

In the Court of Appeal of Alberta

Citation: R v Carbert, 2026 ABCA 314

Date: 20261001
Docket: 2401-0239A
2401-0266A
Registry: Calgary

Docket: 2401-0239A

Between:

His Majesty the King

Respondent

- and -

Chris Carbert

Appellant

Docket: 2401-0266A

And Between:

His Majesty the King

Respondent

- and -

Anthony Olienick

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim or witnesses must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

The Court:

**The Honourable Justice Dawn Pentelchuk
The Honourable Justice Kevin Feehan
The Honourable Justice Joshua B. Hawkes**

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Justice D.A. Labrenz
(Sitting with a Jury)
Convicted on the 2nd day of August, 2024
(Docket: 220151286Q4)

Memorandum of Judgment

The Court:

I. Overview

[1] In late January 2022, a convoy of people and vehicles arrived in the small village of Coutts, Alberta, just north of Montana, to protest COVID-19 vaccine mandates and other public health measures. The protest manifested in a blockade of the Coutts international border crossing, the busiest border crossing in the province. The RCMP came to believe that within this larger protest movement, a group of individuals were stockpiling guns and ammunition preparing to engage in violence with the police.

[2] After an intricate police investigation involving undercover officers, emergency wiretaps, and various search warrants, the RCMP made several arrests on February 13 and 14, 2022, effectively ending the blockade. The appellants, Chris Carbert and Anthony Olienick, were two of four men charged with the most serious *Criminal Code* offences: conspiracy to commit murder of a police officer, contrary to s 465(1)(a); possession of a weapon for a dangerous purpose, contrary to s 88(1); and mischief by wilfully obstructing the lawful use of a highway, contrary to s 430(1)(c). In addition, Mr Olienick was charged with unlawful possession of an explosive, contrary to s 82(1). Jerry Morin and Christopher Lysak were also charged with offences arising from their involvement in the protest, but they resolved their charges by plea and were not ultimately tried together with the appellants.

[3] Undercover operations began on February 7, 2022, and provided the evidence supporting warrantless emergency interceptions under s 184.4 of the *Criminal Code*, which began on February 11, 2022, and subsequent search warrants. On February 13, 2022, Cst Trevor Checkley of the RCMP swore an Information to Obtain (ITO) in support of warrants to search: Smuggler's Saloon in Coutts, which the RCMP believed to be the headquarters of the protest group; Mr Olienick's pickup truck; and a residential property in Coutts (the Coutts property), where the appellants were residing temporarily in a camper trailer. The RCMP sought warrants to search these places mainly for "documents and data" relating to the protest group's security.

[4] The RCMP executed the warrant to search the Coutts property in the early morning hours of February 14, 2022. In the trailers and modular home, they located a sizeable cache of firearms, ammunition and magazines, body armour, a machete, bear spray, a pistol holster, and a bandolier with shotgun shells, among other things. The firearms included 12 rifles, a shotgun, a 9mm Smith and Wesson with a laser sight, and a Sig Sauer 9mm with a shoulder holster and one round of ammunition in the chamber. This evidence formed the basis of the weapons charges against the appellants.

[5] Following the appellants' arrests, the RCMP obtained a warrant to search Mr Olienick's residence in Willow Creek, where the explosives (two pipe bombs) were found and seized. They also obtained a warrant to search the appellants' cell phones and their communications while they were in remand.

[6] The appellants were tried jointly by a jury. Before the trial began, the trial judge heard numerous *voir dires*. The appellants challenged the legality of the s 184.4 wiretaps and the warrants to search the Coutts property, Mr Olienick's pickup truck, and Mr Olienick's residence. The appellants argued these searches, and the resulting seizure of evidence, breached their s 8 *Charter* right to be free from unreasonable search or seizure. They applied to have the evidence excluded from their trials under s 24(2) of the *Charter of Rights and Freedoms*. They argued the s 184.4 wiretaps were not justified, the authorizing justice erred in issuing the search warrants, and the warrant to search for documents and data was simply a ruse to search for firearms, which had the effect of misleading the authorizing justice and subverting the judicial authorization process.

[7] The trial judge held that the first 24 hours of the s 184.4 interceptions were warranted but thereafter the RCMP breached the appellants' s 8 rights because they failed to diligently transition from the warrantless wiretaps to judicially authorized wiretaps. He excluded all communications intercepted after the first 24 hours.

[8] The trial judge declined to exclude the evidence seized from the search of the Coutts property, although he found the search breached s 8. There were two camper trailers and a more permanent modular home on the property. The trial judge found the warrant invalid because the ITO failed to establish an evidentiary connection between the appellants and the specific trailer they were staying in. However, he found this breach to be minor and determined in his s 24(2) *Charter* analysis that it was not necessary to exclude the evidence to protect the integrity of the administration of justice.

[9] The trial judge also declined to exclude the evidence obtained from the search of Mr Olienick's pickup truck and residence, having found no *Charter* breach.

[10] The jury trial began on June 6, 2024. After two months of testimony, the jury acquitted the appellants of the conspiracy to commit murder charge but convicted them of the other charges. On appeal, neither appellant contests their mischief conviction. Both appeal their weapons convictions under s 88(1), while Mr Olienick also appeals his conviction under s 82(1) for unlawful possession of an explosive.¹

[11] The trial judge's pre-trial rulings are the focus of these appeals. Both appellants argue the trial judge:

¹ In the appeal hearing, Mr Olienick applied to amend his notice of appeal to include this conviction. The Crown fully argued whether the search warrant leading to the explosives was valid. In the circumstances, we allow the amendment.

- erred in finding that the requirements of s 184.4 were met during the first 24 hours of the interceptions;
- erred in failing to find additional defects in the warrant to search the Coutts property, issued under s 487(1) of the *Criminal Code*; and
- erred in failing to exclude certain evidence under s 24(2), particularly the firearms and explosives.

[12] Mr Carbert makes several additional arguments. He submits the trial judge erred in failing to properly excise unlawfully obtained evidence from ITOs and invalidate warrants issued to search the appellants' cell phones and to intercept calls placed by the appellants while they were in remand. He argues the trial judge erred in failing to find subversion and to exercise his residual discretion to quash the warrant to search the Coutts property on that basis. Further, he argues the trial judge erred in his instructions to the jury relating to the s 88(1) charge and erred in dismissing an application to declare a mistrial on the basis that the jury's verdicts were inconsistent.

[13] Finally, Mr Olienick argues the trial judge erred in failing to find a s 8 *Charter* breach for the searches of his residence and truck, and to exclude the evidence obtained from those searches.

[14] This was a lengthy and complex trial. The appeals are no different. As we explain, we conclude the trial judge erred in determining that the requirements of s 184.4 were met at all in relation to Mr Carbert. The evidence relating to Mr Olienick was significantly stronger. We see no error in the trial judge's finding that the requirements of s 184.4 were met in relation to Mr Olienick. On the warrant to search the Coutts property, we agree with the trial judge that the warrant was impermissibly broad and facially invalid. While the trial judge erred in failing to properly consider the impact of multiple related *Charter* breaches in his s 24(2) analysis, we would in any event admit the evidence obtained from the search of the Coutts property. The appeals are both dismissed.

II. Emergency Interceptions under Section 184.4

[15] On February 11, 2022, the RCMP began intercepting the appellants' wireless communications under s 184.4, including their oral communications, location services, text messaging, and voicemail. Late in the evening on February 13, 2022, the police arrested Mr Olienick. In the early morning hours of February 14, 2022, the police arrested Mr Carbert. The police disconnected the s 184.4 interceptions shortly thereafter, nearly three full days since they began.

a) Legal framework

[16] Section 184.4 permits a police officer to intercept a private communication without prior judicial authorization if the police officer has reasonable grounds to believe that:

- (a) the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of Part VI of the *Criminal Code*;
- (b) the interception is immediately necessary to prevent an offence that would cause serious harm to any person or to property; and
- (c) either the originator of the private communication or the person intended by the originator to receive it is the person who would commit the offence that is likely to cause the harm or is the victim, or intended victim, of the harm.

[17] In short, s 184.4 is an emergency provision. It allows for “extreme measures in extreme circumstances”: *R v Tse*, 2012 SCC 16 at para 94.

[18] As with any covert wiretap, an interception under s 184.4 is a serious intrusion into the privacy rights of those affected and constitutes a “search or seizure” within the meaning of s 8 of the *Charter*: *R v Duarte*, [1990] 1 SCR 30 at 46, 1990 CanLII 150 (SCC). A s 184.4 interception is also warrantless, which makes it presumptively unreasonable and in breach of s 8: *Hunter v Southam*, [1984] 2 SCR 145 at 160-161, 1984 CanLII 33 (SCC). A warrantless search or seizure may, however, comply with s 8 if exigent circumstances justify the absence of judicial authorization: *Tse* at para 18.

[19] In *Tse*, the Supreme Court of Canada held that the conditions set out in s 184.4 are constitutional because they strictly limit the use of the power to extreme circumstances. Despite that finding, the Supreme Court declared s 184.4 unconstitutional because it lacked any mechanism to permit oversight of police use of the power, such as a requirement to provide after-the-fact notice to affected individuals.

[20] In 2013, Parliament amended the *Criminal Code* to resolve the oversight and accountability issues identified by the Supreme Court in *Tse*: see *Response to the Supreme Court of Canada Decision in R v Tse Act*, SC 2013, c 8; *Criminal Code*, ss 195-196. It also changed the wording of s 184.4 in two ways, discussed below.

[21] *Tse* continues to govern the interpretation and application of s 184.4. The 2013 amendments did not alter the substance of the stringent statutory conditions interpreted and upheld in *Tse*. No subsequent authority overtakes *Tse*. There is a “dearth of reported cases” in relation to s 184.4, which highlights the exceptional nature of the power and the circumstances in which it may be invoked: Robert W Hubbard, Mabel Lai & Daniel Sheppard, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (Toronto: Thomson Reuters, 2022) (loose-leaf revision 6), ch 5 at 204; see also *R v Khela*, 2004 BCSC 38 at para 39.

[22] Section 184.4 requires a police officer to have “reasonable grounds to believe” the requirements of the section are met. This language imports both a subjective and objective element. The officer must have “subjective belief in the grounds justifying the actions taken and those

grounds must be objectively reasonable in the circumstances”: *Tse* at para 33. The onus is on the Crown to establish a “credibly based probability” that the three conditions of s 184.4 are met: *Tse* at paras 33, 58.

[23] The first condition requires the police officer to have reasonable grounds to believe the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of Part VI of the *Criminal Code*. The other key provisions of Part VI are ss 186 and 188. The former allows the police to apply to a judge in writing, following the process set out in s 185, for a wiretap authorization to gather evidence where other investigative procedures are not effective or practical. The accompanying affidavit must address six prescribed matters and preparing it “can be a daunting, labour-intensive task”: *Tse* at para 64. By contrast, s 188 permits a specially designated peace officer to seek a 36-hour wiretap authorization from a specially designated judge where the urgency of the situation requires the interception of private communications to commence before an authorization could with reasonable diligence be obtained under s 186. The application can be made orally, which is more expeditious than the s 185 process: *Tse* at para 75. Thus, to satisfy the first condition of s 184.4, the police officer must have reasonable grounds to believe that seeking judicial authorization under s 186 or s 188 is not feasible or immediately available in the circumstances.

[24] Once s 184.4 has been invoked, however, “the police must, where possible, move with all reasonable dispatch to obtain a judicial authorization under Part VI of the *Code*”: *Tse* at para 61. Section 184.4 is a stopgap measure. As commentators have observed, “[i]n the absence of rigorous compliance with the section, it is difficult to imagine circumstances that would justify the reliance on the section for more than several hours while officers apply for judicial authorization”: Hubbard, Lai & Sheppard, ch 5 at 204.

[25] Critically, s 184.4(b) requires the interception to be immediately necessary to prevent an offence that would cause serious harm to any person or to property. The threat in question must be imminent, and the interception must be a likely effective means – although not the only or most effective means – of preventing the unlawful act: *Tse* at paras 41-44. When s 184.4 was enacted in 1993, the situations identified as potentially requiring immediate wiretapping without authorization were “hostage takings, bomb threats and armed standoffs”: *Tse* at para 28, citing *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 34-3, No 44 (2 June 1993) at 44:10 (Fred Bobiasz). See e.g., in addition to *Tse*, *R v Deacon*, [2008] OJ No 5756, 2008 CanLII 78109 (ONSC); *R v Moldovan*, [2009] OJ No 4442, 2009 CanLII 58062 (ONSC); *R v Ader*, 2017 ONSC 4643.

[26] Finally, s 184.4(c) requires that either the originator or the intended recipient of the private communication be the perpetrator of the harm, the victim, or the intended victim. The perpetrator would include aiders and abettors, as parties to an offence: *Tse* at para 51.

b) RCMP decisions and supporting evidence

[27] Sgt Jean-Philippe Michaud was the police officer in charge of the interceptions. He decided whether the requirements of s 184.4 were met and when they ceased to be met. Since a s 184.4 interception is warrantless, Sgt Michaud did not set out the legal basis for his decisions in an ITO. Instead, he was called upon at trial, in the context of the appellants' challenge to the interceptions, to articulate his grounds for belief that the requirements of s 184.4 were met. His decision-making process was to be "exposed to the scrutiny usually reserved for the affiant" in the normal judicial authorization process: Hubbard, Lai & Sheppard, ch 5 at 207.

[28] Sgt Michaud testified that by February 10, 2022, he had developed reasonable grounds to believe the appellants, among others, were committing conspiracy to murder, and that they would commit murder as part of an imminent firearms-related attack on police officers. His grounds for this belief were based largely on information that undercover operators (UCOs) gathered and relayed to him either directly or through the police team commander, which he recorded in an RCMP "check sheet" dated February 10, 2022.

[29] Undercover operations began in and around Coutts on February 7, 2022. On February 7 and 8, two UCOs went to Milk River, north of Coutts. They talked to some supporters of the protest, gathering general information.

[30] On February 9, two female UCOs were instructed to attend Smuggler's to collect further information, particularly about the protest group's hierarchy. They went to Smuggler's, presenting themselves as supporters of the protesters' cause. They started helping in the kitchen and learned from another woman that Mr Olienick was one of the protest leaders. The UCOs later met Mr Olienick and engaged in conversation with him. Sgt Michaud was informed that Mr Olienick told them he was in charge of security. One of the UCOs saw Mr Olienick open an application on his phone that showed a camera feed surveilling RCMP at a checkpoint. Mr Olienick said the protest was a revolution, he hates every cop, and they should all be hung. He also made comments about firearms, including that the protest group had access to a cache of hundreds of firearms and thousands of rounds of ammunition. He said he could supply everyone in Smuggler's with guns. He said the protest group was trying to bring in "more like-minded military guys". He said they had a "plan B" and to always prepare for the worst.

[31] The next evening, on February 10, 2022, the UCOs gathered crucial information. Mr Olienick asked the UCOs to bring a package for him from a checkpoint to Smuggler's. There was a discussion between the UCOs, Mr Olienick, and Mr Carbert outside Smuggler's. One of the UCOs asked if the package was a bomb, to which the appellants responded that it was not. The UCO then asked if it was guns. The appellants looked at each other, smiled, and tilted or nodded their heads in a particular way, but did not respond verbally. The UCO said guns were fine. Mr Carbert asked Mr Olienick if he was scared. He responded that he was not because he believed the UCOs would not be questioned by police about the package. Mr Olienick said the package was coming in a hockey bag and would be too heavy for the UCOs. The four of them then went to the

meeting spot. The UCOs were called off for safety reasons. The UCOs did not see the delivery or confirm that it occurred. They did not see a hockey bag or firearms.

[32] The UCOs also heard Mr Olienick say, on February 10, that he would fight the police with force if they came on his land and that is where the fight would happen. He referred to a new group of military individuals set up on the outside perimeter.

[33] Based on the information from the UCOs, his personal observations of the protest, and his assessment of the volatility of the situation, Sgt Michaud concluded the requirements of s 184.4 were met in relation to the appellants. He believed serious harm to police officers was imminent and the s 184.4 interceptions were immediately necessary to prevent that harm. He believed arresting the appellants was not an appropriate way to address the imminent risk of harm because this would make the situation even more precarious. Given all the information available to him, including the information indicating the protesters had access to firearms and were conducting surveillance on police officers, Sgt Michaud believed the police were, effectively, “sitting ducks”.

[34] After deciding to invoke s 184.4, Sgt Michaud started preparing an application for a wiretap under s 186, following the procedure set out in s 185. He did not consider using s 186 before s 184.4 because in his view the former process would have taken too long. He decided not to seek a 36-hour wiretap under s 188 for essentially two reasons: he thought the s 188 application process would be about as onerous as the s 186 process, and he did not want to have to rewrite a warrant application within the 36-hour window prescribed by s 188.

[35] According to Sgt Michaud, the s 184.4 interceptions were continuously justified until the protest ended or there was confirmation that the appellants had been arrested or were otherwise no longer involved in the protest at Coutts.

c) Trial judge’s *voir dire* decision

[36] The trial judge conducted a *de novo* review of the s 184.4 interceptions, noting they were presumptively unreasonable because they were not judicially authorized.

[37] The trial judge rejected the argument that s 184.4 needed to be interpreted afresh in light of Parliament’s post-*Tse* amendments to this section. He found that two wording changes were “largely cosmetic and [did] not alter the continuing authority of *Tse*.”

[38] One of the post-*Tse* changes substituted “offence” for “unlawful act” in s 184.4(b). Prior to *Tse*, s 184.4(b) required a peace officer to believe on reasonable grounds that the interception is immediately necessary to prevent *an unlawful act* that would cause serious harm to any person or property. By contrast, the amended version requires a police officer to have reasonable grounds to believe that the interception is immediately necessary to prevent *an offence* that would cause serious harm to any person or property. Parliament made the same substitution in s 184.4(c).

[39] Part VI of the *Criminal Code* defines “offence”. Under s 183, “offence” means “an offence contrary to, any conspiracy or attempt to commit or being an accessory after the fact in relation to an offence contrary to, or any counselling in relation to an offence contrary to” a long list of offences set out in the definition. The term “unlawful act” is not defined and was not defined prior to *Tse*.

[40] Regarding this change, the trial judge stated:

The other change was to substitute “offence” for “unlawful act” in subsection (b). Again, to my mind, nothing turns upon this substitution in drafting. Without needing to engage in more focussed discussion, in most cases and for the most part, “offence” and “unlawful act” are largely synonymous. Although I do admit that at times, they can be different.

[41] On whether the conditions in s 184.4 were satisfied, the trial judge determined that Sgt Michaud had the necessary reasonable grounds to believe the requirements of s 184.4 were met, particularly given the evidence gathered by the UCOs. He found the situation at the protest could be described as grave, serious, dangerous, and imminently life-threatening. He found all three conditions in s 184.4 were met: an authorization could not have been obtained with reasonable diligence; the interception was necessary to prevent “either murder, aggravated assault, or similar firearms-related offences relating to ser[i]ous injury or death to police officers or others”; and there were reasonable grounds to believe the appellants were “part of a group who were people who would commit the offences that would cause the serious bodily harm or death.”

[42] The trial judge was not, however, satisfied that Sgt Michaud fulfilled his duty to transition as quickly as possible from s 184.4 to a judicial authorization under s 188. He found Sgt Michaud should have explored proceeding under s 188 and could have proceeded with that application no later than 24 hours after the last of the interceptions began. He found Sgt Michaud’s decision not to “explore section 188 more fully had the effect of overlooking the constitutional imperative to transition to a judicial authorization as soon as it is reasonably possible to do so.” The trial judge concluded that all interceptions after the first 24 hours breached s 8 of the *Charter*.

[43] Given that most of the UCOs’ evidence primarily concerned Mr Olienick’s actions and statements, the trial judge devoted part of his analysis to whether the interceptions of Mr Carbert’s communications were authorized under s 184.4. He reasoned:

[A]lthough Sergeant Michaud was aware that Mr. Carbert was not present for Mr. Olienick’s concerning comments, it was objectively reasonable for Sergeant Michaud to believe that Mr. Carbert was working in concert with the security group that Mr. Olienick led, and that he likely held the same values as a principal, or at the very least, as a party. I come to this conclusion because Mr. Carbert was an active participant in the attempt to have the female UCOs assist by bringing firearms into the Coutts area. Although the rules of evidence do not have applicability to the formation of reasonable grounds to believe, it is notable that

neither Mr. Carbert nor Mr. Olienick challenged the UCOs['] verbalized understanding that they were being asked to transport a hockey bag of firearms. In the terminology of the law of evidence, this is sometimes referred to as an adoptive admission by silence.

d) Issues on appeal

[44] Mr Carbert argues the trial judge erred in finding that the RCMP were authorized to intercept his communications under s 184.4. He argues the trial judge wrongly concluded that he posed an imminent threat of serious harm by imputing Mr Olienick's system of values and beliefs to him through mere association with Mr Olienick, which led the judge to err in finding that he was a party to Mr Olienick's conduct. Mr Carbert also argues the trial judge was wrong in law to find he made an "adoptive admission" when he remained silent in response to the UCOs' suggestion that guns were going to be delivered to Coutts on the evening of February 10, 2022.

[45] Mr Olienick argues the interception of his communications under s 184.4 was unlawful for three reasons: 1) the trial judge erred in concluding that the amendments to s 184.4 – particularly the substitution of "offence" for "unlawful act" – made no difference to the analysis; 2) the UCO evidence was insufficient to satisfy the requirements of s 184.4; and 3) the interceptions were not immediately necessary, as required by s 184.4(b), because any harm Mr Olienick posed could have been prevented by arresting him.

e) Did the trial judge err in his interpretation of the post-*Tse* amendments?

[46] Mr Olienick argues the trial judge erred in finding that nothing turned on the change in language from "unlawful act" to "offence". He submits that Parliament's intention was to limit the use of s 184.4 to preventing the offences listed in the s 183 definition of "offence". He points to Hansard debates where the Parliamentary Secretary to the Minister of Justice explained in 2013 that the intent behind the change was to make for a "narrower category of unlawful acts", bringing s 184.4 in line with other wiretap authorities in Part VI: "Bill C-55, An Act to amend the Criminal Code", 3rd reading, *House of Commons Debates*, 41-1, No 224 (19 March 2013) at 14886 (Robert Goguen). He argues that to comply with s 184.4, Sgt Michaud had to specify the offence the interception was immediately necessary to prevent, and the offence had to be one that was listed in the s 183 definition of "offence" and met the requirements of s 184.4(b).

[47] The Crown submits in response that Mr Olienick's argument has no support in the legislation or jurisprudence, noting that in *Tse* at paragraphs 45-46 the Supreme Court declined to restrict s 184.4 to preventing the offences listed in s 183.

[48] The question raised is whether it is necessary for a police officer to articulate a specific offence within s 183 or whether, as the Crown argues, it is sufficient if a police officer has reasonable grounds to believe that *any* offence listed in s 183 that would cause serious harm to any person or property may take place. The trial judge's interpretation of s 184.4 raises a question of law reviewed for correctness: *R v Goulet*, 2011 ABCA 230 at para 7.

[49] On the one hand, the Crown’s position must be rejected. By substituting “offence” for “unlawful act”, Parliament intended to narrow the use of s 184.4 to preventing an offence listed in the s 183 definition that would cause serious harm to any person or property. An amendment to the wording of a legislative provision is presumed to have purpose: *Langille et al v Toronto-Dominion Bank*, [1982] 1 SCR 34 at 38, 1982 CanLII 154 (SCC); Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 629-630. Parliament’s purpose in changing the wording of s 184.4 to include a defined term was clearly to link s 184.4 to the list of offences in the s 183 definition. The Hansard debates to which Mr Olienick referred us, which are appropriate to consider here (see e.g. *R v Wilson*, 2025 SCC 32 at para 44), supports this interpretation of the amended provision. The amended provision required Sgt Michaud to have reasonable grounds to believe the interceptions were immediately necessary to prevent an offence listed in s 183 that would cause serious harm to any person or property.

[50] We conclude that a police officer must tie his or her reasonable grounds to at least one specific offence listed in s 183 that satisfies the requirements of s 184.4(b). To suggest that the police may rely on any unspecified offence within s 183 to justify the intercept largely eliminates a check on police powers, which concerned the Supreme Court in *Tse*. As noted, a warrantless intercept on private communications is a profound invasion of privacy.

[51] We are, however, satisfied Sgt Michaud met the requirement to specify the s 183 offence he was trying to prevent. He was clear that he was preventing serious injury to police officers. He referred to the officers shown on Mr Olienick’s surveillance as “sitting ducks”. He testified that at its highest he was concerned with the murder of RCMP officers. In his check sheet, Sgt Michaud listed murder and conspiracy to murder as the offences to be prevented. In his testimony, he said there was going to be an “armed conflict against the police”, which could be “a number of different offences”, and the “highest jeopardy offence to be prevented by way of s 184.4 was murder.” It is not necessary for the underlying evidence to support the specific elements of the offence. Such an approach would effectively blunt s 184.4 by placing too high a burden on police who find themselves in an unpredictable, dynamic, and quickly evolving situation.

[52] In sum, while we agree with Mr Olienick that the trial judge failed to correctly appreciate and articulate the legal significance of Parliament’s wording substitution, we are not persuaded this led him into error. It would have been an error for the trial judge to have concluded that the interceptions were warranted to prevent an offence *not* included in the s 183 definition of “offence” or a s 183 offence that did not satisfy s 184.4(b). But he made no such finding. The trial judge found that Sgt Michaud had the required reasonable grounds to believe there was an imminent risk of, at its highest, murder. Murder and conspiracy to murder fall within the s 183 definition of “offence” and clearly would cause serious harm to a person, so we are not persuaded the trial judge erred as Mr Olienick alleges.

[53] The next issue is whether the trial judge was correct in finding that Sgt Michaud had reasonable grounds to believe the interceptions were necessary to prevent murder or one of the

assault offences listed in s 183, and that all other requirements of s 184.4 were met. We begin with the interception of Mr Olienick's communications.

f) Did the trial judge err in failing to find that the first 24 hours of the interceptions of Mr Olienick's communications breached s 8?

[54] Mr Olienick submits that the interceptions were not necessary because the police could simply have arrested him. He concedes he could have been arrested on a mischief charge on or before February 11, 2022. In support of this argument, he relies on *R v Riley* (2008), 174 CRR (2d) 288, 2008 CanLII 36775 (ONSC) where the court held the use of a s 184.4 interception violated the accused's s 8 *Charter* rights because an equally or more effective means of preventing harm would have been to arrest the accused.

[55] Mr Olienick advances this argument for the first time on appeal; it was not raised in closing argument on the s 184.4 *voir dire*. The Crown confirmed in a letter dated September 19, 2025, after this appeal was heard, that the suggestion the appellants could have been arrested earlier was not put to several key RCMP witnesses at trial or in pre-trial *voir dire*s. Sgt Michaud was, however, asked about potential arrests in cross-examination during the s 184.4 *voir dire*. He testified that because there was a group of individuals that concerned the RCMP, he did not believe the arrest of one person would have eliminated the threat of imminent harm:

So I don't make decisions on who gets arrested and why. I oversee a process. I do consider in my analysis if there's a way to stop the imminent harm right away.

In this case, because there's a group, there's obviously references to a group of like-minded people, and there's also [a] cache of firearms and a transaction believed to involve firearms, it was my belief at the time that there was no way to effectively deal with the imminent harm by simply arresting one person. It . . . would not have solved the imminent harm issue. In fact, it could have caused the exact opposite and made it worse. So . . . I wasn't in charge of making those decisions. But in my part of -- my train of thought, I didn't believe it was the right decision to arrest Mr. Olienick at that time. [Emphasis added].

[56] Courts will not readily second guess the timing of police arrests. The protest was a dynamic, rapidly evolving event and police officers must be empowered to respond quickly, effectively and flexibly, as this Court summarized in *R v Araya*, 2025 ABCA 61 at para 33, leave to appeal to SCC refused, 41777 (28 August 2025):

The circumstances of an apprehension and arrest may rapidly evolve into a different situation than that anticipated by the police. As stated by the Supreme Court in *R v Mann*, 2004 SCC 52 at paragraph 16, "Given their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively and flexibly to the diversity of encounters experienced daily on the front lines of policing". Police officers need to make decisions in volatile, sometimes

dangerous, rapidly changing situations, based on information that is often incomplete or less than exact: *Beaver* at para 72, *R v Coutu*, 2020 MBCA 106 at para 18.

[57] In any event, s 184.4 is not available only as a last resort. The Supreme Court explained in *Tse* at paragraph 43, a s 184.4 interception need not be the only effective means – or even the most effective means – available to police in preventing an offence. Recognizing this, the RCMP were not required to arrest the appellants before February 11, 2022. It is entirely conceivable that to do so would have caused, as Sgt Michaud believed, the very harm the police were trying to prevent.

[58] We now turn to whether the requirements of s 184.4 as a whole were met in relation to Mr Olienick. The trial judge's conclusion that they were is a legal conclusion reviewed for correctness. In the criminal context, the application of a legal standard to the facts is a question of law: *R v Shepherd*, 2009 SCC 35 at para 20. The trial judge's findings of fact are entitled to deference, but his ultimate ruling is subject to review for correctness.

[59] We are satisfied the statutory requirements were met. While it is easy to pass Mr Olienick's statements off as mere bluster – indeed, the jury acquitted him of conspiracy to murder RCMP officers – the totality of the evidence met the statutory conditions. In the *voir dire*, little argument was devoted to dissecting the evidence. Most of the argument focussed on whether Sgt Michaud was justified in proceeding with an interception under s 184.4 instead of proceeding under s 188 and the length of time it was reasonable for the s 184.4 wiretap to remain in place. The trial judge outlined all the evidence Sgt Michaud relied upon in finding that the s 184.4 interceptions were warranted in relation to Mr Olienick and found it was sufficient. We see no error in the trial judge's analysis. The evidence linked directly to Mr Olienick amply established reasonable grounds to believe a s 184.4 interception was necessary to prevent him from committing, at its highest, murder of police officers. Mr Olienick's comments to the UCOs demonstrated a profound hostility toward the RCMP and the willingness to use violence against them. Mr Olienick was in charge of security and took a lead role in what Sgt Michaud believed to be a delivery of firearms. The evidence, viewed in totality, was sufficient to satisfy s 184.4.

g) Did the trial judge err in failing to find that the first 24 hours of interceptions of Mr Carbert's communications breached s 8?

[60] The key evidence supporting the interception of Mr Carbert's communications was the interaction on February 10, 2022, with the UCOs regarding the alleged firearms delivery. The trial judge concluded that Sgt Michaud's belief that Mr Carbert was acting in concert with Mr Olienick was objectively reasonable because Mr Carbert was "an active participant" in the alleged firearms delivery.

[61] We are not persuaded that this evidence was sufficient to meet the requirements of s 184.4. The evidence does not establish that Mr Carbert was present for the concerning comments Mr Olienick made to the UCOs, or that any such comments could reasonably be attributed to him. There is no evidence that Mr Carbert made any statements to support objectively reasonable

grounds to believe he would inflict serious injury to police officers. It is true that Mr Carbert assisted Mr Olienick with what may have been an attempt to bring a package of firearms into Coutts. It is worth repeating that the UCOs did not see the delivery or confirm that it occurred. They did not see a hockey bag or firearms. While assisting with an unlawful delivery is one thing, conspiring to murder or seriously harm police officers is quite another. In our view, it was not objectively reasonable for Sgt Michaud and the trial judge to have inferred merely from Mr Carbert's presence during the discussion on February 10, 2022, and his apparent willingness to assist with the delivery of what the UCOs surmised was a package of firearms, that he was conspiring to seriously harm police officers.

[62] We accept that, for the purposes of s 184.4, the perpetrator can include an aider or abettor: *Tse* at para 51. But the evidence, in our view, falls short here too. Aiding or abetting is doing or omitting to do something that assists or encourages the perpetrator to commit the offence for the purpose of aiding the perpetrator to commit the offence. The aider or abettor must know or be wilfully blind to the perpetrator's intention but need not share that intention. See *R v Briscoe*, 2010 SCC 13. The evidence Sgt Michaud relied upon does not establish reasonable grounds to believe Mr Carbert knew about, shared, or was wilfully blind to any intention on Mr Olienick's part to conspire to murder or seriously harm police officers.

[63] Further, as Sgt Michaud conceded, s 184.4 is "not an investigative tool ... as a means of gathering evidence"; it is a tool to be used in exceptional circumstances to prevent serious injury to people, in this case the RCMP, before a crime is committed. Utilizing s 184.4 against Mr Carbert on this evidentiary record casts too indiscriminate a net and slips into an investigative tool to gather evidence rather than an emergency tool to prevent imminent harm.

[64] Given that we have accepted Mr Carbert's main ground of appeal in relation to s 184.4, it is unnecessary to consider his other arguments.

h) Summary

[65] We conclude that the first 24 hours of the s 184.4 interceptions met the statutory requirements for Mr Olienick, but not for Mr Carbert. Mr Carbert's s 8 *Charter* right was therefore breached for the entirety of the interceptions of his communications, including during the first 24 hours. We consider this breach further in relation to excision and s 24(2).

III. Warrant to search the Coutts property

[66] On February 13, 2022, Cst Checkley sought and obtained warrants to search the Coutts property, Smuggler's, and Mr Olienick's truck, pursuant to s 487 of the *Criminal Code*. We address, first, the warrant to search the Coutts property. A challenge to a search warrant may be "facial" or "sub-facial". The appellants brought both kinds of challenges, and we address them separately below.

a) Legal framework

[67] Section 487(1)(b) permits a justice to issue a warrant authorizing a peace officer to search a place for a thing and seize it if the justice is satisfied there are reasonable grounds to believe the thing is in the place identified and “will afford evidence with respect to the commission of an offence”.

[68] The test for the issuance of a warrant under s 487(1)(b) has three elements:

- 1) reasonable grounds to believe an offence has been committed;
- 2) reasonable grounds to believe the things to be searched for and seized exist and are at the location to be searched; and
- 3) reasonable grounds to believe the things to be searched for and seized will afford evidence of the offence.

See e.g. **R v Beckles**, 2022 ABQB 39 at para 178; Hasan et al, *Search and Seizure* (Toronto: Emond, 2021) at 96.

[69] The scope of a warrant issued under s 487(1)(b) is broad. The phrase “evidence with respect to the commission of an offence” encompasses “all materials which might shed light on the circumstances of an event which appears to constitute an offence”: **CanadianOxy Chemicals Ltd v Canada (Attorney General)**, [1999] 1 SCR 743 at para 15, 1999 CanLII 680 (SCC).

[70] The “reasonable grounds to believe” standard is met when “credibly-based probability replaces suspicion”: **Hunter** at 167. Reasonable grounds to believe requires a “factually based likelihood that there are grounds for the [search warrant], rising above mere suspicion, but not necessarily demonstrating grounds on a balance of probabilities”: **R v Ha**, 2018 ABCA 233 at para 70.

[71] The police typically bring an application for a search warrant *ex parte*, meaning without notifying or involving affected individuals. This imposes a strong obligation on the affiant to make full, frank, and fair disclosure of material information in the ITO: **R v Araujo**, 2000 SCC 65 at para 46; **R v Morelli**, 2010 SCC 8 at paras 44, 49, 60. Although the affiant may rely on hearsay and they need not conduct their own investigation, they must not “ignore signs that fellow officers may be misleading them, or omitting material information”: **R v Paryniuk**, 2017 ONCA 87 at para 77, leave to appeal to SCC refused, 37471 (15 June 2017).

[72] The justice hearing an application for a warrant decides the matter based on the evidence in the ITO considered as a whole, taking a common sense, practical, and non-technical approach: **R v Sadikov**, 2014 ONCA 72 at para 82. The justice may draw reasonable inferences from the evidence: **R v Vu**, 2013 SCC 60 at para 16. An inference may be reasonable even if it is not the only or most compelling one available: **R v Guenter**, 2025 BCCA 308 at para 24, citing **R v Hafizi**,

2016 ONCA 933 at paras 56, 60. Hearsay evidence is admissible, but the justice must assess the nature and quality of the affiant's sources: *Canada (Attorney General) v Ni-Met Resources Inc* (2005), 74 OR (3d) 641 at para 18, 2005 CanLII 8670 (ON CA).

[73] At trial, an accused may bring a “*Garofoli*” application challenging a warrant and arguing that the evidence obtained from it must be excluded under s 24(2) of the *Charter*: *R v Garofoli*, [1990] 2 SCR 1421, 1990 CanLII 52 (SCC). The application starts from the presumption that the warrant is valid. The applicant bears the burden of demonstrating invalidity: *Quebec (Attorney General) v Laroche*, 2002 SCC 72 at para 68. A *Garofoli* application is not a rehearing of the warrant application. The reviewing justice does not ask whether they would have issued the warrant. The test is whether there was “reliable evidence that might reasonably be believed on the basis of which the authorization could have issued”: *Araujo* at para 54 (emphasis omitted); *Garofoli* at 1452; *Morelli* at para 40.

[74] A challenge to a warrant may be “facial” or “sub-facial”: see e.g. *World Bank Group v Wallace*, 2016 SCC 15 at para 120; *R v Donovan*, 2025 BCCA 30 at paras 88-90; *R v Crevier*, 2015 ONCA 619 at paras 73-74.

[75] On a facial challenge, the applicant argues that the record before the authorizing judge was insufficient to satisfy the statutory preconditions. The reviewing justice only considers the evidence that was before the authorizing justice.

[76] On a sub-facial challenge, the applicant puts evidence before the reviewing justice that was not before the authorizing justice. This may consist of the affiant's testimony on cross-examination. The applicant submits that the record before the authorizing justice did not accurately reflect what the affiant knew or ought to have known, and that if it had, the warrant could not have issued. Any erroneous information in the ITO is excised; any information that the affiant omitted but should have included may be added; and any minor good-faith errors on the part of the affiant may be corrected or “amplified”: *Morelli* at paras 41-43, 57, 60, 96; Hasan et al at 608-623. The question then becomes whether the evidence in the ITO, appropriately modified and corrected, satisfies the test for the warrant: *Araujo* at para 61; *R v Phan*, 2020 ONCA 298 at para 53. If it does, the warrant survives.

[77] Some courts have recognized a “residual discretion” to set aside a warrant even where it could have issued on the evidence, as modified on review. In *Paryniuk*, the Ontario Court of Appeal held that there is “a residual discretion to set aside a warrant despite the presence of a proper evidentiary predicate for its issuance where police conduct has subverted the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like”: para 69. The existence of this residual discretion is “well-settled” in Ontario: *Phan* at para 54. The test is high. The police conduct must be “so subversive of the search warrant process as to, in effect, amount to an abuse of process”: *R v Vivar*, 2009 ONCA 433 at para 2; cited in *Paryniuk* at para 70.

[78] We accept that there is a residual discretion to set aside a warrant on the grounds stated in *Paryniuk*. The Crown did not argue otherwise. The Court of King’s Bench has recognized the residual discretion in several cases, as have other appellate courts: see e.g. *R v Borhot*, 2023 ABKB 561 at para 44; *R v Chung*, 2024 ABKB 96 at para 217; *R v Habte*, 2025 ABKB 433 at paras 124-126; *R v Evans (ED)*, 2014 MBCA 44 at paras 17-19; *R v McElroy*, 2009 SKCA 77 at para 30, leave to appeal to SCC refused, 33243 (29 October 2009).²

b) Summary of the ITO

[79] On February 13, 2022, Cst Checkley swore a 28-page ITO in support of warrants to search Smuggler’s, the Coutts property, “including any outbuilding and any trailer”, and Mr Olienick’s truck mainly for “[d]ocuments and data related to planning, organization and operations of the protest group’s security for the Coutts blockade.” He set out the background to the protest and the evidence gathered by the RCMP, including the UCOs’ evidence. He stated he relied on the UCOs’ notes and the notes of their “cover officer”³, who he spoke with directly. He deposed he had reasonable grounds to believe the offence of mischief had been committed, contrary to s 430(3) of the *Criminal Code*.

[80] Cst Checkley stated that the UCOs observed a map in Mr Olienick’s truck and a pile of some 500 pages of documents at Smuggler’s, which an individual stated were “financial documents”. He stated the UCOs overheard Mr Olienick having a conversation with another individual in which this individual told Mr Olienick to gather his “core guys” for a “presentation” at a specific time and place. Cst Checkley also included evidence from the UCOs indicating that closed meetings took place at Smuggler’s.

[81] Cst Checkley set out the evidence supporting his grounds to believe the documents and data sought were in the locations to be searched. Regarding the Coutts property, he swore he believed the protesters’ security group involved structure, hierarchy, and organization, and that documents and data existed relating to Mr Olienick’s role in security. He referred to evidence that Mr Olienick was conducting video surveillance on police movements, his ideas were relayed to the protest leaders, and he had a map in his truck.

[82] Cst Checkley swore he believed Mr Olienick was staying at the Coutts property with other protesters involved in security and the documents and data sought were located there. He stated that both Mr Olienick’s and Mr Carbert’s trucks had been observed at the property. He believed they were both involved in security, given their involvement in the alleged firearms delivery. He described evidence from the UCOs that Mr Olienick told them he was staying in a camper trailer

² Compare *R v Thiessen*, 2020 BCCA 85 at para 66; *R v Beaumont*, 2018 BCCA 342 at paras 40-45, leave to appeal to SCC refused, 38288 (14 February 2019).

³ As Cst Checkley explained in the ITO, the role of the cover officer is to oversee the UCO, establish the objectives, ensure that safety protocols are maintained, and provide direction to the UCO in the field. See also e.g. *R v Badwal*, 2017 BCSC 1009 at para 17; *R v Caissie*, 2018 SKQB 279 at para 98; *R v Fertuck*, 2023 SKKB 200 at paras 92-95.

on the property, that other people slept in the house on the property, and that the owner allowed him to shower in the house.

c) Did the trial judge err in his assessment of the facial validity of the warrant?

[83] The trial judge rejected most of the appellants’ arguments regarding the facial validity of the warrant. He found it was open to the authorizing justice to infer from the evidence that the documents and data sought existed and would be found at the Coutts property. He summarized the evidence in the ITO, including the evidence about Mr Olienick’s security role and his statement to the UCOs that he was staying at the Coutts property. The trial judge considered it reasonable for the authorizing justice to have inferred that Mr Olienick would keep any such documents or data in locations readily accessible to him, such as at the Coutts property.

[84] Despite these findings, the trial judge concluded the warrant was facially invalid. The evidence before the authorizing justice was that there were two trailers and a modular home on the Coutts property and the appellants were residing in one of the trailers. The ITO did not set out evidence establishing in which of the two trailers the appellants were residing. The trial judge ruled that this resulted in “an insufficient nexus to establish reasonable grounds as to the place to be searched.” He concluded that the RCMP conducted an “impermissible overbroad search”, resulting in a breach of the appellants’ s 8 rights. He rejected the Crown’s reliance on *R v Kalonji*, 2022 ONCA 415, leave to appeal to SCC refused, 40329 (2 February 2023) and *R v Hamouth*, 2023 ONCA 518, leave to appeal to SCC refused, 40835 (11 January 2024), distinguishing both cases.

[85] The appellants take issue with the trial judge’s ruling, as does the Crown. We address the appellants’ arguments first.

[86] The appellants argue the requirements of s 487(1)(b) were not met. Mr Olienick concedes reasonable grounds existed to believe the offence of mischief had been committed. Mr Carbert concedes the trial judge properly set out the law. He also accepts that, if there were reasonable grounds to believe “documents and data” existed, they were likely only to be found at Smuggler’s. Yet the appellants argue the ITO failed to establish reasonable grounds to believe documents or data existed and would be found at the Coutts property. They argue the warrant rests on multiple layers of impermissible speculation and conjecture.

[87] 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 justice’s decision: *Sadikov* at para 89. The reviewing justice’s assessment of the validity of the warrant is entitled to deference: *R v Unrau*, 2025 ABCA 239 at para 15. Appellate intervention is, however, justified where a reviewing justice upholds a warrant that relies only on suspicion and conjecture rather than reasonable grounds: see *Morelli* at paras 63, 91, 94-96.

[88] We see no error in the trial judge’s decision. In drawing inferences from the ITO, the authorizing justice properly adopted the common sense, practical, and non-technical approach

endorsed in the jurisprudence. We agree with the trial judge that the inferences required to meet the test for a warrant were available to the authorizing justice. There was ample evidence to support them. There was evidence that, within the protest, a group of individuals was operating with a sophisticated hierarchy and organizational structure. Mr Olienick told the UCOs he was involved in security. There was evidence that Mr Olienick monitored a live camera feed surveilling police officers and that he used a CB radio and a map in his truck. We do not consider it unreasonable to infer from this evidence the existence of documents and data relating to the protest group's security. It was also reasonable, and consistent with common sense, to infer that Mr Olienick would keep such documents and data where he was staying. The evidence was sufficient to support reasonable grounds to believe he was staying at the Coutts property.

[89] As noted, the Crown also takes issue with the trial judge's ruling. As a respondent to a conviction appeal, the Crown is entitled to advance any argument to sustain the conviction that can be based on the record made at trial: *R v SH*, 2019 ONCA 669 at para 29, affirmed 2020 SCC 3; *Perka v The Queen*, [1984] 2 SCR 232 at 240, 1984 CanLII 23 (SCC); Dawe et al, *Criminal Appeals*, 2nd ed (Toronto: Emond, 2025) at 6.

[90] The Crown argues the trial judge erred in finding a breach of s 8 based on the failure of the police to establish, to the requisite standard, which trailer Mr Olienick was living in. The Crown claims the trial judge mischaracterized the living situation at the Coutts property. The situation was, according to the Crown, "much closer to a rooming house situation where people shared common areas than an apartment building where there were independent living areas." The Crown argues the warrant was justified because Mr Olienick had broad access to the property and could have been keeping the sought-after documents and data essentially anywhere on the property.

[91] The key evidence in the ITO relating to the living situation at the Coutts property was this. There were two trailers and a permanent modular home on the property. Mr Olienick was staying in one of the trailers with other individuals but sometimes slept in the bed of his truck. Although Mr Olienick had access to the house to shower, other people were staying there. The appellants' trucks were observed on the property on the same day.

[92] The trial judge concluded it was unreasonable for the authorizing justice to have inferred from this evidence that Mr Olienick had access to the second trailer. The question before us on appeal is whether that conclusion was reasonable. In our view, it was. Apart from the mere proximity of the trailers on the property, there was no evidence in the ITO connecting Mr Olienick to the second trailer. The inference that Mr Olienick had access to the second trailer was speculative and not supported by the evidence.

[93] The trial judge concluded, reasonably in our view, that the living situation on the Coutts property was functionally closer to multiple independent living units than multiple shared-access units. This led him to apply the law regarding search warrants for properties that contain multiple independent living units. If the police want to search a single unit on a property that they know contains more than one living unit, they must establish reasonable grounds to believe that evidence

with respect to the commission of an offence will be found *at that specific unit*: see *R v Campbell*, 2011 SCC 32 at para 15; *R v Ting*, 2016 ONCA 57 at paras 47-51; *R v Goorahoo and Menjivar*, 2020 ONSC 6088 at para 56.

[94] The trial judge held that the police failed to satisfy this requirement because, for each individual trailer, they lacked reasonable grounds to believe Mr Olienick was staying there. Mr Olienick told the UCOs he was staying in a trailer on the Coutts property. This provided some evidence to believe he was staying in trailer A. It also provided some evidence to believe he was staying in trailer B. But without further evidence to indicate in which trailer he was staying, the police fell short of establishing a credibly based probability for each. As a result, the search warrant was impermissibly broad and thus invalid.

[95] We agree with the trial judge that the Crown's reliance on *Kalonji* and *Hamouth* was misplaced. In *Hamouth*, there was evidence clearly tying the suspect of an investigation to the home that was searched. In *Kalonji*, there was evidence that an accused lived at a particular residence. We also note that the facts in *Campbell* are distinguishable. The appellant resided in a unit within a multi-unit dwelling. There was evidence demonstrating that he lived in that unit. Here, however, the police lacked evidence to establish which trailer Mr Olienick was living in.

[96] We are not persuaded that the trial judge erred as the Crown alleges.

d) Did the trial judge err in his assessment of the appellants' sub-facial challenge?

[97] We turn now to whether the trial judge erred in his assessment of the appellants' sub-facial challenge.

[98] At trial, the appellants argued that Cst Checkley sought a warrant to search for documents and data as a ruse to search for firearms despite knowing he did not have the evidence to establish reasonable grounds to believe there were firearms at the Coutts property. To support this claim, the appellants sought to rely on a particular piece of evidence over which the police claimed solicitor-client privilege. They also argued that Cst Checkley and Cst Brianna Taker, a lead RCMP investigator, took inadequate notes and there were differences in their *voir dire* testimonies. They noted further that the police did not search Smuggler's for documents and data pursuant to the warrant; they only conducted a "clearing search" after the warrant to search the Coutts property was executed. According to the appellants, this evidence supported their contention that the police were not genuinely interested in searching for documents and data.

[99] The trial judge rejected all these arguments. He ruled that the particular piece of evidence the appellants sought to rely upon was protected by solicitor-client privilege. He did not accept that the state of the constables' notes was evidence of a ruse. He accepted there were reasonable explanations for the discrepancies in the constables' testimony. He found the decision to conduct only a "clearing search" of Smuggler's, rather than a full search pursuant to the warrant, did not support an inference of subversion. He noted that during this search the police could have looked for any firearms in plain view. In any event, he found it was reasonable for the police to have

changed their focus away from documents and data once they arrested the appellants and found firearms in the search of the Coutts property.

[100] Ultimately, the trial judge declined to infer deliberate deception on the part of the police:

I do not find that the high standard for exercising residual discretion to set aside the warrant has been met by defence. I say this because I do not find on the evidence that the police engaged in the ruse or subterfuge that has been suggested in the application. Instead, I find that the police had a genuine interest in pursuing documents and data relating to the security of the Coutts protestors. While I agree that the police desired to find the firearms and hoped that they would, this does not lead to the necessary conclusion that the documents and data were not desired. Indeed, it is reasonable to think that the sought after documents and data might well lead to the discovery of firearms.

[101] Mr Carbert argues the trial judge erred in failing to exercise his residual discretion to invalidate the warrant due to subversion. He submits it is an “inescapable conclusion” that the search warrant was a ruse to search for firearms and the trial judge “acted unreasonably in failing to so find.” He argues that several pieces of evidence support the inference that the police were engaged in deliberate deception. He submits the trial judge erred in his rulings on solicitor-client privilege.

[102] We see no error in the trial judge’s conclusion that the evidence, save for that he found privileged, failed to support an inference of subversion. His decision declining to infer deliberate deception was reasonable and supported by the record. The trial judge heard and reviewed the police testimony given on the *voir dire*. He concluded there were understandable explanations for any discrepancies in the evidence of Cst Checkley and Cst Taker, and any failure on their part to keep adequate notes. He was satisfied that the decision not to conduct a full evidentiary search of Smuggler’s flowed reasonably from changed circumstances in a rapidly evolving investigation. We owe deference to the trial judge’s perspective and findings.

[103] The remaining question is whether the trial judge erred in depriving the appellants of the benefit of the evidence over which the Crown claimed privilege. Mr Carbert argues that he did. He submits that, had the evidence been disclosed to him, he could have used it to advance his subversion argument or to obtain some other advantage in making full answer and defence. He says the potential impact of the evidence on the trial process cannot be determined, so he is entitled to a new trial.

[104] Part of the *voir dire* on this issue was held *in camera*. The trial judge sealed the transcript, clerk’s notes, and exhibits. In this Court, the parties were permitted to access the sealed materials with restrictions and to file redacted and unredacted appeal materials. We heard oral submissions on this issue *in camera*.

[105] In the circumstances, our reasons must necessarily be brief and conclusory. We have carefully considered the parties' arguments and the materials filed. We reject Mr Carbert's argument that the trial judge applied an incorrect legal standard. The trial judge relied on Supreme Court authority and was correct in doing so. We are satisfied the trial judge correctly stated the law and applied it to the disputed record. The disputed record meets the test for solicitor-client privilege stated in *Solosky v The Queen*, [1980] 1 SCR 821 at 837, 1979 CanLII 9 (SCC), and no exception applies to defeat the privilege.

[106] Having regard to the totality of the evidence, including all the evidence in the ITO, we agree with the trial judge that the appellants failed to establish subversion. He did not err in declining to exercise his residual discretion to invalidate the warrant. This ground of appeal is dismissed.

IV. Warrant to search Mr Olienick's truck

[107] In addition to the warrant to search the Coutts property, Cst Checkley also sought and obtained a warrant to search Mr Olienick's pickup truck. The grounds for both warrants are set out in the same ITO. Cst Checkley relied on the same background context and evidence from the UCOs, highlighting Mr Olienick's involvement in security for the protest group, summarized above.

[108] The evidence specifically relevant to the truck included that the UCOs were in the truck and observed body armour plates, a functioning CB radio, and a map on the console. Cst Checkley also highlighted the evidence about the alleged firearms delivery on February 10, 2022, and the live surveillance feed that Mr Olienick had on his device.

[109] The trial judge concluded that the warrant to search Mr Olienick's truck was valid, for essentially the same reasons he gave in relation to the Coutts property. We see no error in the trial judge's decision. For reasons already provided, the trial judge reasonably rejected the appellants' sub-facial challenge. He also made no error in upholding the facial validity of the warrant. The UCOs observed at least one security-related document in Mr Olienick's truck: a map. Viewed in light of all the other evidence, it was not unreasonable to infer that other security-related documents or data would be found in the truck, a place readily accessible to Mr Olienick.

V. Excision and the warrants to search cell phones and remand calls

[110] The trial judge found two breaches of the appellants' s 8 rights: the s 184.4 interceptions after the first 24 hours, and the search of the Coutts property. In addition, we found the interception of Mr Carbert's communications during the first 24 hours was unlawful and breached his s 8 right.

[111] If an ITO includes unconstitutionally obtained information, that information must be excised: *R v Grant*, [1993] 3 SCR 223, 1993 CanLII 68 (SCC); *R v Wiley*, [1993] 3 SCR 263, 1993 CanLII 69 (SCC); *R v Plant*, [1993] 3 SCR 281, 1993 CanLII 70 (SCC); Hasan et al at 610-611; see also *R v Zacharias*, 2023 SCC 30 at paras 2, 26, 30, 107. Once the information is excised,

the question becomes whether the warrant could have issued based on the information remaining in the ITO, as amplified on review: *Grant* at 251-252; *Wiley* at 273-274; *R v Mahmood*, 2011 ONCA 693 at para 116, leave to appeal to SCC refused, 34705 (28 June 2012).

[112] At trial, the appellants sought excision of unconstitutionally obtained information from ITOs sworn in support of various warrants issued after the warrant to search the Coutts property. They urged the trial judge to excise not only information obtained in breach of their own *Charter* rights but also information obtained in breach of Mr Morin's and Mr Lysak's *Charter* rights. They argued that, after excision, the subsequent warrants could not have issued.

[113] Mr Carbert focused on subsequent warrants to search his and Mr Olienick's phones at specified times and a warrant to search and seize calls the appellants made while they were in remand. Mr Olienick sought excision in relation to all subsequent warrants, including the warrant to search his residence. The trial judge addressed the validity of the warrant to search Mr Olienick's residence in a separate application, which we address in the next section.

[114] The trial judge declined to invalidate the search warrants relating to the cell phones and remand calls. He discussed at length the law regarding excision and whether an accused is entitled to excision of information obtained in breach of a third party's *Charter* rights. He noted that trial level courts appear to be divided on this issue. He agreed with the cases concluding that an accused is entitled to excision of information obtained in breach only of their own *Charter* rights. He then considered the validity of the subsequent warrants. Crucially, he found that even if he excised information obtained in breach of both the appellants' and third parties' *Charter* rights, there was still ample evidence to support the issuance of the warrants.

[115] On appeal, Mr Carbert argues the trial judge erred in concluding that excision applies only to information obtained in breach of the appellants' own *Charter* rights. He submits the correct approach is that excision also applies to information obtained in breach of third parties' *Charter* rights. Notably, however, as the Crown points out, Mr Carbert makes no attempt to establish that the trial judge erred in finding the warrants were properly issued even after excision of information obtained in breach of both his and third parties' *Charter* rights.

[116] We decline to rule on whether the trial judge adopted the correct approach to excising information obtained in breach of third parties' *Charter* rights. In the context of this appeal, that issue is academic and inconsequential. Even if Mr Carbert is correct about the law of excision, the trial judge considered that approach and found that the warrants survived scrutiny. Mr Carbert has not alleged, let alone established, any error in that decision. The warrants are presumptively valid and Mr Carbert has not discharged his burden to show otherwise.

[117] We found an additional breach of Mr Carbert's s 8 right – the first 24 hours of the s 184.4 interceptions. Even after accounting for this, there was ample evidence not obtained through s 184.4 interceptions to support the subsequent warrants. Mr Carbert has not demonstrated that this breach had any material bearing on the validity of any subsequent warrant. He has not established that any subsequent warrant could not have issued after excision. Accordingly, the additional

breach makes no difference to the validity of subsequent warrants. This ground of appeal is dismissed.

VI. Warrant to search Mr Olienick's residence

[118] On February 19, 2022, Cst Checkley sought and obtained a warrant to search Mr Olienick's residence, located in the municipal district of Willow Creek, Alberta. The police executed the warrant on the night of February 19, 2022, and the following day. They seized, among many other things, two pipe bombs, which formed the basis of the s 82(1) charge against Mr Olienick. At trial, Mr Olienick challenged the validity of the warrant on facial and sub-facial grounds. The trial judge found no breach of s 8. Mr Olienick appeals.

a) Summary of the ITO

[119] Cst Checkley swore a 59-page ITO in support of the warrant. He asserted he had reasonable grounds to believe three offences had been committed: conspiracy to commit murder, contrary to s 465(1)(a); possession of a weapon for a dangerous purpose, contrary to s 88; and mischief over \$5,000, contrary to s 430(3). He swore he had reasonable grounds to believe firearms, ammunition, firearms accessories, a gas mask, and documents and data were located at Mr Olienick's property and would afford evidence of the commission of the offences.

[120] Much of the ITO restates information included in the ITO in support of the warrant to search the Coutts property. Cst Checkley set out the background to the Coutts blockade, the protest leadership, and the police's interactions with the protest leaders. He summarized the evidence gathered by the UCOs from February 9 to 12, 2022, including Mr Olienick's many concerning statements relating to police and the alleged firearms delivery on February 10.

[121] Cst Checkley provided additional information obtained during the investigation. Much of this evidence was obtained through the unlawful search of the Coutts property and the unlawful s 184.4 wiretaps. As such, this evidence had to be excised. The trial judge did excise this evidence, so we need not summarize it here.

[122] The ITO then focused on information relating to Mr Olienick's property. This information indicated that Mr Olienick lived on the property and that it was owned by Iron Rock Enterprises Ltd, the directors of which are Mr Olienick and his mother.

[123] Following this, the ITO set out information obtained from the Canada Border Services Agency regarding items shipped to addresses or PO boxes that Cst Checkley believed were associated with Mr Olienick or to which Mr Olienick had ready access, such as his mother's residence. Cst Checkley stated he believed the items to be a timer used to improve shooting skills, leather "in the waist band" gun holsters, magazine holders, a holster for a pistol, a gas mask, and a holder for the gas mask. Cst Checkley stated he believed Mr Olienick possessed multiple handguns that the police had not yet seized and that would be found at the residence.

[124] To support the warrant to search for firearms and related items, Cst Checkley emphasized, among other information, that Mr Olienick told the UCOs the protesters had hundreds of guns and thousands of rounds of ammunition, only a small portion of which was seized in the search of the Coutts property and Mr Olienick's truck; he was involved in the alleged firearms delivery at Coutts; and he imported holsters and magazine pouches for handguns. Cst Checkley stated he had reasonable grounds to believe some of the firearms and tactical equipment available to Mr Olienick and the protest group were at Mr Olienick's residence.

[125] To support the warrant to search for documents and data, Cst Checkley emphasized, among other information, that Mr Olienick's security role involved a level of sophistication and structure, he had a map in his truck and made notes about the convoy, and he purchased the shot timer on December 23, 2021. Cst Checkley stated he had reasonable grounds to believe records and receipts relating to the protest group and their access to firearms and related items would be located at Mr Olienick's residence.

[126] Based on the information in the ITO, Cst Checkley concluded he had reasonable grounds to believe the named offences had been committed, the things sought were at Mr Olienick's residence, and these things would afford evidence of the offences listed.

b) Trial judge's *voir dire* decision

[127] The trial judge dismissed Mr Olienick's application to invalidate the warrant. He summarized the evidence in the ITO. He excised any information obtained in breach of the *Charter* and found there was ample evidence remaining to support the warrant.

[128] The trial judge rejected various arguments advanced by Mr Olienick. He rejected the argument that the police should not have searched the property because it was corporately owned. He found that ownership was irrelevant to the validity of the warrant. He rejected the argument that the warrant was invalid because the evidence seized would not support convictions for the named offences. He explained that this is not the test for a warrant. On the sub-facial challenge, the trial judge declined to excise certain information because he found it was not misleading or erroneous. He rejected the argument that the manner in which the police conducted the search established invalidity. He found the evidence of Mr Olienick's mother, given in the *voir dire*, did not detract from Cst Checkley's reasonable grounds.

c) Did the trial judge err in affirming the validity of the warrant?

[129] Mr Olienick argues the trial judge erred in affirming the validity of the warrant. He says there was no evidence he attended his residence during the offence period and no evidence about when he was last there. He submits that Cst Checkley's reliance on information from the Canada Border Services Agency shows the search was a "fishing expedition". He notes that the items he imported were legal and were delivered to places other than his residence.

[130] We reject these arguments. Whether Mr Olienick went to his residence during or around the time of the protest is immaterial. Whether he did or not, there were reasonable grounds to believe the things sought would afford evidence of the named offences. If firearms and tactical gear, or documents relating to them, were found, this would support a finding that Mr Olienick had access to the means of harming police and was conspiring with others to do so. Far from a fishing expedition, the information about the items he imported reinforced Cst Checkley's grounds to believe the named offences had been committed.

[131] Having reviewed the ITO, stripped of the unconstitutionally obtained information, we are satisfied the trial judge made no error in affirming the validity of the warrant. We agree with the trial judge that there was ample evidence to support the issuance of the warrant.

VII. Exclusion of evidence analysis – section 24(2)

[132] Section 24(2) of the *Charter* provides that where a court concludes evidence was “obtained in a manner that infringed or denied” a *Charter* right, “the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

[133] The trial judge found two breaches of the appellants' s 8 *Charter* rights: the search of the Coutts property and the interception of their communications under s 184.4 after the first 24 hours. He excluded the evidence obtained from the wiretaps but not the evidence obtained from the search of the Coutts property.

[134] We found an additional breach of Mr Carbert's s 8 right during the first 24 hours of the s 184.4 wiretap. It is not clear to us whether Mr Carbert seeks exclusion of the evidence obtained during this period. If he is, we decline to exclude the evidence. Mr Carbert has failed to demonstrate how these communications bear on his convictions. He did not make submissions on how s 24(2) applies to this evidence. The burden is on Mr Carbert to establish that the evidence must be excluded: *R v Tim*, 2022 SCC 12 at para 75; *R v Fearon*, 2014 SCC 77 at para 89. He has failed to discharge that burden.

[135] While we would not exclude this evidence, Mr Carbert's success in establishing an additional breach of his s 8 right advances his case on appeal. As we explain below, we must consider this additional breach in assessing whether to exclude the evidence obtained from the unlawful search of the Coutts property. Having differed from the trial judge on the *Charter* breaches affecting Mr Carbert, we must consider afresh whether to exclude the evidence obtained from the search: *R v Beaver*, 2022 SCC 54 at para 118; *R v Thompson*, 2025 ONCA 500 at para 93.

[136] Mr Olienick's case for exclusion stands on a different footing. He has not established an additional breach of his *Charter* rights. He is not entitled to a fresh s 24(2) analysis in this Court unless he can establish reviewable error in the trial judge's s 24(2) analysis. Mr Olienick argues the trial judge erred in declining to exclude the evidence obtained from the search of the Coutts property. We consider his arguments below.

a) Legal framework

[137] There are three prerequisites to the exclusion of evidence under s 24(2): the applicant's *Charter* rights were infringed or denied, the evidence was obtained in a manner that infringed or denied the applicant's *Charter* rights, and the admission of the evidence would, having regard to all the circumstances, bring the administration of justice into disrepute. See ***R v Collins***, [1987] 1 SCR 265 at 276, 1987 CanLII 84 (SCC). There is no dispute in this case that the first two prerequisites are met.

[138] As the Supreme Court of Canada set out in ***R v Grant***, 2009 SCC 32 at para 71, to determine whether the third prerequisite is met, courts assess and balance the effect of admitting the evidence on society's confidence in the justice system, having regard to:

- 1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
- 2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and
- 3) society's interest in the adjudication of the case on its merits.

[139] The ultimate question is whether admission of the evidence would bring the administration of justice into disrepute, not whether the evidence should be excluded: ***R v Le***, 2019 SCC 34 at para 139. If admission would bring the administration of justice into disrepute, then the evidence must be excluded to maintain the integrity of, and public confidence in, the justice system.

[140] The first line of inquiry assesses the seriousness of the *Charter*-infringing state conduct. The Supreme Court recently summarized the correct approach in ***R v Fox***, 2026 SCC 4 at para 94. The question is whether the state has engaged in conduct from which the court should disassociate itself. The aim is not to punish the police but to preserve public confidence in the rule of law and its processes. The court's task is to situate the seriousness of the *Charter*-infringing conduct on the spectrum of culpability. Technical, inadvertent, or otherwise minor *Charter* breaches do not impair public confidence in the rule of law as much as reckless disregard of *Charter* rights, a major departure from *Charter* standards, or a systemic pattern of *Charter* breaches. Inadvertence in breaching the *Charter* may be serious if it rises to the level of significant negligence. Courts should disassociate themselves from state conduct that departs significantly from *Charter* standards or shows that state actors knew or ought to have known that their conduct failed to comply with the *Charter*.

[141] The second line of inquiry evaluates the impact of the breach on the applicant's *Charter*-protected interests by identifying the interest engaged and evaluating the degree of the impact on that interest. The greater the impact, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. Impact lies on a spectrum from fleeting, technical, transient, or trivial, to profoundly intrusive and seriously compromising. See ***Fox*** at para 111;

Grant at paras 76-78; **Le** at para 151; **Tim** at para 90; **Beaver** at para 123; **R v McColman**, 2023 SCC 8 at para 66; **R v Lafrance**, 2022 SCC 32 at para 96.

[142] The third line of inquiry considers society’s interest in the adjudication of the case on its merits. Excluding evidence that facilitates the truth-seeking function of the criminal trial process may have a detrimental impact on the repute of the administration of justice. The main considerations are the reliability of the evidence sought to be excluded, the importance of that evidence to the Crown’s case, and the seriousness of the offence. Reliable evidence that is critical to the Crown’s case generally supports inclusion. The seriousness of the offence may cut both ways because society has a strong interest both in adjudicating serious charges on the merits and maintaining a justice system that is above reproach in high-stakes cases. See **Fox** at para 118; **Grant** at paras 79-84; **Le** at para 158; **Beaver** at para 129; **McColman** at paras 69-70; **Tim** at para 96; **Lafrance** at para 98.

[143] The final step is to balance the factors under the three lines of inquiry to determine whether admitting the evidence would bring the administration of justice into disrepute. The focus is prospective and societal. The analysis is qualitative; mathematical precision is not possible or desirable. No single factor is determinative. The cumulative weight of the first two lines of inquiry is balanced against the third. When the first two lines strongly favour exclusion, the third line will generally not tip the balance toward admission. While there may be cases where the first factor alone overwhelms the others and compels exclusion, there may also be cases where the third line overwhelms the first two. See **Fox** at paras 125-126; **Grant** at para 86; **Tim** at para 98; **Beaver** at paras 133-134; **McColman** at para 74; **Le** at paras 141-142; **Lafrance** at paras 90, 101.

b) Trial judge’s *voir dire* decision

[144] The trial judge began his reasons by noting a concession made by the Crown. Having reviewed **R v Jones**, 2017 SCC 60, the Crown conceded the appellants had standing to seek exclusion of the evidence obtained from the searches of the trailer they were not staying in and the modular home. Accordingly, the trial judge considered all the evidence obtained from the search of the Coutts property under s 24(2).

[145] On the first **Grant** factor, he found the *Charter*-infringing conduct was “inadvertent or minor”, “a slight error of associating some precision as [to] the location”, and was “undertaken in good faith.” He noted that Cst Checkley applied for a warrant and subjectively believed he had met the test for a warrant. He characterized the *Charter*-infringing conduct as a mistake on the part of Cst Checkley as to the inferences that could reasonably be drawn from the evidence in the ITO. He noted that the ITO was “fair, full, and frank” and did not overstate the grounds for the warrant or mislead the authorizing justice. He relied on various cases for the proposition that where the police act under the authority of a warrant that falls just short of the required reasonable grounds, the breach is not generally regarded as serious. He rejected the appellants’ argument that the police were blameworthy in failing to take the investigative steps necessary to determine which trailer

the appellants were living in. He considered Cst Checkley's error "blameless" because he had no awareness of it.

[146] Second, the trial judge found the *Charter*-infringing conduct had a "serious" impact on the *Charter*-protected privacy interests of the appellants. He rejected the Crown's argument that the appellants had a lesser expectation of privacy in a temporary camper trailer. He found that vacation trailers are "homes away from home", akin to a hotel room, and as such they attract a high reasonable expectation of privacy. He concluded that "the police seriously intruded upon an area for which there was not only a high expectation of privacy, but the violation of that privacy result[ed] in a demeaning of the dignity of the occupants."

[147] Third, the trial judge found the truth-seeking process of the criminal trial would be better served by admitting the evidence. He noted the evidence was real, relevant, and reliable. He accepted the Crown's case on the conspiracy to murder charge would have been "severely compromised" without the large number of firearms and ammunition seized. He found the firearms were also critical to the s 88(1) weapons charges. While he recognized that the seriousness of the offences cuts both ways, he found the most significant consideration to be "the public interest in the prosecution with such reliable evidence".

[148] In the final balancing, the trial judge found the first and third *Grant* factors favoured inclusion, while the second favoured exclusion. Ultimately, he determined "the reasonable person, informed of *Charter* values and dispassionately apprised of all the circumstances . . . would conclude that the administration of justice would not be harmed by the inclusion of the evidence."

c) Did the trial judge err in his s 24(2) analysis?

[149] Mr Olienick argues the trial judge erred by failing to consider the s 8 *Charter* breaches as a "collective". He submits that, viewed collectively, the *Charter* breaches are "clearly serious, have huge impact, and should have been excluded" even considering society's interest in adjudication on the merits.

[150] In *R v Zacharias*, 2023 SCC 30 at paras 47-49, the Supreme Court of Canada distinguished between two kinds of *Charter* breaches. A "consequential" *Charter* breach is one that is unlawful "only as a consequence of the 'initial' breach or breaches that preceded it": para 47. For example, an unlawful arrest is a consequential breach of s 9 if it is premised on the results of a search that breached s 8. An "independent" *Charter* breach, on the other hand, is a breach that is characterized by "additional or independent misconduct." While both kinds of breach must be factored into the s 24(2) analysis, they have different impacts.

[151] Consequential breaches are "unlikely to significantly impact the overall seriousness of the *Charter*-infringing state conduct": *Zacharias* at para 52. This is because they tend to reflect no more than the misconduct inherent in the initial breach.

[152] Independent breaches, on the other hand, may cumulatively increase the seriousness of the *Charter*-infringing state conduct because they demonstrate additional misconduct and may evidence a pattern of misconduct: **Zacharias** at para 49. A failure to consider related breaches together can “distort the view taken of the seriousness of the *Charter*-offending conduct”: **R v Truong**, 2025 ONCA 69 at para 42. A pattern of abuse of the *Charter* may exacerbate the seriousness of the breach: **Grant** at para 75; **R v O’Brien**, 2023 ONCA 197 at para 25; **R v Fan**, 2017 BCCA 99 at para 72; **R v Lauriente**, 2010 BCCA 72 at para 27; **R v Simmons**, 2024 ABKB 409 at para 73. A pattern of *Charter* breaches may increase the court’s need to distance itself from the unconstitutional conduct in order to maintain the good repute of the administration of justice: **R v Robertson**, 2019 BCCA 116 at para 60; **Fan** at para 73.

[153] All *Charter* breaches, whether consequential or independent, must be considered in assessing the impact of state misconduct on the accused’s *Charter*-protected interests under the second **Grant** factor. As the Supreme Court explained in **Zacharias** at para 56, consideration of all breaches is necessary to get an accurate picture of their impact. Related *Charter* breaches are part of “all the circumstances” that must be considered under s 24(2). “When additional rights and breaches of those rights are factored into the s. 24(2) analysis, there will necessarily be a more significant impact on the accused that is therefore relevant to the analysis of the second *Grant* factor.”

[154] Breaches involving third-party targets of the same investigation are relevant to the cumulative impact analysis even if they themselves do not satisfy s 24(2)’s threshold “obtained in a manner” requirement and did not directly result in the discovery of evidence: **Robertson** at paras 56-63; **R v Lambert**, 2020 NSPC 37 at para 283, affirmed 2023 NSCA 8.

[155] It is an error for a court not to consider how multiple related *Charter* breaches affect the seriousness of *Charter*-infringing state conduct and their impact on *Charter*-protected interests: **R v Reilly**, 2021 SCC 38 at para 3; **Robertson** at para 61; **Truong** at paras 38-44; **R v James**, 2025 ONCA 213 at paras 36-42; **R v Adler**, 2020 ONCA 246 at para 39. Where a *Charter* breach is related to others, it is an error in principle to view it in a vacuum or as part of a siloed or compartmentalized analysis. “Two separate analyses will not necessarily equate to one analysis that considers the cumulative effect of the related breaches – the whole may be more than the sum of the parts”: **Truong** at para 43.

[156] In argument in the s 24(2) *voir dire*, Mr Olienick argued that “the cumulative effect of the two breaches does matter and arrives at a serious or somewhat more than serious level.” He cited, for example, **R v Bottomley**, 2023 BCSC 603, which summarized the principles set out in **Robertson**, **Fan**, **Lauriente**, and **O’Brien**. The Crown resisted this argument, submitting that the breaches did not compound each other because they were independent and committed by different officers.

[157] In his s 24(2) decision, the trial judge cited **Zacharias** for the proposition that “subsequent actions may possibly increase the severity of the *Charter*-infringing state conduct” and may

increase the impact on the accused's *Charter*-protected interests. In his analysis of the seriousness of the s 184.4 wiretap breaches, he stated: "I do not find any systemic difficulties in relation to the overall police conduct in relation to this investigation or any cumulative conduct because of the earlier breach that would, for that reason alone, . . . require the court[] distancing itself from the police conduct overall." However, in his earlier analysis relating to the search of the Coutts property he did not consider the reverse. He did not address whether the s 184.4 wiretap breaches exacerbated the seriousness of the search warrant breaches or their impact on *Charter*-protected interests.

[158] The Crown argues the trial judge's reasons read as a whole, combined with his reasons on other *voir dires* involving excision, demonstrates he properly considered the cumulative impact of the *Charter* breaches under the first two **Grant** factors.

[159] We disagree. Excision in the context of a warrant review is conceptually distinct from exclusion of evidence under s 24(2). We accept the trial judge made a finding in his s 24(2) analysis that the overall investigation did not raise any "systemic difficulties". However, this question does not exhaust the cumulative impact analysis. The trial judge failed to go further and consider whether the s 184.4 wiretap breaches exacerbated the seriousness of the search warrant breaches and their impact on *Charter*-protected interests. He siloed his analysis of each set of breaches and overlooked cumulative impact. He failed to step back from the first analysis and take a "final look to see if, in all the circumstances, some or all of the evidence that had avoided exclusion when assessed individually, should be excluded when the cumulative impact is taken into account": **R v Lambert and Bailey**, 2023 NSCA 8 at para 102, leave to appeal to SCC refused, 40672 (26 October 2023). As in **Adler** at para 39, "while the trial judge acknowledged the need to consider the cumulative effect of the various *Charter* breaches, he did not do so."

[160] Having found reviewable error in the trial judge's s 24(2) analysis, it is open to us to consider the analysis afresh, accepting the findings of the trial judge that are untainted by the error: **Robertson** at para 63, citing **R v Vu**, 2013 SCC 60 at para 67; **Truong** at para 44; **Adler** at para 40.

d) Fresh section 24(2) analysis

[161] The breaches of the appellants' s 8 rights in relation to the search of the Coutts property must be considered in all the circumstances.

[162] The unlawful search of the property implicated not only the appellants' privacy rights but also the privacy rights of the other temporary residents of the property. The failure of the police to narrow the search only to those places where there were reasonable grounds to believe the appellants had access infringed upon the privacy interests of all the residents of the Coutts property. While those other individuals are not before the court and breaches of their s 8 *Charter* rights have not been adjudicated, the impact of the search on their interests cannot be ignored: see **R v Thompson**, [1990] 2 SCR 1111 at 1143-1144, 1990 CanLII 43 (SCC). The collateral impact on their interests is part of the relevant context.

[163] Overlaid upon these considerations are the s 184.4 wiretap breaches. As we found, the wiretap in relation to Mr Carbert was not justified. In relation to Mr Olienick, the police breached his privacy rights for approximately two full days. These breaches were serious. As the trial judge found, Sgt Michaud demonstrated “some reckless disregard for [the] *Charter* values” articulated in *Tse*. The unlawful s 184.4 interceptions amounted to serious *Charter*-infringing conduct and an “abuse of police authority”.

[164] These factors must be considered together in assessing the first two ***Grant*** factors. The unlawful search warrant and the unlawful wiretaps were part of the same investigation, overlapped in time, and were initiated by the same team of police officers. The breaches were clearly related and must be considered together. This is not a case where, for example, there were two separate investigations and no factual connection between the breaches: see ***R v Yakubovsky-Rositsan***, 2010 ONCA 748 at para 5.

[165] In light of these considerations, we cannot agree with the trial judge that the seriousness of the breaches of the appellants’ s 8 rights arising from the unlawful search of the Coutts property was purely minor and technical. The s 184.4 wiretap breaches colour and exacerbate the search warrant breaches. They show that the search warrant breaches were not isolated instances of disregard for *Charter* rights. The failure to establish reasonable grounds as to which trailer the appellants were staying in may appear minor when viewed in terms of its impact only on them – the police failed to take some final investigative steps. But that failure had an even greater impact on the privacy interests of the other residents of the Coutts property. They were not subjects of investigation identified in the ITO, but their temporary residences were unlawfully searched.

[166] We would also not go so far as the trial judge in saying that Cst Checkley’s failure to establish reasonable grounds for the warrant was “blameless” because he was not aware of the defect in his application. He had a legal duty to be aware of the defect and to avoid it. The ITO fell short of the standard required by law. The breach may not have been deliberate or egregious, but it was not entirely blameless.

[167] Taking these considerations into account, the breaches were not minor. They involved inadvertence, inattention, and ultimately error. That said, they do not fall on the higher end of the spectrum of culpability. As the trial judge rightly found, the police sought and obtained judicial authorization for the search, which significantly attenuates the seriousness of the breaches. The judicial authorization process is designed to protect *Charter* rights. Following that process generally demonstrates “the antithesis of wilful disregard of *Charter* rights”: ***R v Rocha***, 2012 ONCA 707 at para 28. The police followed the judicial authorization process in this case, which demonstrates a good faith effort to comply with *Charter* rights and values. This significantly tempers the seriousness of the breaches.

[168] Turning to the second ***Grant*** factor, the impact on the appellants’ *Charter*-protected interests was significant and intrusive. We agree with the trial judge that the appellants and the other residents of the Coutts property had a strong reasonable expectation of privacy in their

temporary residences. Temporary residences such as hotel rooms and camper trailers do indeed serve as an individual's "home away from home." The unlawful search had a serious impact on highly valued and zealously protected privacy interests.

[169] The third factor considers society's interest in adjudication of the case on the merits. We endorse the trial judge's reasoning. The firearms and related items seized are real and reliable evidence. Exclusion of this evidence would have severely compromised the Crown's case against the appellants on the weapons and conspiracy charges. While the seriousness of the offences may cut both ways, the strongest consideration in the circumstances is the public interest in the prosecutions proceeding with the benefit of the evidence. The prosecutions aimed to deter and denounce dangerous forms of public protest that are squarely antithetical to Canadian democratic values. The truth-seeking function of the criminal trial is best served by the admission of the evidence.

[170] The final step is to balance the three lines of inquiry. The first two factors pull moderately in favour of exclusion. This is not a case where they pull so strongly in favour of exclusion that the third factor must yield. In the specific circumstances of this case, the third factor weighs very strongly in favour of admission. The ultimate question is whether admission of the evidence in the proceedings would bring the administration of justice into disrepute. In our view, it would not. Excluding the evidence in the context of these prosecutions would do greater damage to the integrity of our justice system. We would not exclude the evidence.

VIII. Jury instructions regarding the section 88(1) charge

[171] We turn now to Mr Carbert's challenge to the jury instructions. He argues the trial judge misdirected the jury on the offence of possession of firearms for a purpose dangerous to the public peace, contrary to s 88(1). He says the jury instructions "glossed over" the elements of the offence. He also takes issue with three specific aspects of the jury instructions relating to this offence.

[172] Appellate courts read jury instructions functionally and as a whole to determine whether the trial judge properly equipped the jury to decide the case according to the law and the evidence: *R v Abdullahi*, 2023 SCC 19; *R v Bilodeau*, 2024 ABCA 148 at paras 18-21, affirmed 2025 SCC 2. To properly instruct the jury in respect of the law, the trial judge must accurately inform them of all the law they need to decide the case. Brevity and simplicity are virtues, so long as they are combined with accuracy and completeness. The circumstances of the trial can inform what the jury needs to understand to decide the case.

[173] The trial judge accurately instructed the jury that to convict under s 88(1) they had to be satisfied beyond a reasonable doubt that Mr Carbert possessed a weapon, knew that what he possessed was a weapon, and possessed the weapon for a purpose dangerous to the public peace: *R v Kerr*, 2004 SCC 44 at para 23; *R v Blanchard*, 2016 ABQB 706 at para 322, affirmed 2024 ABCA 130; *Bilodeau* at para 26. The judge then elaborated on these elements, including by

explaining the different ways in which possession may be established, the definition of a weapon, and what the knowledge component requires. He did not “gloss over” the elements of the offence.

[174] Mr Carbert argues further that the trial judge made three more specific errors in his instructions on the third “purpose” element of the s 88(1) offence.

[175] The trial judge instructed the jury that possessing a weapon for a purpose dangerous to the “public peace” means possessing it for a purpose dangerous to “the normal state of society and the general peace provided for by the law.” He explained that this element may be met even if the accused possessed the weapon in a private dwelling or even if the purpose for the possession was defensive. The judge instructed the jury to look at the evidence in the context of what the accused did or said and to use their good common sense.

[176] First, Mr Carbert argues the judge erred by instructing the jury that the “public peace” means “the normal state of society and the general peace provided for by the law.” He submits that this instruction may have led the jury to convict him on something less than the required purpose dangerous to the public peace, which he suggests would include “[r]evealing the weapon(s) in public” in a manner that “induced a chaotic response.”

[177] We reject this argument. The trial judge’s statement was consistent with *Kerr*, where the Supreme Court of Canada described the public peace as generally referring to “a state of order or to the normal state of society” or to the “general peace and order of the realm, as provided for by law”: paras 36, 66, 89. As the Supreme Court stated at paragraph 36, “there could be no exhaustive test for dangerousness, because of the wide variety of settings and circumstances in which a danger may arise.” The trier of fact determines whether the accused possessed the weapon for a purpose dangerous to the public peace based on all relevant factors considered contextually. The trial judge instructed the jury regarding the relevant factors and evidence. Mr Carbert has not identified any inaccuracy or omission in the judge’s instructions. His suggestion that the jury may have convicted based on a finding that his purpose was simply to induce a chaotic response is speculative and inconsistent not only with the arguments raised in the circumstances of the trial but also with the judge’s instructions that the purpose must be dangerous to the public peace, as provided for by law.

[178] Second, Mr Carbert takes issue with another statement from the trial judge’s instructions on the third element of the s 88(1) offence. The trial judge instructed: “If you find that Anthony Olienick possessed many firearms jointly with a number of people, it may impact upon the inference you draw as a matter of common sense.” Mr Carbert submits the trial judge should have explained that even if “joint possession was found, each accused’s purpose had to be evaluated individually . . . it was open to the jury to acquit Mr. Carbert and not Mr. Olienick.”

[179] This argument cannot succeed. Reading the jury charge as a whole, the trial judge made it abundantly clear to the jury that they had to consider the counts and the accused separately. To provide but one example, the judge explicitly instructed the jury early in the charge that they “must separately consider the evidence relating to each count in the Indictment and the evidence relating

to Anthony Olienick and Chris Carbert on each count separately.” The judge added: “[a]s may seem obvious, your verdict of guilty or not guilty in relation to the counts that jointly charge Anthony Olienick and Chris Carbert need not be the same in relation to either the counts or the accused.” Given these instructions, there is no realistic possibility the jury convicted Mr Carbert without considering his purpose for possession of the firearms separately from Mr Olienick’s purpose.

[180] Finally, the trial judge instructed the jury on what use they could make of Mr Carbert’s evidence about the firearms he brought into Coutts, one of which was prohibited, in determining his purpose for possessing them. The trial judge instructed the jury that they could not conclude that Mr Carbert possessed the prohibited firearm for a purpose dangerous to the public peace simply because it was prohibited and could fire many bullets rapidly. He told them to consider Mr Carbert’s exculpatory explanation, which was that he possessed the firearm “merely to sight it in and to show it off”. The judge instructed the jury that if this explanation did not leave them “with a reasonable doubt in accordance with [his] instructions, [they] might consider the nature of [the] firearm and its properties”.

[181] Mr Carbert argues the trial judge misdirected the jury by failing to make clear that even if they disbelieved him, the Crown was still required to prove his purpose for possessing the firearms was dangerous to the public peace.

[182] Again, the jury instructions must be read contextually and as a whole. Earlier in the charge, the judge clearly explained to the jury that the burden of proof is on the Crown to establish guilt and that the accused is not required to prove his innocence or disprove any Crown evidence. He instructed the jury that if they disbelieved Mr Carbert’s testimony, or any other evidence that they found to be exculpatory, or if any of this evidence left them with a reasonable doubt, they had to find Mr Carbert not guilty. After these instructions, the judge stated:

Even if you completely reject Chris Carbert’s testimony and any other evidence that you find to be exculpatory, you must not simply assume the Crown’s version of events must be true. Instead, you must carefully assess the evidence that you do believe and decide whether that evidence persuades you beyond a reasonable doubt that he is guilty of the count that you have under consideration.

[183] The charge as a whole made it clear to the jury that even if they disbelieved Mr Carbert’s exculpatory explanation for possessing the firearms, they could not find him guilty under s 88(1) unless they were satisfied that the Crown had proven all the elements of the offence beyond a reasonable doubt. The judge instructed the jury to consider Mr Carbert’s explanation for bringing the firearms into Coutts “in accordance with his instructions”, which directed the jury to his earlier instructions on exculpatory evidence and the Crown’s burden of proof. The judge was not required to repeatedly recite those instructions throughout the charge.

IX. Consistency of the jury's verdicts

[184] Finally, Mr Carbert argues the jury's verdicts are inconsistent.

[185] To reiterate, Mr Carbert and Mr Olienick were both charged with: conspiracy to murder police officers, contrary to s 465(1)(a); possession of firearms for a purpose dangerous to the public peace, contrary to s 88(1); and mischief by wilfully obstructing the lawful use of Highway 4 at or near Coutts without legal justification or excuse, the value of which exceeded \$5,000, contrary to s 430(1)(c). For both Mr Carbert and Mr Olienick, the jury rendered verdicts of not guilty on Count 1, guilty on Count 2, and guilty on Count 3.

[186] Mr Carbert argues the verdicts on Count 1 and Count 2 are inconsistent. He says the verdict of not guilty on Count 1 necessarily precluded a finding of guilty on Count 2. He submits that since the jury rejected the Crown theory that he was conspiring to murder police, they could not possibly have found that he possessed firearms for the dangerous purpose of shooting police.

[187] As the Supreme Court explained in *R v RV*, 2021 SCC 10 at paras 1, 28-31, a jury renders inconsistent verdicts when it finds an accused both guilty and not guilty of the same conduct. A conviction is unreasonable and must be set aside where the verdicts cannot be reconciled on any rational or logical basis and no properly instructed jury, acting reasonably, could have rendered the verdicts it did based on the evidence. If the verdicts can be reconciled such that they reveal a theory on which the jury could have returned the verdicts without acting unreasonably, the verdicts are consistent and appellate intervention is not warranted.

[188] This is not the first time Mr Carbert has argued the verdicts are inconsistent. He made this argument to the trial judge, after the jury rendered their verdicts, seeking a mistrial. In the context of finding the facts required for sentencing, the judge concluded he was *functus officio* and could not declare a mistrial. However, he reasoned in any event that the verdicts are not inconsistent because the elements of the s 465(1)(a) offence and the s 88(1) offence are different. A criminal conspiracy is formed when two or more individuals actually agree, with genuine intention, to act together in pursuit of a mutual criminal objective: see *United States of America v Dynar*, [1997] 2 SCR 462 at paras 86-90, 1997 CanLII 359 (SCC). The trial judge explained that the verdicts were not inconsistent because the jury could reasonably have found that Mr Carbert possessed the firearms for a purpose dangerous to the public peace without entering into a genuine agreement with one or more others to murder police officers. The Crown adopts this reasoning.

[189] The verdicts are not inconsistent. By acquitting Mr Carbert of the charge of conspiring to murder police officers, the jury was not therefore required to acquit him of the charge of possessing firearms for a purpose dangerous to the public. We agree with the trial judge that it was reasonably open to the jury to find that Mr Carbert possessed the firearms for a purpose dangerous to the public peace without going so far as to enter into an actual agreement with others to use the firearms to murder police officers. There is a rational and logical basis for the different verdicts. The guilty verdict is therefore not unreasonable, and this ground of appeal is dismissed.

X. Conclusion

[190] For these reasons, the appeals are dismissed.

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Additional submissions received September 19, 2025

Memorandum filed at Calgary, Alberta
this 1st day of October, 2026

Pentelechuk J.A.

Feehan J.A.

Authorized to sign for: Hawkes J.A.

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