
CANADA / JUDGMENT

R. v. Robertson

2019 BCCA 116

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 116 R. v. Robertson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Robertson,

2019 BCCA 116

Date: 20190409

Docket: CA45101

Between:

Regina

Respondent

And

Jason Robertson

Appellant

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

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

August 17, 2017 (R. v. Robertson, 2017 BCSC 2402, Kamloops Docket 97803-3C).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

L.A. Ruzicka

M.J. Booker

Place and Date of Hearing:

Vancouver, British Columbia

December 13, 2018

Place and Date of Judgment:

Vancouver, British Columbia

April 9, 2019

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Hunter

Summary:

The appellant and his wife were charged with numerous offences after the police searched their home pursuant to a warrant and discovered stolen and improperly stored firearms and stolen property. The trial judge found that the manner in which the warrant was executed resulted in breaches of the appellant and his wife's s. 8 rights. She also found a s. 10(b) violation in relation to the appellant's wife. The judge excluded the evidence against the wife, resulting in her acquittal. She did not exclude the evidence against the appellant and convicted him of seven of the ten offences with which he was charged. On appeal, the appellant says the judge erred in her s. 24(2) analysis by not taking into account the breach of his wife's s. 10(b) rights and by finding that he was wilfully blind that two commemorative rifles in his possession were stolen. Held: Appeal dismissed. Where a Charter breach is part of a pattern of breaches against the accused and a third party, a judge may take the breaches of the third party's rights into account in considering whether to exclude the evidence against the accused at the evaluative stage of the s. 24(2) analysis. The judge erred in importing into this analysis a requirement that there be an undefined but "necessary connection" between the appellant and the breach of his wife's s. 10(b) rights. On a fresh analysis of the s. 24(2) factors, however, the evidence was properly admitted. The judge did not err in her application of the doctrine of wilful blindness. She impliedly found that the appellant's suspicions were aroused regarding the origin of the commemorative rifles and concluded that he deliberately failed to make inquiries. It was open to her to come to this

conclusion.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] On May 8, 2014, the RCMP executed a search warrant at a residence in Kamloops, British Columbia occupied by the appellant, his wife and their two young children. No one was at home when the search began. In the course of the search, the police found stolen firearms, unsafely stored firearms, stockpiles of electronics (some of which were stolen), small quantities of drugs, drug packaging material, digital scales, score sheets, large bundles of cash, brass knuckles, a conductive energy weapon (commonly known as a "taser"), and an Indian Status certificate bearing the appellant's photograph but another person's name.
- [2] No issue was taken with the validity of the warrant at trial. However, the judge found that the manner in which the search was executed violated the s. 8 Charter rights of the appellant and his wife in two respects.
- [3] First, the police violated the "knock and announce" rule which requires them to give notice of presence, notice of authority (by identifying themselves as law enforcement officers), and notice of purpose (by stating the legal justification for the entry) before forcing entry into a dwelling house. Second, the manner in which the search was conducted resulted in the seizure of items that were neither specified in the warrant nor subject to seizure under s. 489 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Section 489 authorizes a police officer executing a search warrant to seize, in addition to the things mentioned in the warrant, anything the officer believes on reasonable grounds has been obtained by the commission of an offence.
- [4] In addition, the judge found that the police violated the appellant's wife's s. 10(b) rights when she returned to the residence as the search was ongoing by questioning her after she had asserted her right to counsel but before she was given an opportunity to exercise that right.
- [5] Having found these constitutional breaches, the judge excluded the evidence against the appellant's wife under s. 24(2) of the Charter, finding that its admission would bring the administration of justice into disrepute. The exclusion of the evidence in relation to the appellant's wife resulted in her acquittal.
- [6] The judge admitted the evidence seized in the search against the appellant.
- [7] Against this background, the appellant advances two grounds of appeal. First, he submits that the judge committed a material error in principle in her s. 24(2) analysis by failing to take into account the breach of his wife's s. 10(b) rights in determining whether to admit the evidence against him. Relying on *R. v. Lauriente*, 2010 BCCA 72 and *R. v. Mauro*, 2017 BCCA 45, the appellant submits that the judge was required to consider whether the breaches, viewed cumulatively, reflect a pattern of disregard for constitutional rights. He argues that this issue needed to be addressed as part of the s. 24(2) analysis as it informs the seriousness

of the police conduct and the ultimate question of whether the evidence should be excluded to maintain public confidence in the administration of justice.

- [8] In light of this alleged error in principle, the appellant submits that the judge's s. 24(2) ruling is not entitled to deference. He acknowledges that if error in principle is found, it is open to this Court to assess the s. 24(2) considerations afresh paying due regard to the findings of the judge untainted by the error. He submits, however, that given the distance at which this Court stands from the finely-calibrated and context-sensitive inquiry that would be required, we should allow the appeal instead, set aside the convictions and order a new trial.
- [9] The appellant's second ground of appeal challenges his conviction for possessing an RCMP Heritage 30-30 calibre rifle and a Little Bighorn Centennial 44-40 calibre rifle (the "Commemorative Rifles") knowing they were obtained by the commission of an offence contrary to s. 96(1) of the Code. The appellant conceded at trial that he was in possession of these rifles. The rifles had been reported stolen by their owner. The sole issue at trial was whether the appellant was in possession of the Commemorative Rifles knowing they had been obtained by the commission of an offence. The judge found the appellant to be wilfully blind to the question of whether the rifles had been stolen. Wilful blindness can substitute for actual knowledge whenever knowledge is a component of the mens rea. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he sees the need for further inquiries, but deliberately chooses not to make them because he would prefer to remain ignorant. The appellant argues that his conviction on this count is tainted by error in law in the judge's application of the doctrine of wilful blindness. Accordingly, even if the s. 24(2) ruling is affirmed, the appellant seeks a new trial on this count.
- [10] I agree with the appellant that the judge erred in principle in her s. 24(2) analysis. As the judge's factual findings relevant to this ground are thorough and unchallenged on appeal, I do not see that this Court is disadvantaged in any way in conducting the s. 24(2) analysis anew and, consequently, I see no reason to remit this case to the trial court. Having conducted the s. 24(2) analysis afresh without disturbing the judge's factual findings untainted by the error, I would admit the evidence from the search against the appellant.
- [11] Further, I would not give effect to the appellant's second ground of appeal. In my view, the judge did not err in law in applying the doctrine of wilful blindness. Having regard to the reasons for judgment as a whole, it is clear the judge found that the appellant's suspicions were aroused by the presence of the distinctive Commemorative Rifles in his home. She found that he deliberately refrained from making any further inquiries about them. This conclusion was open to her on the evidence. The appellant has shown no basis upon which this Court could properly interfere with her factual findings.
- [12] In the result, and for the reasons that follow, I would dismiss this appeal.

II. The Sections 8 and 10(b) Violations

1. Overview

- [13] In a detailed ruling indexed as 2016 BCSC 2474 ("Section 8 Ruling") the judge addressed a variety of Charter breaches alleged by the appellant and his wife. The Crown conceded that Ms. Robertson's s. 10(b) rights had been breached. The appellants also alleged multiple breaches of s. 8 in the manner the search was conducted.
- [14] The judge summarized the key events leading up to the execution of the search warrant at the appellant's residence this way:
- [3] In February 2014, the Kamloops RCMP began an investigation called "E-plosion", primarily targeting Jason Robertson. The RCMP believed that he was the head of a drug trafficking organization in Kamloops. Mr. Robertson lived with his wife, Sarah Robertson, and two young children on [address omitted] in Kamloops, B.C.
- [4] During the investigation, the RCMP relied heavily upon surveillance, tracking targets, and intercepting transactions. Part of the aim was to identify drug stash locations. On March 10, 2014, the RCMP seized a scale with cocaine residue and drug ledgers known as score sheets from the garbage outside the residence.
- [5] On May 7, 2014, the RCMP saw associates of Mr. Robertson load a quad onto a truck at the residence and drive to another of Mr. Robertson's residences on [address omitted] in Kamloops. They followed the truck and when they stopped it later that day, they found a large amount of cocaine in the truck and a large amount of marihuana in the quad and in the truck.
- [6] After that seizure, the RCMP obtained three search warrants and executed them on May 8, 2014. They searched [the appellant's property to which the quad was driven], then the [appellant's] residence, and then a third residence of one of Mr. Robertson's associates on [address omitted]. That the search warrants were valid is not in dispute.
- [7] In searching the [first of the appellant's properties], the RCMP found half a pound of marihuana and drug trafficking paraphernalia. At the [appellant's] residence, they expected to find more drugs as well as firearms and stolen property. Upon entering, however, the police found much more than they had expected.
- [8] In [this] residence ("the residence"), the RCMP found, among other things, many firearms (some believed to be reported stolen, some improperly stored, and some in two gun safes), many electronics (some reported stolen), drugs, drug packaging material, score sheets, a large bundle of cash, brass knuckles, a conductive energy weapon, and an Indian Status certificate with Mr. Robertson's picture and another person's name.
- [15] The residence was equipped with a sophisticated multi-camera security system that recorded both audio and video.

[16] The appellant was charged in a 10-count indictment with offences the trial judge grouped into the following five categories:

- (1) Possessing stolen firearms count (Count 1): a single count of possessing six stolen firearms the Crown alleged were obtained by the commission of an offence contrary to s. 96(1) of the Code. Included in this count were the Commemorative Rifles;
- (2) Unlawful storage of firearms count (Count 2): a single count alleging the unlawful storage of seven firearms seized from the appellant's residence in contravention of s. 117(h) of the Firearms Act, S.C. 1995, c. 39, resulting in an offence under s. 86(2) of the Code (the Crown did not proceed with the charge on one of the firearms, bringing the total to six);
- (3) Prohibited weapons counts (Counts 3, 4, 5 and 6): these counts relate to the brass knuckles and taser found in the residence. Both are prohibited weapons. The appellant was alleged to be in possession of these weapons contrary to ss. 91(2) and 92(2) of the Code;
- (4) Stolen property counts (Counts 7, 8 and 9): these counts allege the appellant was in possession of stolen property knowing it to have been obtained by the commission of an indictable offence contrary to s. 355 of the Code. Count 7 relates to an Apple MacBook Pro laptop. Count 8 relates to two modular test tool kits used in the telecommunications industry that were the property of TeliPhone Navigata-Westel Communications Inc., both of which bore the name of a contact person on a business card affixed to the tool kits. Count 9 relates to an Apple iPad with the owner's name engraved on the back. All of these items were confirmed to be stolen; and
- (5) Identity theft count (Count 10): this count relates to possession of an identity document in the name of another person but bearing the appellant's likeness contrary to s. 56.1(1) of the Code.

[17] The appellant's wife was jointly charged with the appellant on all counts except Counts 1 and 10.

2. The Constitutional Violations Found by the Trial Judge

(a) Failure to Abide by the Knock and Announce Rule

[18] The police were unsure whether anyone was in the residence when they arrived to execute the warrant. In fact, no one was home when the entry occurred and the judge took this into account in determining the extent to which the breach impacted the Charter-protected interests of the appellant and his wife.

[19] The police determined to employ what the judge characterized as a "hybrid approach" that defeated both the purposes of a "hard entry" and the principles underlying the "knock and announce" rule. They first knocked on the garage door at 5:29:09 p.m. Although there was evidence that the garage door was frequently used to access the residence, the occupants of the residence would have to walk from the living area of the home and through the garage to reach that door. Four seconds later, the police identified themselves by announcing "Police".

Three seconds after that, they knocked a second time. Eight seconds later, they knocked a third time. Eight seconds after that, one of the officers shouted "RCMP" and "Search Warrant". Four seconds after identifying the lawful basis upon which they sought entry to the residence, the police breached the door with a battering ram. Twenty-seven seconds passed between the first knock and the time of entry. Only four seconds elapsed between identification of the lawful basis for entry and the breaching of the door.

- [20] The first officer to enter the residence was not wearing police identification or a protective vest. The Crown did not seek to justify the entry on the basis of exigent circumstances, but argued that the time the police gave to any occupant who may have been in the residence to respond by opening the door was sufficient in the circumstances.
- [21] Relying on the three requirements of the knock and announce rule summarized in *R. v. Cornell*, 2010 SCC 31 at para. 18 (notice of presence, notice of authority, and notice of purpose) and recognizing that there is no hard and fast rule governing the length of time the police should wait at a door after knocking but before forcibly entering the premises, the trial judge ruled that the manner in which the police entered the residence to execute the warrant breached the s. 8 rights of the appellant and his wife. Her reasons for this conclusion are summarized below:
- [34] However, in this case the police took into account before executing the warrant the information they had that there were weapons - including assault rifles - in the residence. They made a plan. The plan was to effect a knock and announce entry. Nothing changed. No events occurred after they arrived and during the time that they were at the door which changed their advance estimation of the amount of force or urgency that would be required for their entry. This was not a fluid situation.
- [36] It is not necessary to consider if the extensive information known to the police in advance of the execution of the warrant would have amounted to exigent circumstances which would justify a dynamic entry. In assessing the circumstances that they understood were present at the residence, the officers themselves did not determine that there were exigent circumstances due to concerns for officer safety.
- [43] In summary, the video shows the RCMP diverged from the "knock and announce" rule when they used a battering ram to breach the applicants' residence only 27 seconds after making their presence known. The forced entry occurred just four seconds after the first time a RCMP officer can be heard shouting "search warrant". The RCMP diverged from the knock and announce rule by not waiting a sufficient amount of time for any occupants to put down what they were holding and come to the door.

- [44] The Crown has not established an evidentiary basis to justify the divergence from the knock and announce rule. The concern about weapons is not supported by the decision to effect a knock and announce entry, and by the manner in which the first officer entered the living area of the residence. The evidence does not substantiate the Crown's claim that the officers entered as they did out of concern for officer safety. The knock and announce rule could safely have been complied with in full. No exigent circumstances arose at the scene.
- [22] The Crown does not challenge the judge's conclusion on this point. Nothing in these reasons should be taken as endorsing the proposition that there were no exigent circumstances in this case that might conceivably have justified a hard entry. The point was conceded below and is not before us.

(b) The Overseizure

- [23] It is necessary to put this Charter breach in context. When the police entered the residence to conduct the search, they understood that the appellant and his wife were authorized to possess non-restricted firearms. On entry, the police found an unexpected number of items they believed to be stolen, including boxes of duplicate electronics and shelves of car electronics attached to cut wires. Forty firearms were located, some in a locked gun safe in the garage that was forced open at the direction of the police. Some of the firearms not locked in the gun safe were improperly stored in the garage and in the main residence. There was a sawed-off trigger lock on a workbench in the garage.
- [24] The officer tasked with seizing items was aware from his experience as a drug investigator that people sometimes trade stolen merchandise, or their own property, for drugs. Based on information received from a fellow officer, the officer in charge of the seizure had reasonable grounds to believe that the Commemorative Rifles found in the residence had been reported stolen.
- [25] The police decided to seize all of the firearms in the residence (including those properly stored in the safe) because they had reasonable grounds to believe that some of them had been stolen. In addition, given the number of firearms involved, it would take a considerable period of time to check whether each and every firearm had been reported stolen. Finally, distinguishing a non-restricted firearm from a restricted or prohibited firearm requires specialized knowledge that was not available to the police at the time of the search.
- [26] Although not relevant to the issues the judge had to decide on the Charter voir dire, further investigation confirmed that the appellant was in lawful possession of 34 of the 40 firearms seized. Six of the firearms seized had been stolen. Three of those were found in the gun safe. A fourth stolen rifle was found on top of a well-stocked ammunition cabinet in the garage. The other two stolen firearms were the Commemorative Rifles. These were stored in their original boxes in a downstairs office with a stolen iPad and other boxed and unboxed electronic equipment.

- [27] The police seized the passports of the appellant and his wife along with miscellaneous items which were returned to them after examination. These items included a fishing rod, currency from Antigua, a 10 ounce silver bar, binoculars, cologne, a cooktop, the manual for the security system in use in the residence, scanners, walkie-talkies, televisions, gift cards, a bottle of vodka and suitcases. The suitcases were seized to help the police remove from the residence some of the 129 seized items.
- [28] The seizing officer testified that, with the benefit of hindsight, some of the items he seized had no evidentiary value and should not have been seized. He testified that he had not planned for the number of items to be seized and was "overwhelmed" by the task.
- [29] The primary issue in relation to the overseizure concerned the firearms seized from the safe. The judge dismissed the appellant's argument on this point for the following reasons:
- [84] Was it reasonable to believe that the firearms in the safes were stolen and thus, pursuant to s. 489, obtained by the commission of an offence? The evidence in this regard includes the testimony of Cst. Froyland that the decision to seize all firearms was made after finding the two commemorative rifles they believed to be stolen. After locating those rifles, and in the context of the amount of other property believed to be stolen, the police formed the belief that they had grounds to seize the remaining firearms, not already seized for unsafe storage.
- [85] The police had information that Mr. Robertson was a major drug trafficker, and not only that stolen items are generally exchanged for drugs, but that Mr. Robertson in particular has accepted stolen items for drugs.
- [86] Inside the residence, the police encountered a scene that further supported Mr. Robertson's association with drug trafficking and stolen property. They saw drugs, score sheets, drug packaging material, bundles of cash, a money counter, a sophisticated surveillance system, and prohibited weapons. They saw stashes of electronics, rows of televisions, piles of car stereo equipment (some with cut wires), professional telecommunications equipment (confirmed on scene to be stolen), and distinct-looking commemorative firearms (believed to have been stolen and traded to Mr. Robertson for drugs). They saw a large stockpile of firearms: on the floor upon entry into the garage; on the workbench (along with a sawed-off trigger lock); in and on top of the safes; in the basement; on the floor of the bedroom; and on the bedside table. They also saw many firearms improperly stored, without trigger locks and near ammunition.
- [87] Although the police were aware that the applicants both had licences to possess non-restricted firearms, it was reasonable to believe that they would not be in possession of 40 lawfully acquired firearms in the context of the evidence of drug trafficking (where stolen items are traded for drugs) and other stolen property. In these circumstances the police had reasonable grounds to believe that the firearms found in the garage safes were obtained by the commission of an offence. I find that the requirement for reasonable grounds for seizing the firearms in the safes is met.

- [30] The judge also dismissed the appellant's contention that the police improperly seized the passports for ulterior purposes: Section 8 Ruling at paras. 98-105. In addition, she dismissed an argument that the police exceeded the scope of the warrant by searching a vehicle parked on the appellant's property. She found that the search of the vehicle was a safety search that was reasonable, minimally intrusive and authorized at common law given the information the police had that there could be a handgun in the vehicle: Section 8 Ruling at paras. 106-117. The judge also dismissed an argument that the search was unreasonable because the officers who executed the warrant were acting as agents for Revenue Canada and the British Columbia Civil Forfeiture Office, and because it was not properly supervised: Section 8 Ruling at paras. 118-124; 125-135.
- [31] The overseizure found by the judge was, therefore, limited to the miscellaneous items the Crown did not seek to tender at trial. She concluded that the seizure of these items breached the appellant's s. 8 rights:
- [92] At the time, Cst. Froyland was faced with a house full of items that he believed were obtained in the commission of an offence. This belief was based on the information he had beforehand about Mr. Robertson's occupation as a drug dealer, and about how Mr. Robertson had received stolen property. It was also based on the amount, nature, state, and location of items in the residence. The cologne and reel were found in the downstairs office piled on the floor with many other electronics and the rifles believed to be stolen. He had a subjective belief regarding these miscellaneous items.
- [93] Cst. Froyland stated he took luggage and other receptacles to assist the police in transporting the items. He admitted that, had he known in advance the large number of items in the residence he would determine should be seized, he would have brought more boxes. He said:
- I hadn't planned for the sheer volume of what I faced, unfortunately, and my view was that, um, a suitcase or a -- a milk crate, a Rubbermaid container that was there assisted the police in containing those items so they could be sorted and then if needed to be, returned back to the Robertsons, which ultimately they were.
- [96] The seizure of the miscellaneous items occurred without reasonable grounds for the seizure of each of them. While the location of some of them, the downstairs room full of apparently stolen property, provided a context that could legitimately give the officers pause to consider whether there were grounds for seizing particular items, that further consideration does not appear to have taken place. Rather, a blanket seizure was implemented. The subjective belief was not objectively reasonable.

- [97] in the case at bar the seizure of many of the miscellaneous items in the residence of the applicants that were not authorized by the warrant was unreasonable. The onus is on the Crown to establish that the seizure of these items not authorized to be seized by the warrant was nonetheless authorized by law. There is no legal authorization for the seizures of these items, and as such the seizures constituted a breach of the s. 8 rights of the applicants.
- (c) The Section 10(b) Breach in Relation to the Appellant's Wife
- [32] As noted earlier, the Crown conceded that the s. 10(b) rights of the appellant's wife were breached after one of the searching officers engaged her in conversation when she returned to the residence without giving her a reasonable opportunity to exercise her right to counsel. The circumstances giving rise to this breach were summarized by the trial judge in these terms:
- [137] When an accused is arrested or detained, it is incumbent on the detaining/arresting officer to explain the reason for the detention, and to inform the detainee of their section 10(b) right to contact and instruct counsel without delay (*R. v. Bartle*, [1994] 3 S.C.R. 173). Once an accused has indicated a desire to contact counsel, officers must hold-off from asking questions or eliciting evidence from the detainee until they have had an opportunity to contact and instruct counsel (*R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Suberu*, 2009 SCC 33).
- [138] Failure to hold-off with questioning amounts to a violation of the accused's section 10(b) rights.
- [139] In this case, Ms. Robertson is depicted in the video asking for a lawyer before she is read her rights. After she is read her rights she says she does want to talk to a lawyer. Instead of holding off, Cst. Baker and then Sgt. Senner both ask her questions related to such things as her knowledge of the guns and where the TV's came from, the whereabouts of her husband, as well as some general comments to her about how she made money. Although Cst. Baker testified that she was more concerned about her kids than speaking to a lawyer, this is not borne out in the video as it is clear she was requesting to speak to counsel from the beginning. Cst. Baker conceded that he did not hold off, even though he was fully aware he was required to hold off on the day he arrested Ms. Robertson.
- [140] It should be noted as well that Cst. Baker testified that it would have been possible to permit Ms. Robertson to speak to a lawyer on a cell phone prior to transporting her back to the detachment. In *R. v. Camacho*, 2011 BCSC 175, Justice Barrow held that failing to provide an arrestee the opportunity to consult with counsel prior to taking them back to the detachment can amount to a breach of section 10(b) if there was nothing that prevented the police from facilitating the arrestee's right to counsel at the scene.

- [141] Ms. Robertson's rights were breached when Sgt. Senner and Cst. Baker attempted to elicit evidence from her prior to implementing her s. 10(b) right to contact counsel. Her rights were also breached when she was not permitted to speak to a counsel on a cell phone at the scene prior to be taken to the detachment. Both breaches are violations of the implementational component of s. 10(b).

III. The Trial Judge's Section 24(2) Ruling

- [33] In a separate ruling indexed as 2017 BCSC 965 ("Section 24(2) Ruling"), the judge determined to exclude the evidence of the search in relation to the appellant's wife (resulting in her acquittal) but admit the evidence in relation to the appellant.
- [34] The judge addressed each of the breaches individually, applying the three well-known criteria developed in *R. v. Grant*, 2009 SCC 32, to assist in determining whether evidence unconstitutionally obtained should be excluded: the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and society's interest in the adjudication of the case on its merits.
1. Failure to Abide by the Knock and Announce Rule

[35] The judge found the breach to be serious. She held that by fashioning a hybrid of "knock and announce" with a dynamic entry, the police eliminated all realistic opportunity that any occupant in the residence could come to the door before it was breached: Section 24(2) Ruling at paras. 55-56. She found, however, that the violation had only "a minor impact" on the appellant's Charter-protected interests: at para. 78. She noted that neither the appellant nor his wife was at home when the entry occurred. In addition, the evidence was discoverable. The police had a valid warrant and, had they complied with the knock and announce rule, they would have obtained entry and discovered the evidence a very short time after they in fact discovered it: at paras. 76-77. The judge found that the third *Grant* factor favoured the inclusion of this highly reliable physical evidence in circumstances where the alleged offences were serious and exclusion of the evidence would be fatal to the Crown's case: at paras. 83-86.
 2. The Overseizure of Miscellaneous Items

[36] The judge found that the limited overseizure was not a serious breach of s. 8. The seizing officer subjectively believed that the miscellaneous items were also stolen property and subject to seizure under s. 489 of the Code. While the judge found that the seizing officer's subjective belief was not objectively reasonable, she noted that "[n]o recklessness was alleged or found" and that the miscellaneous items were returned to the appellant and his wife: Section 24(2) Ruling at paras. 59-60. The overseizure had only a minimal impact on their Charter-protected interests: at para. 80. Once again, society's interest in the adjudication of the case on its merits favoured inclusion of the evidence.
 3. The Section 10(b) Breach in Relation to the Appellant's Wife

- [37] The breach of Ms. Robertson's right to counsel was found to be serious. The officer who questioned Ms. Robertson knew she had asserted the right to counsel and that the implementational duties of the police had not been satisfied. Nevertheless, the officer proceeded to ask Ms. Robertson questions about the appellant's whereabouts and where the electronics being removed from the house came from. He also said to her that he found it strange the Robertsons would own several vehicles and homes when neither of them seemed to have employment. He also asked her, "So you didn't see this coming?" The judge found these questions to be provocative and part of an intentional (though unsuccessful) effort to obtain incriminating evidence. The officer's conduct was found to constitute a "flagrant breach" of Ms. Robertson's right to counsel and the right to silence it is intended to protect: Section 24(2) Ruling at paras. 61-74; 81-82. The infringement had a major impact on Ms. Robertson's Charter-protected interests: Section 24(2) Ruling at paras. 81-82.
- [38] Considering the seriousness of the s. 8 breach committed in relation to the entry and the seriousness and impact of the breach of Ms. Robertson's right to counsel, the judge concluded that a balancing of the Grant factors favoured exclusion of the evidence as against her: Section 24(2) Ruling at para. 92.
4. The Cumulative Effect of the Breaches on the Appellant's Application for Exclusion of the Evidence
- [39] In her thorough discussion of s. 24(2) principles, the judge noted the threshold requirement that evidence sought to be excluded be obtained in a manner that infringed a Charter claimant's rights: Section 24(2) Ruling at paras. 17-21. She noted that the required connection between the breach and the evidence obtained may be temporal, contextual, causal or a combination of all three: *R. v. Wittwer*, 2008 SCC 33 at para. 21.
- [40] In addressing the appellant's application to exclude the evidence obtained in the search, the judge found a sufficient temporal and contextual connection between the s. 8 Charter breaches and the seizure of the items in issue: Section 24(2) Ruling at para. 44. She also found a causal connection between the Charter breach by overseizure and the seizure of the miscellaneous items, but noted that the Crown did not seek to tender those items in evidence: at para. 45.
- [41] The defence submitted that the judge should consider the breaches of Ms. Robertson's rights - particularly the s. 10(b) breach - in considering whether to exclude the evidence as against the appellant. The judge accepted that constitutional violations in relation to the rights of others under investigation may assist in placing the seriousness of an individual breach in context, and in determining whether a demonstrated pattern of disregard for Charter rights is such that admission of the evidence would bring the administration of justice into disrepute: Section 24(2) Ruling at para. 30. She referred to this Court's judgment in *Lauriente* at para. 30, to the effect that "in deciding whether to exclude evidence relating to an individual Charter breach in the context of a larger investigation, a court is entitled to consider the cumulative effect of multiple Charter breaches in that same investigation,

regardless of whether the same applicant was also the subject of those other Charter violations."

- [42] In addition, the judge expressly recognized that a pattern of disregard for constitutional rights can increase the gravity of police misconduct and, thus, the seriousness of the breach: Section 24(2) Ruling at para. 50.
- [43] Despite her acknowledgement of these principles, the judge declined to consider the breach of Ms. Robertson's right to counsel in determining whether to exclude the evidence obtained in the search. She did so because she found that the "necessary connection" between the appellant and the breach of Ms. Robertson's rights did not exist:
- [90] Counsel for Mr. Robertson submitted that the court can consider the breaches of Ms. Robertson's right to counsel when determining whether to exclude the evidence regarding Mr. Robertson. In these circumstances, where Mr. Robertson was not at the residence at all during any of the search, the necessary connection between Mr. Robertson and the breach of Ms. Robertson's s. 10(b) rights does not exist. I do not take that into account in the balancing regarding Mr. Robertson.
- [91] In the result, after consideration and the required balancing of the factors regarding Mr. Robertson, the balancing favours admitting the evidence located and seized in the search of the residence. I dismiss the application of Mr. Robertson.

[Emphasis added.]

IV. The Reasons for Judgment

- [44] In oral reasons for judgment indexed as 2017 BCSC 2402 ("RFJ"), the judge convicted the appellant of Count 1 (possessing stolen firearms - but only in relation to the Commemorative Rifles), Count 2 (unsafe storage of six of the seven firearms set out in that count); Count 3 (possessing a prohibited weapon, brass knuckles, without a license); Count 5 (possessing a prohibited device, a taser, without a license); Count 8 (possessing stolen property, the two modular test tool kits); Count 9 (possessing stolen property, the Apple iPad); and Count 10 (possessing an identity document in the name of another person). Acquittals were entered on Counts 4, 6 and 7. In relation to Count 7, the judge had a reasonable doubt about whether the appellant knew the Apple MacBook Pro laptop found in the master bedroom was obtained by the commission of an indictable offence. Unlike the iPad and telecommunications tool kits, the laptop did not bear the owner's name and was not found with other stolen property.

- [45] On Count 1, the sole issue was whether the Crown had proved beyond a reasonable doubt that the appellant knew the rifles were obtained by the commission of an offence. The judge noted that the element of knowledge could be established by evidence of actual knowledge, by circumstantial evidence through which knowledge could be inferred, or by imputing knowledge to the appellant through the doctrine of wilful blindness: RFJ at paras. 36-38, citing *R. v. Briscoe*, 2010 SCC 13 at para. 21.
- [46] Although the appellant was not charged with any drug-related offences, the judge found that it was likely the appellant was involved in the sale of drugs from his residence. The judge had before her opinion evidence, which she accepted, that drug dealers sometimes exchange drugs for stolen property. While she was not prepared to infer that the appellant traded drugs for any of the stolen property in his residence, she found that he was familiar with the trade of stolen property for drugs: RFJ at para. 82. In coming to this conclusion, she observed that one of the notations found in the appellant's residence, which was said by the Crown to be a score sheet, reads, "1600 - 200 phone". There was evidence before her that \$1,600 is the approximate price to be paid for one ounce of cocaine.
- [47] The judge concluded that the appellant was wilfully blind to whether the Commemorative Rifles were obtained by the commission of an offence. Her reasoning on this point is reflected in the following passages:
- [89] The Heritage rifle and Little Bighorn rifles were commemorative rifles found in their boxes in the office with the stockpiles. Was Mr. Robertson wilfully blind in not making further enquiries regarding these rifles?
- [90] I find that he was. As a person familiar with stolen property and an owner of many firearms, it would be readily apparent that these were two speciality items in contrast to the "usual firearms" stored in the garage. Looking at the firearms as a spectrum of property, those differences would be readily apparent such that I conclude additional enquiries were deliberately not made. Mr. Robertson was willfully blind in this regard and his requisite knowledge that they were obtained by crime is therefore imputed.
- [91] His guilt with regard to these offences, part of Count 1 is the only reasonable inference to be drawn from the totality of the evidence. All of the elements have been proven beyond a reasonable doubt.

V. The Grounds of Appeal

- [48] The appellant advances two grounds of appeal. A third ground of appeal relating to the unlawful storage of firearms count was abandoned in oral argument.

[49] First, the appellant submits the judge erred in principle in her s. 24(2) analysis and, as a consequence, seeks a new trial on all counts. Second, even if the evidence obtained in the search was properly admitted, the appellant submits the judge erred in principle in her application of the doctrine of wilful blindness. If successful on this ground, the appellant seeks a new trial on Count 1 in relation to the Commemorative Rifles.

VI. Analysis

1. The Section 24(2) Ruling

[50] There are two components to a s. 24(2) analysis. Before excluding evidence under s. 24(2) of the Charter, the Court must be satisfied: (1) that the evidence was obtained in a manner that infringed or denied a Charter right; and (2) that the admission of the evidence in the proceedings would bring the administration of justice into disrepute.

[51] In *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.), Doherty J.A. characterized the first component as engaging a threshold determination of whether the evidence was "obtained in a manner" that infringed a Charter right. The judge in this case had no difficulty concluding that the evidence the Crown sought to tender against the appellant was obtained in a manner that infringed his s. 8 rights. The second component of s. 24(2) requires evaluation of whether the admission of evidence found to have been obtained in a manner that infringed a Charter right would, having regard to all the circumstances, bring the administration of justice into disrepute. This evaluative exercise involves an objective assessment of whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence: *Grant* at para. 68. The three lines of inquiry identified in *Grant* are undertaken to the end of answering this question. As Doherty J.A. observed in *R. v. McGuffie*, 2016 ONCA 365 at paras. 61-63:

[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, 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.
- [52] At the second or evaluative stage, the cumulative effect of multiple constitutional breaches in the course of an investigation, including those committed in relation to third-party investigative targets, is also a relevant consideration. As explained in *R. v. Fan*, 2017 BCCA 99 at paras. 72-73:
- [72] The seriousness of a Charter breach is not determined in a vacuum. On the contrary, the cumulative effect of multiple breaches is a relevant consideration. Where a breach is part of a larger pattern of abuse or disregard for Charter rights, this exacerbates its seriousness: *R. v. Bohn*, 2000 BCCA 239 at paras. 45, 47; *R. v. Lauriente*, 2010 BCCA 72 at para. 27. Accordingly, when evaluating the seriousness of a breach for s. 24(2) purposes, a court should consider the cumulative effect of multiple breaches: Spence at para. 51.
- [73] A pattern of breaches tends to support exclusion because courts need to distance themselves from the behaviour: Grant at para. 75. However, a finding of cumulative breaches will not necessarily result in the exclusion of evidence under s. 24(2): *R. v. Trieu*, 2010 BCCA 540 at para. 93. Each case turns on its own facts.
- [53] The appellant submits that the judge erred in principle by importing into the evaluative stage of the s. 24(2) inquiry a further, but undefined, threshold requirement that there exist a "connection" between the accused and the breach of the third party's rights.
- [54] The Crown submits the judge clearly understood she could consider the breach committed in relation to Ms. Robertson in determining whether to exclude the evidence against the appellant in accordance with Lauriente. The Crown argues that the judge, in fact, undertook this exercise but concluded that she could place no weight on the s. 10(b) breach because there was no "sufficient connection" or "causal connection" between that breach and the appellant. The Crown notes that the s. 10(b) breach did not result in any incriminating statements being made against the appellant or the discovery of additional evidence. Thus, the Crown submits that the judge's approach does not reflect error in principle and her decision to admit the evidence is entitled to deference on appeal: Grant at para. 86; *R. v. Côté*, 2011 SCC 46 at para. 44.
- [55] In advancing this argument, the Crown appears to endorse the trial judge's conclusion that, in the absence of a connection between the s. 10(b) breach and the appellant, it was not open to her, at the evaluative stage, to consider the violation of Ms. Robertson's rights in

determining whether to exclude the evidence against the appellant. The Crown submits that the judge's approach to this issue is consistent with the inquiry required at the threshold stage to determine whether evidence was obtained in a manner that infringed the Charter claimant's rights. The Crown relies on *R. v. Mack*, 2014 SCC 58, where the Court summarized how judges should assess the threshold question of whether evidence was obtained in a manner that infringed an accused's rights:

- [38] Whether evidence was "obtained in a manner" that infringed an accused's rights under the Charter depends on the nature of the connection between the Charter violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned evidence will not suffice (*Wittwer*, at para. 21).
- [39] The strength of the connection between a piece of evidence and a Charter breach is a question of fact (see *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40). A trial judge's decision under s. 24(2) of the Charter is entitled to considerable deference on appeal. Such a decision will only be interfered with where the trial judge has failed to consider the proper factors or has made an unreasonable finding (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44, and *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 86).

[Emphasis added.]

- [56] I am unpersuaded by the Crown's submission that the judge simply determined, in the exercise of her discretion, to give the s. 10(b) breach committed in relation to Ms. Robertson no weight in the s. 24(2) analysis. I am satisfied the judge refused to factor into her s. 24(2) analysis the s. 10(b) breach committed in relation to Ms. Robertson because of the absence of what she considered to be a "necessary connection" between that breach and the appellant. With respect, I am of the view that the judge erred in principle by doing so. As I have explained, the requirement of a connection between the evidence and the Charter breach is unique to, and lies at the heart of, the threshold stage of the s. 24(2) inquiry. The judge erred in incorporating a similar requirement into the evaluative stage.
- [57] While I have not been able to determine the source of the "necessary connection" requirement the judge read into the *Lauriente* inquiry, it appears to me that the judge's conclusion on this issue may be traced to a lengthy exchange between the Court and Crown counsel on the application of *Lauriente* to the circumstances this case. A portion of that exchange is excerpted below:

Crown counsel: Now, my friends also rely on the Lauriente case to argue for the cumulative effect of breaches, and not only on one applicant but how a breach on one person can affect the analysis of another. So, for instance, in this case my friend's arguing that the breach on -- of Mrs. Robertson's s. 10 rights ought to be a factor in the 24(2) analysis of Mr. Robertson. And the Crown disagrees with that interpretation of the law.

In the Crown's submission the breach in this case of Ms. Robertson's s. 10(b) rights is a [discrete] event and one that is not a cumulative one built upon others that affect Mr. Robertson, frankly, whatsoever.

The Court: The defence relies on Lauriente partly for the proposition that in dealing with Mr. Robertson's rights, I can in assessing the 24(2) factors, take into account the 10(b) breach of Mrs. Robertson's rights. So I'm understanding that's what the defence is saying. And I'm understanding that you take issue with that application of Lauriente but I'm not understanding how this case, Spence [2011 BCCA 280], assists.

Crown counsel: The Spence case describes what would be a limited application of Lauriente where it was a -- like I said, a brief investigation where each step built upon the other one, and so one breach was affected by the other. And it also states that this sort of option or ability to see breaches cumulatively does not mean that we disregard the need for evidence -- the requirement that evidence is obtained in a manner that infringed upon a right. And so the Crown submission is that there is no connection between the breach of Mrs. Robertson's right to counsel and the evidence against Mr. Robertson essentially.

The Court: All right. So you're saying the threshold, the proximity test --

Crown counsel: Yes.

The Court: so paragraph 25 and then 26 and 27 [of Lauriente] also deal with the breaches of the rights of the co-accused. So I'm understanding that you say that's not something I should take into effect, and particularly the breach of Mrs. Robertson's 10(b) rights when assessing the factors for Mr. Robertson. But will you assist me, is it with the initial -- the threshold or proximity test that I give that effect?

Crown counsel: Yes. The temporal or causal connection to proximity analysis is still an important consideration.

The Court: Right. And then just one last question. In 27, in Lauriente, where it says "she" -- meaning I expect the trial judge:

... properly considered the cumulative effect of the breaches as relevant to a determination of the seriousness of the breaches ...

-- looking at obviously the factors. So is it Crown's submission that looking at the cumulative effect of the breaches in terms of seriousness, that I should look at Mr. Robertson separately and not include the 10(b)?

Crown counsel: It's -- in Lauriente, as I understand it, everything was quite closely connected, and the court found it was a pattern. And so it was inadvisable to sort of tease apart certain part -- certain aspects of this pattern. In the Crown submission, the case here before Your Ladyship, there is no such pattern. It is not so closely connected where one breach builds upon the other, or anything like that. In the Crown submission, they are [discrete] incidences.

Crown counsel: Finally I'll turn to the s. 10 violation. The Crown's submission as I mentioned is that this violation affects only Mrs. Robertson. The Crown submits, first, relying on Balbar and Arthur that the evidence found before Mrs. Robertson even gets to the residence is so loosely connected to the subsequent breach as to not even trigger the "obtained in a manner" requirement.

Now, the evidence that's found afterward, there is no causal connection there. Undoubtedly, there is a temporal connection in that they find things -- they continue to find things in the house while she's there on the driveway, and a contextual connection in that she's in the same area, I suppose. But it's a very loose connection between her breach on the driveway partway through and the items that they're continuing to find in the house.

[Emphasis added.]

- [58] The submission made by the Crown in the court below was refined to some extent but largely reiterated on appeal. Other than repeating the test that must be applied at the threshold stage, the Crown does not suggest what sort of connecting factors, unique to the evaluative stage, should be considered in determining whether an accused is entitled to rely on the breach of the third party's rights in aid of an argument that the cumulative effect of a series of constitutional violations warrants exclusion of the evidence. Further, the Crown has not cited any authority in support of the approach taken by the trial judge.
- [59] In my respectful view, it is clear from the language of s. 24(2) itself that the question of whether evidence was "obtained in a manner" that infringed a Charter right is confined to the threshold inquiry. At the evaluative stage, the claimant has already met that threshold test. The court's task at this stage is to consider whether admission of the evidence so obtained would bring the administration of justice into disrepute.
- [60] Lauriente and the cases that have followed it recognize that it may be important, at the evaluative stage, to address an individual Charter breach in a broader context to properly determine whether the evidence should be excluded. That contextual inquiry may be relevant in at least two ways. First, where a breach is part of a larger pattern of disregard for Charter rights, its seriousness is exacerbated. Second, the existence of a pattern of breaches may increase the court's concern about distancing itself from the unconstitutional conduct in order to maintain the good reputation of the administration of justice.
- [61] In performing this analysis, judges exercise a broad case-specific discretion. While they are not required to exclude evidence in the face of a pattern of breaches, they are required to consider how such a pattern affects the s. 24(2) analysis. I see no need in this case to attempt

to further define the considerations that might influence a judge to attach more or less weight to the existence of other Charter breaches involving third-party targets of the same investigation. It is, in my view, sufficient to say that the trial judge in this case erred by incorporating into the evaluative inquiry a requirement that there be some undefined connection between the appellant and the breach of Ms. Robertson's right to counsel.

- [62] Even assuming that such a connection is required - a proposition I do not accept - I do not see how that connection could be missing in this case. The breach of Ms. Robertson's s. 10(b) rights occurred in the driveway outside the residence she shared with the appellant as the search was ongoing. It is temporally and contextually associated with the breaches of the appellant's s. 8 rights. While the breach was not causally connected to the discovery of any evidence, a causal connection is not required even at the threshold stage. In my respectful view, it would make no sense to require a connection at the evaluative stage that is greater than that which is required at the threshold stage.
- [63] Having found error in principle, it is open to this Court to assess the s. 24(2) considerations afresh, accepting the findings of the trial judge that are untainted by the error: *R. v. Vu*, 2013 SCC 60 at para. 67. Having undertaken that reappraisal, I would not exclude the evidence.
- [64] With respect to the first two Grant factors, I find that the first (the seriousness of the Charter-infringing state conduct) supports excluding the evidence, while the second (the impact on the appellant's Charter-protected interests) supports admitting the evidence. Of the three breaches, the judge found that the failure to knock and announce and the s. 10(b) breach were serious, while the overzealousness was not. She found that the failure to knock and announce and the overzealousness had only minor impacts on the appellant's Charter-protected interests, while the breach of Ms. Robertson's rights had a major impact on her interests. I conclude that, when the breach of Ms. Robertson's rights is taken into account, the seriousness of the state conduct is exacerbated. Nonetheless, the impact on the appellant's Charter-protected interests remains minimal.
- [65] With respect to the third Grant factor, the evidence that the appellant seeks to have excluded is reliable, physical evidence. The exclusion of that evidence would effectively "gut" the Crown's case and result in the appellant's acquittal. Application of the third Grant factor thus supports the admission of the evidence. While the third Grant factor will seldom tip the balance in favour of admissibility on its own, here it works together with the second factor to support admissibility.
- [66] I find unpersuasive the appellant's argument that the evidence should be excluded as against him in order to protect the repute of the justice system. Ms. Robertson's constitutional interests have already been vindicated by the exclusion of the evidence against her. In saying this, I do not wish to be taken as suggesting that a claimant's case for the exclusion of evidence under s. 24(2) will always be defeated in a case of this kind where a remedy for the breach has been granted to a third party whose rights were violated. I say only that, in this case, the appellant has not established that admission of the evidence against him would

bring the administration of justice into disrepute. Accepting the findings of the trial judge and balancing the Grant factors as best I can, I would not exclude the evidence.

2. Application of the Doctrine of Wilful Blindness

- [67] The appellant submits that in convicting him of possessing the Commemorative Rifles knowing they were obtained by the commission of an offence, the judge erred in her application of the doctrine of wilful blindness. He makes a number of interrelated points in support of this ground. First, he says the judge did not find that the appellant's suspicions were, in fact, aroused. In the absence of such a finding, the doctrine of wilful blindness had no application to this case. Second, he submits there was no evidence that his suspicions about the origins of the Commemorative Rifles were aroused, and no evidence from which a reasonable inference could properly be drawn that his suspicions were aroused.
- [68] The appellant advanced a third argument in his factum that the judge erred by applying an objective standard to the doctrine of wilful blindness. The appellant correctly noted in his factum that the doctrine of wilful blindness applies in circumstances where it is shown that an accused was in fact suspicious but deliberately refrained from making inquiries so as to remain ignorant of the truth. He says that the judge, on two occasions, noted that the circumstances were such that it "would be readily apparent" that the Commemorative Rifles were distinct from the rest of the rifles found in the home. He says that in doing so the judge was applying an objective standard, asking what the appellant should have known rather than what he actually did know. This point was not pressed in oral argument.
- [69] To put the appellant's position in context, it must be recalled that the Commemorative Rifles were found in their original boxes leaning against a wall in the downstairs office. Also found in that office were boxed and unboxed electronics (including five Sony PlayStations), laptops, cell phones and stereo equipment. In addition, the iPad engraved with the name of the owner was found in this office. In the downstairs bedroom next to the office, the police found television screens, laptops and car stereo decks attached to cut wires. The judge found the appellant likely engaged in the sale of drugs from his residence, though she declined to draw the inference that he traded drugs for any of the property found in the residence. She did, however, conclude that the appellant was familiar with the trade of stolen property for drugs, and took this factor into account in considering the required element of knowledge with respect to the stolen rifles.
- [70] Given the number of firearms in the residence, and the similarities between the 34 firearms lawfully possessed and the four non-distinctive stolen rifles, the judge was unable to conclude that the appellant's suspicions were aroused as to whether those four rifles were stolen. In the result, she declined to apply the doctrine of wilful blindness to the four non-distinctive rifles particularized in Count 1.
- [71] I am unable to give effect to the appellant's submission that the judge did not find as a fact that his suspicions were aroused. In my view, the judge, at least implicitly, found that the appellant's suspicions were aroused by the presence of the Commemorative Rifles. Her

conclusion was based primarily on their distinctive nature and, to a lesser extent, on the fact they were found in a room with other stolen property. She concluded from this evidence that the appellant deliberately did not make additional inquiries: RFJ at para. 90. The appellant's deliberate choice not to make inquiries necessarily connotes the suppression of a suspicion by one who would prefer to remain ignorant.

- [72] The judge's reasons as a whole also support the conclusion that she found the appellant's suspicions to have been aroused in relation to these two items. Where other items were either non-distinctive (the four other stolen rifles) or did not bear the name of the actual owner (the Apple MacBook Pro laptop), the judge declined to make a finding that the appellant's suspicions were aroused and, as a consequence, declined to apply the doctrine of wilful blindness.
- [73] I am also unable to give effect to the appellant's argument that the evidence did not support an inference that his suspicions were aroused by the Commemorative Rifles. In my view, the evidence accepted by the judge, taken as a whole, provided ample support for such an inference. As noted, the rifles were distinctive, in open view, in the same room as the stolen iPad, and possessed by someone who was likely trafficking drugs from the residence and was familiar with the trade of stolen property for drugs. In the circumstances, it was open to the judge to infer that the appellant's suspicions were aroused and that he deliberately failed to make inquiries about the origins of the Commemorative Rifles. The factual inference drawn by the judge has not been shown to be the product of palpable and overriding error. Thus, there is no basis upon which this Court could properly intervene.
- [74] Finally, I am not persuaded by the appellant's third argument that the judge erred in principle by importing an objective standard to the doctrine of wilful blindness. As noted above, he argued that the judge erred by applying what amounts to an objective test by concluding that it would have been readily apparent to the appellant that the Commemorative Rifles, given their distinctive nature and location, called out for further inquiries.
- [75] To give effect to the appellant's position on this point, one would have to read the impugned language emphasized above in isolation from the rest of the paragraph in which it appears and in isolation from the reasons for judgment as a whole. I cannot do so. Reading the reasons as a whole, it is clear that the judge properly instructed herself on the application of the doctrine of wilful blindness. She expressly recognized the obligation on the Crown to prove beyond a reasonable doubt that the appellant knew the rifles were stolen. She noted that the required element of knowledge could be grounded in actual knowledge, inferred on the basis of circumstantial evidence or imputed through the doctrine of wilful blindness: RFJ at para. 68. She quoted extensively from both *R. v. Sansregret*, [1985] 1 S.C.R. 570 at 584 and *Briscoe*, specifically noting that the doctrine applies where an accused whose suspicion is aroused deliberately chooses not to make inquiries because he prefers to remain ignorant. Where the judge concluded the evidence fell short of establishing that the appellant was on notice that further inquiries were required, she declined to apply the doctrine of wilful

blindness and acquitted: RFJ at paras. 86-88. Finally, as I noted earlier, the judge found that the appellant deliberately chose not to make inquiries as to the origins of the Commemorative Rifles. The appellant could only have deliberately failed to make inquiries if he was possessed of a state of mind that gave rise to the need for those inquiries.

[76] Reading the reasons for judgment as a whole, I am unable to conclude that the judge erred in principle by incorrectly incorporating an objective element into her application of the doctrine of wilful blindness.

VII. Conclusion

[77] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Hunter"

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