para. 47). He held that this factor favoured inclusion and, after balancing the Grant factors, the evidence obtained from the search of the appellant's residence was admissible.
- [61] I turn to discuss the judge's ruling on s. 24(2), beginning with the standard of review and the general legal principles.

Standard of Review: s. 24(2)

- [62] A trial judge's s. 24(2) analysis is entitled to considerable deference on appeal.

- [63] In *R. v. Mian*, 2014 SCC 54 at para. 77, the Court, citing *R. v. Côté*, 2011 SCC 46 at para. 44, per Justice Cromwell, writing for the majority, recognized it was well-established that the determinations of trial judges as to what would bring the administration of justice into disrepute having regard to all the circumstances will be reviewed deferentially. Where a trial judge has considered the proper factors and has not made any unreasonable finding, their determination is owed considerable deference on appellate review.
- [64] In *R. v. McGuffie*, 2016 ONCA 365, Justice Doherty explained the standard of review in somewhat more detail:
- [64] The three inquiries identified in *Grant* require both fact-finding and the weighing of various, often competing interests. Appellate review of either task on a correctness standard is neither practical, nor beneficial to the overall administration of justice. A trial judge's decision to admit or exclude evidence under s. 24(2) is entitled to deference on appeal, absent an error in principle, palpable and overriding factual error, or an unreasonable determination: see *Grant*, at paras. 86, 127; *Côté*, at para. 44; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 82; *Jones [R. v. Jones]*, 2011 ONCA 632, at para. 79; *R. v. Ansari*, 2015 ONCA 575, 330 C.C.C. (3d) 105, at para. 72.

Legal Framework Applicable to s. 24(2) of the Charter

- [65] In summary, the s. 24(2) analysis involves the following stages:
- (1) as a threshold issue, the court must be satisfied that the evidence was obtained in a manner that infringed or denied a Charter right;
 - (2) if that threshold is met, the court must engage in the evaluative exercise under s. 24(2) and determine whether the admission of evidence would bring the administration of justice into disrepute. There are three factors considered in answering this question, identified in *Grant*:
 - (a) the seriousness of the state's Charter-infringing conduct;
 - (b) the impact of the breach on the Charter-protected interests of the accused; and,
 - (c) society's interest in an adjudication on the merits.

See *R. v. Robertson*, 2019 BCCA 116, at paras. 51-52; *McGuffie* at paras. 61-63.

Discussion on Threshold Issue: Was there a causal, temporal or contextual link between the Charter violations and the seized evidence?

- [66] As a preliminary matter, the Crown submits the judge erred in implicitly finding a sufficient causal, temporal or contextual nexus between the s. 8 Charter violations and the obtaining of the evidence so as to engage the evaluative analysis in s. 24(2).
- [67] The threshold issue to engage a s. 24(2) analysis is whether the accused has shown on a balance of probabilities that the evidence was "obtained in a manner" that infringed the accused's Charter rights.

- [68] The threshold question requires a connection between the Charter violation and the evidence obtained. The connection may be causal, temporal, contextual, or some combination of the three, but it must be more than remote or tenuous: *R. v. Wittwer*, 2008 SCC 33 at para. 21.
- [69] At trial, the appellant submitted there was a causal, temporal, and contextual link between the unconstitutional conduct and the impugned evidence. The Crown did not respond to this submission, and it appears the judge assumed the required connection was undisputed as he did not explicitly address it in his ruling.
- [70] However, on appeal the Crown disputes the existence of the requisite connection between the Charter violations and the evidence seized in the execution of the search warrant. The Crown says there is no causal connection between the unconstitutional police conduct and the evidence obtained by the warrant. The Crown says the evidence would have been obtained by the valid warrant in any event. While conceding a temporal and contextual link between the unconstitutional conduct and the seized evidence, the Crown argues the connection is too tenuous and remote to trigger s. 24(2).
- [71] The law is clear that even though the evidence might have been discoverable by entirely lawful police conduct, if there is a sufficient temporal and contextual link between the evidence and either preceding or subsequent police breaches of an accused's Charter rights, the accused will have met the requirement of showing that the evidence was obtained "in a manner" that infringed the accused's Charter rights: *R. v. Lauriente*, 2010 BCCA 72; *R. v. Pawar*, 2020 BCCA 251; *R. v. Pino*, 2016 ONCA 389.
- [72] In *Lauriente*, the accused was suspected of having a marijuana grow operation. In the course of a one week investigation there were several breaches of the accused's Charter rights: by police trespassing on his property and five days later by their unauthorized highway stop of him for the purpose of gathering information and taking his photograph. There were also breaches of a co-accused's Charter rights. Two days after the highway stop, the police searched the property with a properly authorized search warrant and obtained the evidence in dispute. The trial judge held that the search warrant was valid. However, the judge excluded the evidence pursuant to s. 24(2) based on the Charter breaches, and verdicts of acquittal followed.
- [73] On appeal, the Crown in *Lauriente* argued that the judge erred in the application of s. 24(2), submitting the Charter breaches had no temporal or causal connection to the evidence gathered pursuant to the valid search warrant. This Court rejected that argument and dismissed the appeal, holding at para. 49:

Here, the warrantless perimeter search of Mr. Lauriente's property, and the highway stop of his vehicle for the purpose of taking his photograph and gathering further information from him, were tactical investigative methods chosen by the police to further the investigation which were sufficiently temporally linked to the evidence discovered upon execution of the warrant to justify the trial judge in moving to the second stage of the s. 24(2) analysis.

[74] As stated in *Lauriente* at para. 47, the fact that the validity of the warrant is upheld, even where it was based in part on information obtained from a Charter breach, does not sever the connection between the breach and the impugned evidence.

[75] Indeed, even where evidence was lawfully obtained before a Charter breach, the necessary threshold connection can be found to exist temporally and contextually. This is because, as *Pino* explains, the approach to the threshold issue is generous and broad, at para. 51:

beginning with *Strachan* [*R. v. Strachan*, [1988] 2 S.C.R. 980], the Supreme Court has taken an increasingly generous and broad approach to the "obtained in a manner" requirement in s. 24(2) - an approach that looks to the overall purpose of the section, whether admission of the evidence would bring the administration of justice into disrepute.

[76] Having reviewed the leading authorities, *Pino* summarized the following considerations that should guide a court's approach to the "obtained in a manner" requirement in s. 24(2) (at para. 72):

- The approach should be generous, consistent with the purpose of s. 24(2)
- The court should consider the entire "chain of events" between the accused and the police
- The requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct
- The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections
- But the connection cannot be either too tenuous or too remote

[77] The reason for the generous and broad approach to the threshold question is the purpose of s. 24(2). The purpose is to protect the administration of justice from being brought into disrepute, which would occur if the courts were seen to condone a serious Charter violation: *Pino* at paras. 69-70.

[78] Also pertinent to the present case are the observations of Cromwell J. in *Côté* at paras. 77-79: that whether or not the telewarrants obtained by the police in that case were valid had little or no impact on the trial judge's decision to exclude the physical evidence. The trial judge relied on the fact that the totality of the search process was tainted by the unconstitutional searches that preceded the issuance of the warrants. Justice Cromwell said that finding was consistent with well-established case law on how illegal warrantless searches can taint a subsequent search that is otherwise lawful, of which *R. v. Grant*, [1993] 3 S.C.R. 223,

provided a good example. He wrote:

- [79] In that case, the information obtained through the warrantless perimeter search was used to support the police's application for search warrants. This Court held that once the illegally obtained information was excised from the affidavits presented to the issuing justice, the information that remained was sufficient to issue the warrants. While this Court held that the warrants were valid, it found that the illegal searches "were nevertheless an integral component in a series of investigative tactics which led to the unearthing of the evidence in question". It was thus "unrealistic to view the perimeter searches as severable from the total investigatory process which culminated in discovery of the impugned evidence" (p. 255). Similarly, in the case at bar, given the trial judge's findings of fact that the police misconduct was continual and systematic from the outset of the investigation, the question of exclusion must not be approached in a compartmentalized fashion.
- [79] In Pawar, the police unlawfully entered the accused's home without a warrant and without exigent circumstances, in breach of the accused's Charter rights. Later that evening, the police obtained and executed a search warrant on the home, finding a large quantity of illicit drugs. The Crown conceded that there was a temporal connection between the unlawful entry into the home and the subsequent obtaining of the drugs by valid search warrant, and so the threshold was met to engage a s. 24(2) analysis. On appeal, this Court found the trial judge to have erred in the s. 24(2) ruling. This Court concluded that it would bring the administration of justice into disrepute to admit the evidence.
- [80] The strength of the connection between a piece of evidence and a Charter breach is a question of fact: *R. v. Mack*, 2014 SCC 58 at para. 39.
- [81] I consider the trial judge implicitly found the required threshold connection between the Charter breaches and the evidence in question, after hearing the appellant's uncontested submission on the issue. I am of the view he made no error in doing so.
- [82] The sequence of police conduct was temporally and contextually linked to the obtaining of the evidence: in the course of investigating two armed robberies, they unlawfully entered the appellant's home, arrested him and did a clearing search of the home, and then they drafted the ITO for a search warrant of the home. The ITO included the evidence viewed by the police during the clearing search of the residence. The police obviously considered the unlawful entry, arrest and clearing search to be part of the same investigation as that for which they sought the warrant. They did not seek the warrant until they unlawfully entered and saw the evidence in the home, and they targeted the warrant to the evidence they saw in the home. They conducted the search pursuant to the warrant within hours of the unlawful entry into the home.
- [83] I cannot accept the Crown's submission that the connection between the Charter breaches and the evidence obtained is tenuous or remote.

[84] In my opinion, as was the case in *Lauriente, Côté and Pawar*, the earlier Charter violations tainted the subsequent search, even though the search was conducted pursuant to a facially valid warrant. The appellant has demonstrated a sufficient temporal and contextual link between the unconstitutional conduct of the police and the evidence sought to be excluded.

[85] I turn to address the primary issue on this appeal: whether the trial judge erred in his analysis under s. 24(2) of the Charter by admitting the evidence.

Discussion on Second Stage Analysis under s. 24(2) of the Charter

[86] As mentioned, the appellant submits the trial judge made three errors in his s. 24(2) analysis that require this Court to undertake a fresh and independent analysis: first, the judge erred by considering the Charter-compliant conduct of the police as mitigating the seriousness of the breaches; second, he erred by failing to take into account the wrongful conduct of the other police officers; and finally, he erred by applying the overarching test of s. 24(2) independently at each stage of the analysis.

[87] The Crown argues the judge correctly stated and applied the s. 24(2) framework as developed in *Grant*.

[88] In *R. v. Le*, 2019 SCC 34 at paras. 139-142, the majority of the Supreme Court of Canada set out the general principles applicable to the analytical framework of s. 24(2). Those principles can be briefly summarized as follows:

- Section 24(2) of the Charter provides that, where evidence is obtained in a Charter-infringing manner, the evidence shall be excluded if its admission would bring the administration of justice into disrepute.
- While the inquiry under s. 24(2) is often phrased as whether or not the evidence should be excluded, the proper question is whether the administration of justice would be brought into disrepute by its admission.
- The focus of the inquiry is on the effect admitting the evidence would have on the administration of justice broadly, not the impact of the state misconduct on the criminal trial.
- In *Grant*, the Court identified three lines of inquiry relevant to whether evidence should be admitted: (1) the seriousness of the Charter-infringing conduct; (2) the impact of the breach on the Charter-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.
- The first two lines of inquiry typically work together to pull towards exclusion of the evidence. However, they do not need to pull with identical degrees of force to justify exclusion of the evidence. It is the sum, not the average, of the first two lines of inquiry that determines the pull towards exclusion.

- The third line of inquiry typically pulls towards the admission of evidence, particularly where the evidence is reliable and critical to the Crown's case.
- If the sum of the first and second inquiries pulls strongly towards exclusion of the evidence, the third inquiry will rarely tip the balance in favour of admissibility. On the other hand, if the first two inquiries make a weak case for exclusion, the third inquiry will often confirm that admitting the evidence will not bring into disrepute the administration of justice.

[89] With the above principles in mind, I will address the arguments on appeal.

Did the Judge Err in Assessing the Seriousness of the Charter-Infringing Conduct?

- [90] The appellant submits that the judge erred by improperly considering the Charter-compliant conduct of the police as mitigating the seriousness of their Charter-infringing actions.
- [91] The Crown submits the judge did not err in assessing the seriousness of the breaches. Rather, he properly considered the seriousness of the police misconduct on a scale. He did not rely on the proper police conduct as mitigating their misconduct; instead, the judge merely identified the absence of factors that might otherwise have exacerbated the seriousness of their misconduct. The judge properly considered that the breaches were not systemic. He found the police acted in a professional manner when he assessed whether they acted in bad faith and, in turn, when he assessed the seriousness of the breaches.
- [92] The question is really whether, when the judge commented on the totality of other police conduct, the judge was simply commenting on the absence of aggravating factors or was taking into account the presence of mitigating factors.
- [93] I am persuaded the judge erred by considering the Charter-compliant conduct of the police as mitigating the seriousness of their Charter breaches. This error is reflected in para. 92 of the judge's ruling where he said, "[t]here is no question that the conduct of Constable Sinclair resulted in a serious violation of the [appellant's] s. 8 Charter right. That being said, it is necessary to assess the totality of the police conduct at the time the [appellant's] s. 8 Charter right was violated" (emphasis added). Following this qualifying statement, the judge then referred to police conduct that was not improper.
- [94] In contrasting the "totality of the police conduct" to the seriousness of Constable Sinclair's conduct, the judge referred to the fact the police were only in the residence for approximately 10 minutes, they did not move or remove any property during their clearing search, and then obtained a warrant they assumed to be valid.
- [95] In assessing the "totality" of the police conduct, the judge emphasized conduct that he considered to be professional on the part of other police officers. He found "[b]ut for the conduct of Constable Sinclair, the police otherwise conducted themselves in a professional manner. In particular, I find Constable Adzijaj conducted himself professionally" (para. 95).

- [96] In the same vein, the judge found that Constable Sinclair acted without the approval of senior officers, and had they approved his conduct, then the "overall state conduct would fall at the serious end of [the] spectrum" (para. 104).
- [97] The difficulty with the judge's approach is that Constable Sinclair's conduct alone was already at the serious end of the spectrum.
- [98] It was not argued that Constable Sinclair had been acting at the direction of or with the approval of senior officers. Senior officers were criticized by the defence for not coming up with a safer and more effective arrest plan, and for alternatives if the appellant did not voluntarily come to the door of the home. But it was not suggested by defence counsel in submissions that senior officers directed Constable Sinclair to enter the home.
- [99] That the judge was examining factors to attenuate the seriousness of Constable Sinclair's misconduct can also be seen by the judge's observation that his conduct was "opportunistic" but "not wilful" and did not "entail conduct that was inhumane or degrading" (at paras. 101-102). However, Constable Sinclair did not accidentally enter the home and then the bedroom without a warrant; he did so as a choice. Given the longstanding, well-known requirement of a warrant, there can be little doubt that it was wilful.
- [100] The logic of the judge's reasons in referring to other officers not being involved in Constable Sinclair's misconduct was to identify that the totality of the state conduct was less serious and less likely to require the court to disassociate from it by excluding the evidence (para. 105).
- [101] While there was an absence of systemic misconduct, it does not mitigate against the seriousness of the Charter-infringing conduct. The court in McGuffie, at para. 67, explicitly disapproved of this type of reasoning. In that case, the court said:

Systemic or institutional abuse of constitutional rights may be an aggravating factor rendering police misconduct more serious. The absence of evidence of systemic non-compliance with Charter requirements by the police is not a mitigating factor. The police are expected to comply with the law, especially the Charter.

- [102] In my view, the judge erred in principle in treating the Charter-compliant conduct of other officers as attenuating the seriousness of Constable Sinclair's misconduct. The Charter-compliant conduct could not mitigate or offset the seriousness of the Charter breaches. Rather, it simply did not further aggravate the already serious Charter breaches.

Did the Judge Err by Failing to Consider the Conduct of the Other Officers?

- [103] The appellant alleges the judge erred by failing to take into account relevant legal principles or relevant evidence. He identifies this error as occurring when the judge focussed exclusively on the actions of Constable Sinclair and failed to consider the conduct of the other officers who either acquiesced or participated in Constable Sinclair's Charter-infringing conduct. By way of example, the appellant notes that the judge

commended Constable Adzijaj for his conduct, notwithstanding the fact that he followed Constable Sinclair into the appellant's residence. Constable Adzijaj knew at the time he entered the appellant's residence that he was violating the appellant's s. 8 rights, so his actions are tantamount to a willful breach. Further, Corporal Chen and Constable Pare entered the home immediately after Constables Sinclair and Adzijaj and participated in clearing the residence. The appellant says the judge erred by failing to consider all of the officers' conduct in assessing the seriousness of the Charter breaches.

[104] Respectfully I cannot agree with these submissions.

[105] It is clear from the above analysis of the first asserted error that the judge did consider the conduct of the other officers. He was aware of how their actions contributed to the Charter breaches, and described their evidence in detail in his ruling (at paras. 35-48). Further, the judge's finding that Constable Adzijaj acted professionally was consistent with the submissions of defence counsel at trial.

[106] The fact is that Constable Sinclair put all of the officers in a difficult and dangerous situation once he entered the home. The police were briefed that the appellant could be armed and could be hostile to police.

[107] Constable Sinclair's serious misconduct created the cascade of events that led to the other police entering and searching the home. While also a breach of the appellant's s. 8 Charter right, the clearing search followed upon the warrantless entry and warrantless arrest. It would not have occurred but for those breaches. Once inside and having made the arrest, the police simply cleared the residence of the only other person present to prevent the destruction of evidence and for safety purposes.

[108] The appellant characterizes the alleged error in not taking into account the participation of the other officers in the Charter breaches as "failing to take into account relevant legal principles" or "failure to take into account relevant evidence". It seems to me that the appellant is challenging certain of the judge's underlying findings of fact without identifying palpable and overriding error. I would not sustain the appellant's arguments on the second alleged error.

Did the Judge Err by Improperly Weighing the Grant Factors?

[109] The appellant says the judge erred by assessing the effect on the administration of justice independently at the first and second stages of the Grant analysis. After concluding the breaches were serious (Grant inquiry #1), he concluded that the police misconduct would not bring the administration of justice into disrepute. The judge made the same finding after concluding the breaches had a significant impact on the appellant's privacy interests (Grant inquiry #2). By assessing whether the administration of justice would be put into disrepute separately at the first and second branches of the analysis, the judge overly compartmentalized what is to be a broad, overall assessment. Viewing each factor in isolation undermines the balancing mandated by Grant.

- [110] To illustrate the appellant's submission, it is helpful to reproduce the relevant portions of the ruling. In assessing the first Grant factor--the seriousness of the Charter breaches--the judge said:
- [105] When assessing the totality of the state conduct in this case, I am not prepared to find that the admission of evidence obtained from the search of the residence will likely have a negative impact on the public's confidence in the rule of law and will, thereby, risk bringing the administration of justice into disrepute.
- [106] This factor favours inclusion.
- [111] As to the impact of the breaches on the appellant's Charter-protected interests, the judge said:
- [112] I find that the unwarranted police intrusion into the residence of the applicant was significant and unjustified. However, I do not find that it was profoundly intrusive to the extent of establishing that the state conduct would bring the administration of justice into disrepute.
- [113] This factor favours inclusion.
- [112] The Crown submits the appellant improperly parses the judge's ruling. When the reasons are read as a whole, the Crown says it is clear the judge properly applied the s. 24(2) analytical framework: he assessed and balanced the effect of admitting the evidence on society's confidence in the justice system, having regard to the three Grant factors. It did not matter where in his ruling the judge made findings applicable to the balancing exercise required by Grant; instead, what matters was that the judge properly applied the s. 24(2) framework.
- [113] The Crown's argument is superficially attractive. However, on closer examination, I must disagree. In my view, the appellant identifies an error in principle in the judge's s. 24(2) analysis.
- [114] As this Court observed in Robertson at para. 51, the evaluative exercise of whether the admission of evidence obtained in a manner that infringed a Charter right would, having regard to all the circumstances, bring the administration of justice into disrepute is the question to the end of which the three lines of inquiry identified in Grant are undertaken. Robertson adopted the reasoning in McGuffie, which, shortly afterward, the Supreme Court of Canada endorsed in Le at paras. 141-142.
- [115] While the trial judge assessed the effect on the administration of justice at each stage of the Grant analysis, such an assessment cannot replace the overall weighing and balancing exercise at the end of all three s. 24(2) inquiries. By considering the effect on the administration of justice of each Grant factor independently, rather than considering all three of the factors collectively, the judge overly compartmentalized what is meant to be a broad analysis. In doing so, he failed to properly weigh and balance the results of each

inquiry with the others to determine whether, on an overall assessment, the administration of justice would be brought into disrepute by admission of the evidence. The wording of s. 24(2) itself is plain: "having regard to all the circumstances". The judge erred in principle by failing to undertake the broader inquiry mandated by s. 24(2).

- [116] In compartmentalizing his analysis and concluding separately for each of the first two stages of the Grant inquiry that admission of the evidence would not bring the administration of justice into disrepute, the judge made it inevitable that he would come to the same conclusion on the last stage of the Grant inquiry, which typically favours admission of the evidence. Indeed, it led to the foregone conclusion that the evidence would be admitted because there were no competing factors to balance by way of an overall assessment.
- [117] Had the trial judge conducted the correct analysis, he would have properly concluded that, considered together, the seriousness of the cumulative breaches and their impact on the Charter-protected rights of the appellant favoured exclusion of the evidence.
- [118] Likewise, had the judge properly conducted an overall assessment of the Grant factors, rather than each one in isolation, the judge would have realized that the seriousness of the breaches and their impact on the Charter-protected rights of the appellant outweighed society's interest in the adjudication of the case on its merits. In McGuffie, Doherty J.A. wrote:
- [61] After Grant, at paras. 71-86, the admissibility of evidence under s. 24(2) is approached by examining:
- 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 an adjudication on the merits.
- [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the Charter-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in Grant. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34.
- [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see e.g. *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 75-103; *Aucoin* [*R. v. Aucoin*, 2012 SCC 66], at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in

favour of admissibility: see e.g. *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 81-89; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 98-112. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.

- [119] The Supreme Court of Canada in *Le*, citing *McGuffie* and other jurisprudence, reasoned the same way. Of specific relevance to this case, the Court in *Le* said, "[w]here the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility" (at para. 142). This principle is well-established in the jurisprudence, as is evident from *Côté*, *Morelli* (followed in *McGuffie*), and *R. v. Paterson*, 2017 SCC 15 (also cited in *Le*). While this principle cannot be rigidly applied in all cases, it is particularly apt in the present case. I conclude the trial judge erred by failing to consider and apply it.
- [120] Having found the trial judge erred in his s. 24(2) analysis, this Court owes no deference to his conclusion that the evidence obtained in the execution of the search warrant was admissible: *Le* at para. 138. This Court must therefore undertake a fresh and independent analysis, accepting the underlying findings of fact made by the trial judge not tainted by the errors: *Robertson* at para. 63, citing *R. v. Vu*, 2013 SCC 60 at para. 67.
- [121] I now turn to a fresh and independent s. 24(2) analysis, applying the *Grant* framework as described in *Le*.

Fresh and Independent Analysis

Seriousness of the Charter-Infringing Conduct

- [122] The judge found that the appellant's s. 8 Charter rights were breached on three occasions: when Constable Sinclair entered the residence through the glass patio door; when Constable Sinclair entered the appellant's bedroom to arrest him; and when the police conducted the clearing search following the arrest.
- [123] The appellant repeats his arguments summarized above that the conduct of other police officers was improper and ought to be taken into account in assessing the seriousness of the Charter breaches. The appellant takes issue with the other three officer's conduct in following Constable Sinclair into the residence, and in conducting the clearing search, arguing that the other officers implicitly condoned Constable Sinclair's misconduct.
- [124] I find these arguments are an attempt to take issue with the judge's findings of fact, without demonstrating a palpable and overriding error. The judge found that Constable Sinclair's unlawful entry and unlawful arrest necessitated the clearing search to ensure no one else was in the residence. The police neither moved nor removed anything during that cursory search. The judge found that, but for the conduct of Constable Sinclair, the police, and Constable Adzijaj in particular, conducted themselves in a professional manner (at para. 95).

[125] It is not necessary to resolve all of these arguments because the Crown properly conceded, and the judge initially correctly found, that Constable Sinclair's misconduct resulted in a "serious violation of the [appellant's] s. 8 Charter right" (at para. 92). It militates or "pulls" in favour of excluding the evidence: *Le* at para. 141; *McGuffie* at para. 62; and *Robertson* at para. 51. As the majority of the Court repeated in *Le* at para. 143 (citing *Paterson* at para. 43), when considering the seriousness of the Charter-infringing conduct, a court's task is to situate that conduct on a scale of culpability. The operating premise is that inadvertent, technical or otherwise minor infringements impact less upon the rule of law and, therefore, upon the reputation of the administration of justice than wilful or reckless disregard of Charter rights (citing *Grant* at para. 74; *R. v. Harrison*, 2009 SCC 34 at para. 22).

[126] The s. 8 Charter infringements here fall at the very serious end of the spectrum. The violations were flagrant. Since 1997 when the Supreme Court of Canada released its decision in *Feeney*, police officers have required what has come to be known as a "Feeney warrant" in order to enter a dwelling-house to make an arrest. The majority of the Court in *Feeney* summarized the requirements as follows:

51. To summarize, in general, the following requirements must be met before an arrest for an indictable offence in a private dwelling is legal: a warrant must be obtained on the basis of reasonable and probable grounds to arrest and to believe the person sought is within the premises in question; and proper announcement must be made before entering. An exception to this rule occurs where there is a case of hot pursuit.

[127] The *Feeney* requirements are now codified in s. 529 of the Criminal Code, which provides:

Powers to Enter Dwelling-houses to Carry out Arrests

Including authorization to enter in warrant of arrest

529 (1) A warrant to arrest or apprehend a person issued by a judge or justice under this or any other Act of Parliament may authorize a peace officer, subject to subsection (2), to enter a dwelling-house described in the warrant for the purpose of arresting or apprehending the person if the judge or justice is satisfied by information on oath in writing that there are reasonable grounds to believe that the person is or will be present in the dwelling-house.

Execution

(2) An authorization to enter a dwelling-house granted under subsection (1) is subject to the condition that the peace officer may not enter the dwelling-house unless the peace officer has, immediately before entering the dwelling-house, reasonable grounds to believe that the person to be arrested or apprehended is present in the dwelling-house.

- [128] Both before and after the decision in Feeney, courts have consistently found that warrantless entries into the home constitute serious violations of the resident's s. 8 Charter rights: *R. v. Silveira*, [1995] 2 S.C.R. 297 at para. 152; *Paterson* at para. 46; *Morelli* at paras. 105-106.
- [129] Constable Adzijaj was aware that entering someone's home without a Feeney warrant or without exigent circumstances could potentially be a very serious breach of the Charter. He understood a Feeney warrant could be obtained by telecommunication if it was impractical to appear in person before a Judicial Justice of the Peace. Constable Adzijaj had no discussion with Constable Sinclair about obtaining a Feeney warrant, nor was it ever discussed at the pre-arrest meeting. Constable Adzijaj never considered it himself.
- [130] Constable Adzijaj testified that had Constable Sinclair discussed making the warrantless entry with him, that he, Constable Adzijaj, would have advised against it.
- [131] For his part, Constable Sinclair was also aware that a Feeney warrant was a judicial authorization that allows the police to enter someone's residence and arrest them without exigent circumstances. He also understood the requirements to obtain a Feeney warrant. Constable Sinclair also knew he could apply for a Feeney warrant by telephone if it was impractical to go before a Judicial Justice of the Peace. Constable Sinclair testified, however that, it was just a "possibility" that the appellant was in the house.
- [132] Constable Sinclair agreed that he decided to simply enter the residence rather than to call the senior officers by cell phone or radio for advice. These officers were available. Constable Sinclair had no discussion about a Feeney warrant with Constable Adzijaj.
- [133] In summary, the relevant law regarding warrantless entries into a residence has been clear for over 20 years. The police knew, or ought to have known, that they could not enter a residence without a warrant to effect an arrest (absent exigent circumstances, which did not exist here). To do so constituted a serious violation of the appellant's s. 8 Charter rights, as Constable Adzijaj conceded in cross-examination.
- [134] It is disturbing the police did not discuss the well-known requirement of a Feeney warrant at their pre-arrest meeting. It is obviously more disturbing that they entered the appellant's residence to effect a warrantless arrest in violation of Feeney as codified in the Criminal Code. Nor is it reassuring that as the judge noted, Constable Sinclair testified, "he would not do anything differently under similar circumstances" (at para. 103). The nature and circumstances of the Charter violations place them at the serious end of the spectrum and pull towards exclusion of the evidence.

Impact of the Breaches on the Charter-Protected Rights of the Appellant

- [135] Addressing the second inquiry under Grant, the impact on the appellant of the breaches of his Charter-protected s. 8 right to be secure against unreasonable search or seizure was significant. The judge correctly observed that the appellant enjoyed a high expectation of privacy in his home, which was universally recognized, and the unwarranted police intrusion was "significant and unjustified" (at paras. 108, 112).
- [136] The Crown submits the impact on the appellant's Charter-protected interests was on the lesser end of the seriousness scale for the reasons given by the judge. The intrusion was brief, nothing was seized, and the appellant's liberty interest was not breached as there were grounds to lawfully arrest him. The day after the unlawful warrantless entry and unlawful warrantless arrest, the investigation was followed up with a valid search warrant. The Crown relies upon the doctrine of discoverability in saying this favours admission of the evidence as it mitigates the seriousness of the earlier breaches and their impact.
- [137] The judge found the impact of the breaches to be significant, although not "profoundly" so. I respectfully disagree. The appellant was tackled in his own home in the privacy of his bedroom by a large police officer who was immediately joined by another officer. Additional officers followed shortly thereafter. The impact on the appellant's Charter-protected rights is connected to the seriousness of the breaches because they were carried out in an area where the expectation of privacy is very high.
- [138] The Crown submits the doctrine of discoverability mitigates the impact of the Charter-infringing conduct. Evidence obtained by unconstitutional means is said to be "discoverable" if the evidence could have been obtained in a Charter-compliant manner, had the police chosen to do so: *R. v. Bains*, 2014 BCCA 43 at para. 51; *Côté* at para. 66. Discoverability can be a relevant factor in both the first and second lines of inquiry under Grant. Justice Cromwell in *Côté* noted the fact police could have obtained a search warrant will often lessen the impact of the unlawful search on the accused's Charter rights (at para. 72). However, Cromwell J. warned that: "[w]hile discoverability may still play a useful role in the s. 24(2) analysis, it is not determinative. A finding of discoverability should not be seen as necessarily leading to admission of evidence" (*Côté* at para. 70). As this Court explained in *Pawar* at para. 87:

Giving the discoverability doctrine a long leash in cases of this kind risks judicial condonation of serious privacy breaches resulting from unacceptable conduct by investigatory agencies: see *Le* at para. 158, quoting from *R. v. Collins*, [1987] 1 S.C.R. 265 at 281. If no remedy is available for unjustified warrantless entries of private dwelling-houses in cases where grounds to obtain a warrant existed at the time of the unlawful entry, there will be little incentive for the police to adopt Charter-compliant behaviour. More importantly, the administration of justice may fall into disrepute in the long term if remedies are not granted for the violation of well-established constitutional precepts.

- [139] The police could have sought a Feeney warrant to enter the appellant's residence and arrest him. They did not. Instead, the police opted to violate the appellant's well-established Charter rights. On cross-examination, Constable Sinclair stated that he would not do anything differently under similar circumstances. To the extent the impact on the appellant's rights is mitigated by the doctrine of discoverability, the seriousness of the Charter-infringing conduct would be similarly aggravated by the failure of the police to turn their minds to obtaining a Feeney warrant.
- [140] Although discoverability can be a relevant consideration in assessing the first and second Grant factors, the principle does not carry significant weight in the present case.
- [141] The other factors cited by the judge--there were no other family members present in the home, the police did not seize anything during the clearing search and there was no impact on the appellant's dignity--did not mitigate the seriousness of the intrusion, but simply reflected the absence of further aggravating factors.
- [142] I agree with the appellant that the admonition in Paterson applies here. In Paterson, the police were investigating a 911 call when they conducted a cursory search of the appellant's apartment after smelling marihuana. Having noted the high expectation of privacy in private homes, the majority of the Court concluded:
- [49] Where, therefore, the Charter-protected interest in privacy is at stake (as it is here), infringements arising from circumstances denoting a "high expectation of privacy" tend to favour exclusion of evidence, while -- all other considerations being equal -- infringements of lesser interests in privacy will not pull as strongly towards exclusion. As the Court said in Grant 2009 (at para. 78): "An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not."
- [50] The Crown acknowledges that the warrantless entry into the appellant's residence was a "relatively serious intrusion", but says that any impact on the appellant's Charter-protected interests was "attenuated by the relative brevity and focussed nature of the initial warrantless search", since the police retreated to obtain a warrant after observing the firearm and drugs. While I agree that the decision by police to obtain a warrant before conducting a further search of the appellant's residence prevented a serious impact on the appellant's privacy interest from becoming even more serious, I also agree with the Crown that this was a "serious intrusion", "relativ[e]" to other forms of intrusion. It is well settled that "[a]n illegal search of a house will therefore be seen as more serious at this stage of the analysis" (Grant 2009, at para. 113). I therefore conclude that the impact of the warrantless entry on the appellant's rights under s. 8 of the Charter was significant. This factor strongly favours exclusion of the evidence.
- [143] As the majority of the Court said in Le:

- [151] The second Grant line of inquiry requires us to consider whether, from the standpoint of society's interest in respect for Charter rights, admission of evidence tainted by a Charter breach would bring the administration of justice into disrepute. This entails asking whether and to what extent, in the totality of the circumstances, the Charter breach "actually undermined the interests protected by the right infringed" (Grant, at para. 76). Like the first inquiry under Grant, this entails answering a question of degree of seriousness: "[t]he more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute" (Grant, at para. 76).
- [144] In the case at bar, the entry into the home and bedroom, the arrest, and the post-arrest clearing search encroached on a high expectation of privacy. The impact of the breaches was profoundly intrusive. This second inquiry pulls toward exclusion of the evidence, as noted in *Le* at para. 141, and *Paterson* at para. 50.

Society's Interest in the Adjudication of the Case on its Merits

- [145] Moving on to the third inquiry under Grant, the charges are serious and the evidence in question, including the packages of "Belmont" cigarettes, "vape" products, the black mask with a white skull logo and other distinctive clothing, a CZ 858 model rifle and a loaded magazine, is both real and highly reliable. Its exclusion would likely seriously weaken the Crown case against the appellant. Society has an interest in the adjudication of the case on its merits. This third factor favours admission of the evidence. Nevertheless, the Crown also relies on other evidence not tainted by the Charter breaches.

Overall Balancing

- [146] In this balancing, the Crown relies again on the lawfully issued search warrant, submitting there were at best only weak temporal and contextual links between the breaches and the obtaining of the evidence, and no causal link. The discovery of the items in the appellant's residence on November 18, 2017, did not depend on Constable Sinclair's actions of November 17, 2017. The Crown says the validity of the search warrant and lack of causal connection between the breaches and the evidence favour admission of the evidence.
- [147] I cannot agree. In my view, as described by Cromwell J. in *Côté* at paras. 77-79, the Crown is attempting to compartmentalize the Charter breaches and the search pursuant to the warrant. But it is the totality of the search process here that was tainted by the unconstitutional entry, arrest, and clearing search, which preceded the issuance of the warrant.
- [148] As stated above under the general principles relevant to a s. 24(2) analysis, the more serious the unconstitutional conduct and the greater the impact on the Charter-protected interests, the stronger the case for exclusion. As I observed in discussing the judge's improper

weighing of the Grant factors, "[w]here the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility" (Le at para. 142, citing Paterson at para. 56; McGuffie at para. 63). It is important to note that this general rule should not be applied rigidly. The majority of the Supreme Court of Canada in *R. v. Omar*, 2019 SCC 32, by substantially adopting the reasons of Justice Brown in *R. v. Omar*, 2018 ONCA 975, implicitly endorsed this general principle. This Court recently in *Pawar* said, regarding this general rule:

- [98] Weighing the relevant factors in the context of an inquiry under s. 24(2) is not an exercise that involves mathematical precision: *Grant* at para. 86. I do not understand the Court in *Le* to suggest otherwise. Section 24(2) requires a nuanced, case-specific assessment of whether the admission of unconstitutionally obtained evidence would bring the administration of justice into disrepute. I agree with the view expressed by Brown J.A. in [*R. v. Omar*, 2018 ONCA 975] that McGuffie did not purport to establish an inflexible "two-strikes-and-the-evidence-is-out" rule: at paras. 119, 121. Nevertheless, the predictive observation endorsed by the Supreme Court of Canada in *Paterson* and in *Le* is useful if regarded as a general analytical tool or rule of thumb.
- [149] There is no reason to override this general rule in the present case. The first and second Grant inquiries individually pull toward exclusion of the evidence. Together they outweigh society's interest in the adjudication of the case on its merits. The overall balancing simply does not and cannot pull in favour of admission of the evidence when the Court's focus must be on the overall repute of the justice system, viewed in the long term, by a reasonable person, informed of all relevant circumstances and of the importance of Charter rights (*Le* at para. 140, citing *Grant* at para. 68).
- [150] As Justice Moldaver said, in dissent but not on this point, in *Le* (at para. 216), "[t]he public's faith in the police rests in part on their belief that the police will not intrude unnecessarily on their property and privacy rights. As such, the police should always be mindful of and respect the owner/occupier's rights. Doing so is essential to fostering public trust in the police." While these observations were made in the context of reviewing the implied "licence to knock" doctrine, they apply equally to this case.
- [151] The observations of this Court in *R. v. Ahmed-Kadir*, 2015 BCCA 346, bear repeating:
- [111] In my view, the scales tip towards exclusion of the handgun found in Mr. Ahmed-Kadir's residence. The importance of maintaining respect for Charter rights and ensuring that the justice system remains above reproach outweighs the collective cost of his acquittal. To admit the handgun in the face of the breaches that occurred here would send the message that when the charges are serious, individual rights count for little.
- [152] The police misconduct was wilful and so serious that it is necessary to exclude the evidence obtained in order to disassociate the justice system from the police misconduct and preserve the reputation of the administration of justice.

Disposition

[153] In the result, I would allow the appeal, exclude the evidence, quash the convictions, and order a new trial.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Madam Justice Fenlon"

Reasons for Judgment of the Honourable Mr. Justice Willcock:

[154] I have had the opportunity to review in draft form the reasons of my colleague, Justice Griffin. I agree with and adopt her conclusions:

- a) the trial judge did not err in concluding the search warrant was facially valid;
- b) but there was a causal, temporal or contextual link between the admitted Charter violations and the seized evidence; and
- c) therefore, despite the fact the challenged evidence was obtained pursuant to a search conducted with a valid warrant, it was obtained in a manner that infringed the appellant's Charter right to be secure against unreasonable search.

[155] With respect, however, I am unable to agree with the conclusion the trial judge erred in law in his s. 24(2) assessment of whether the admission of the evidence thus obtained would bring the administration of justice into disrepute by:

- a) improperly considering the Charter-compliant conduct of some police officers as mitigating the seriousness of Charter-infringing actions; or
- b) improperly weighing the factors considered in that assessment, as identified in Grant.

[156] In the result, I am of the view we should not engage in a fresh and independent s. 24(2) analysis but, rather, that we should defer to the trial judge's assessment. I would dismiss the appeal.

[157] As this Court recently noted in Pawar:

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

[Emphasis added.]

[158] It is also well settled that our task on appeal is not to parse the reasons for judgment to seek to find in them legal error that is not evident. The reasons should be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered'": *R. v. Villaroman*, 2016 SCC 33 at para. 15, citing *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16; and *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at para. 11.

[159] Here, there is no doubt the trial judge directed himself appropriately with respect to the factors to consider on a s. 24(2) application. He was aware of and cited the factors set out at paras. 71 and 72 of *Grant*. That being the case, in the absence of an unreasonable finding, it is my view that we should not interfere in the judge's exercise of the qualitative balancing required by s. 24(2). That balancing was described by Brown J. in *Paterson*, an appeal he described as a "close call", as follows:

[54] As was observed in *Grant* 2009, at para. 140, "[t]he balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision." Indeed, because the *Grant* 2009 factors are mutually incommensurable -- balancing seriousness of state conduct, seriousness of the infringement of Charter rights and the impact upon society's interest in adjudication -- the "balancing" will never be an entirely objective exercise.

[160] The only questions that properly arise on the appeal are whether the judge erred in law by considering some Charter-compliant conduct to be mitigating, or by engaging in an "overly compartmentalized" assessment of the *Grant* factors. With respect, I can see no such apparent error of law in the judgment in this case, and there is no suggestion the trial judge made an unreasonable finding in the sense in which the expression is used in *Pawar*, a finding not based upon a sufficient evidentiary foundation.

Consideration of Charter-Compliant Conduct

[161] There is no dispute that, as Doherty J.A. noted in *McGuffie* at para. 67, systemic or institutional abuse of constitutional rights may be an aggravating factor rendering police misconduct more serious. Where an allegation of institutional abuse is made, it must be addressed by the trial judge.

[162] At trial in the case at bar, the appellant's counsel submitted that while the arrest inside the appellant's residence without a warrant was in itself a serious Charter breach, a number of additional factors aggravated that breach. In particular, she submitted, once the appellant's rights were breached by the entry into his home to effect the arrest, the police chose to "double down" on that unconstitutional conduct by conducting a search that was not warranted by concerns with respect to officer safety. She argued while Constable Adzijaj intended to do a quick search for officer safety, other officers took the search beyond that:

I say they used it as an opportunity to look for clothing, because they knew that clothing was important. And they've been told, at least some of them, at a briefing, be on the lookout for a skull mask. They'd also possibly been told be on the lookout for shoes, and that's exactly what they find during the course of this 22-minute search. So all of that to say the manner in which the search was carried out in my submission makes the breach that much more aggravated.

[Transcript, submissions of counsel p. 141]

[163] This conduct was alleged to have been part of a pattern of disregard of the appellant's rights, of "intentional, wilful, reckless behaviour". The suggestion in argument at trial was that those who planned the appellant's arrest, at the briefing to which counsel referred, implicitly approved the entry into and search of his home. It was in the context of that assertion that we must read the trial judge's assessment of the police conduct. In light of the submissions, the judge was correct to say it was necessary to address the totality of the police conduct at the time the applicant's s. 8 Charter right was violated.

[164] Immediately after the passage cited by my colleague as reflecting consideration of the conduct of some officers as mitigating, (para. 92 of the reasons on the voir dire), the trial judge specifically addressed the most significant allegation of aggravating misconduct: that the search following the unlawful entry into the residence and unlawful arrest was unnecessary or too extensive. He found that it was not, apparently rejecting the suggestion that the police "doubled down" on Constable Sinclair's misconduct.

[165] It would have been an error in principle to treat the Charter-compliant conduct of other officers as attenuating the seriousness of Constable Sinclair's misconduct. In the circumstances of this case, however, it was necessary to address the appellant's submission that conduct of other officers aggravated Constable Sinclair's serious Charter breach. In my view, it is reading too much into the reasons for judgment to say that the trial judge engaged in the former exercise rather than the latter.

[166] The trial judge's description (at para. 101) of Constable Sinclair's conduct as "not wilful" is troubling. The wrongful entry and arrest were certainly wilful in the sense that they were intentional. That was not open to doubt. The trial judge discussed wilfulness when he described the entry via an unlocked door as "opportunistic" and Constable Sinclair as "not particularly sophisticated when it comes to strategic planning" (at paras. 96-97). He apparently concluded that Constable Sinclair did not go to the appellant's home with a plan to enter it to effect the arrest.

[167] The breach can only be said to have been "not wilful", however, in the sense that Constable Sinclair did not believe he was acting wrongfully. The trial judge expressly accepted that Constable Sinclair believed his conduct was appropriate. However, he did not mistake that for "good faith". He clearly recognized (at para. 62) that "ignorance of Charter standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith". He found Constable Sinclair to have been negligent and regarded the Charter breach as "significant and unjustified" (at para. 112).

[168] I cannot say the trial judge erred at law in his assessment of the seriousness of the Charter breach.

Compartmentalization

[169] Justice Griffin, of course, is correct to say that assessing the effect on the administration of justice at each stage of the Grant analysis cannot replace the overall weighing and balancing exercise at the end of all three s. 24(2) inquiries. However, in my view, it is not an error to consider the extent to which the administration of justice may be brought into disrepute by the admission of evidence at each stage when considering sequentially:

- a) whether the Charter breach was so significant as to require the courts to dissociate themselves from it;
- b) whether its impact on the rights of the accused was so great that exclusion is warranted; and
- c) whether the truth-seeking function of the criminal trial process would be better served by its exclusion.

[170] Insofar as the first factor is concerned, Frankel J.A., writing for this Court in *R. v. Reddy*, 2010 BCCA 11, noted at para. 92:

[192] ... Wilful or reckless disregard for Charter rights will tend to support exclusion: [Grant] paras. 71-74. Further, as the Chief Justice and Charron J. noted [in Grant] (at para. 75):

"Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: [citations omitted].

[171] This approach was taken in Grant where the Court, in a passage cited by the trial judge in this case, noted:

[72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[Emphasis added.]

- [172] So, an assessment of the first factor calls for consideration of the extent to which the court must disassociate itself from the impugned conduct, and whether the admission of the evidence would bring the administration of justice into disrepute. That question is not left to the end of the day.
- [173] The Supreme Court in *Grant* described an appropriate assessment of the second factor as follows:
- [176] This inquiry focusses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.
- [Emphasis added.]
- [174] The judge's consideration of whether the Charter breach was "profoundly intrusive" closely mirrored the words the Court used in *Grant*. He wrote:
- [112] I find that the unwarranted police intrusion into the residence of the applicant was significant and unjustified. However, I do not find that it was profoundly intrusive to the extent of establishing that the state conduct would bring the administration of justice into disrepute.
- [175] In my view, this cannot be said to be a flawed approach.
- [176] Finally, insofar as the third factor is concerned, this Court in *Reddy* noted:
- [94] The last factor--society's interest in a decision on the merits--involves the question of "whether the truth seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": [Grant at] para. 79. The reliability of the evidence is an important consideration, as is the importance of the evidence to the truth-seeking function of the trial. Although "seriousness of the offence" remains a consideration, it has far less importance than under the *Collins/Stillman* framework, because s. 24(2) focuses on the long-term implication for the repute of the administration of justice, and not the public's short-term desire for a conviction: [Grant at] para. 84.
- [177] This passage was cited in *Vanhorn*, which was, in turn, cited by the trial judge, after he described the seriousness of the charges and the fact the challenged evidence was reliable and could have a significant impact on the case:

[118] I do not allow this conclusion to overwhelm the s. 24(2) analysis. I recognize that the third line of the Grant inquiry requires that I take into account the "long-term implication for the repute of the administration of justice, and not the public's short-term desire for a conviction": Vanhorn, supra, at para. 47.

[Emphasis added]

[178] The trial judge apparently closely followed the analysis in the leading cases in his assessment of the three enumerated factors.

[179] Ultimately, of course, the balance must be struck in light of all of these factors. In this regard the trial judge said only, at the conclusion of his reasons on the voir dire:

[120] In balancing the Grant factors, I find that the evidence obtained from the search of the applicant's residence is admissible.

[180] That statement is terse. However, in my opinion, it was not necessary for the trial judge to say more. What he said is sufficient to establish that he undertook the broad inquiry mandated by s. 24(2). We should bear in mind that "it is no argument to say the judge's reasons could have been more comprehensive": Ewert v. Höegh Autoliners AS, 2020 BCCA 181 at para. 47; R.E.M. at para. 17; F.H. v. McDougall, 2008 SCC 53 at para. 100.

[181] In particular, I cannot say, as my colleague has, that if the trial judge had conducted the correct analysis (reserving all comment on how admission of the evidence would effect the repute of the administration of justice until last and treating the overall balancing more expansively), he would have properly concluded that the seriousness of the cumulative breaches and their impact on the Charter-protected rights of the appellant favoured exclusion of the evidence. Our own assessment of the right outcome of the careful balancing process described in Paterson should not affect the assessment of whether the trial judge has erred in law.

"The Honourable Mr. Justice Willcock"

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