



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Parsley*, 2026 NLCA 23

Date: June 29, 2026

Docket Number: 202201H0015 and 202601H0014

BETWEEN:

HIS MAJESTY THE KING

APPELLANT

AND:

STEPHEN PARSLEY

FIRST RESPONDENT

AND:

DIMITRIS ANDREOPOULOS

SECOND RESPONDENT

AND:

WILLIAM RICHMOND

THIRD RESPONDENT

AND:

WAYNE PARSLEY

FOURTH RESPONDENT

AND:

HERBERT LEWIS

FIFTH RESPONDENT

Coram: D.M. Boone C.J.N.L., K.J. O'Brien and G.L.C. Noel JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
St. John's (0119A01108, 0120PA00108, 0120PA00210,
0120PA01155, 0120PA01244)

Appeal Heard: April 16, 2026

Judgment Rendered: June 29, 2026

Reasons for Judgment by: D.M. Boone C.J.N.L.

Concurred in by: K.J. O'Brien and G.L.C. Noel JJ.A.

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Authorities Cited:

CASES CITED: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Andreopoulos, Lewis, Parsley, Parsley, Richmond*, 2021 CanLII 95067 (NL PC); *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Furlong*, 2012 NLCA 29; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *R. v. Kinsella*, 2022 NLCA 40; *R. v. Zacharias*, 2023 SCC 30; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Robinson*, 2016 ONCA 402; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Luong*, 2010 BCCA 158; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234; *R. v. Golub*, 1997 CanLII 6316 (ON CA), leave to appeal to SCC refused, 26298 (4 May 1998); *R. v. Shinkewski*, 2012 SKCA 63; *R. v. Fry*, 1999 CanLII 18945 (NL CA); *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Washington*, 2007 BCCA 540; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Reilly*, 2020 BCCA 369, aff'd 2021 SCC 38, [2021] 2 S.C.R. 1078; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Genge*, 2023 NLCA 35; *R. v. Squires*, 2016 NLCA 54; *R. v. Butler*, 2025 NLCA 24; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Oates*, 1992 CanLII 7130 (NL CA); *R. v. Head*, [1986] 2 S.C.R. 684; *R. v. J.F.*, 2022 SCC 17, [2022] 1 S.C.R. 330; *R. v. Vaillancourt*, 2019 ABCA 317; *R. v. Colpitts*, 2017

NSSC 228; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Nofall*, 2018 NLCA 63.

STATUTES CONSIDERED: *Controlled Drugs and Substances Act*, SC 1996, c. 19, sections 5(1), 5(2); *Canadian Charter of Rights and Freedoms*, sections 8, 24(2), 11(b); *Criminal Code*, RSC 1985, c. C-46, sections 676(1)(a), 489(2), 686(4), 686(8).

D.M. Boone C.J.N.L.:

[1] A Provincial Court judge acquitted the five Respondents of drug trafficking offences under sections 5(1) and 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19. The Crown’s case was based upon nine kilograms of cocaine that police found inside a crate shipped by a freight handler. The judge excluded the cocaine from the evidence at trial. The Crown appeals.

OVERVIEW

[2] The freight handler’s manager had alerted the police that he considered the manner that the crate was consigned to be suspicious, and that his suspicions were heightened when his staff opened the crate looking for details about the consignee. The freight handler staff resealed the crate before the manager called police.

[3] The police looked inside the crate while it sat in the freight warehouse. There was no evidence as to how the crate was reopened before the police looked inside. The police saw that it contained floor tiles that did not fill the space inside and that the crate appeared (based on a comparison of the outside and the inside dimensions) to have a false bottom. They seized the crate based partly on those observations. They obtained a warrant, removed the false bottom and discovered the cocaine. They then obtained warrants that allowed them to install tracking devices in the crate. Two of the Respondents picked up the crate and brought it to the Respondents Parsleys’ residence and opened it. The police entered and searched that residence under a general warrant and a search warrant. They arrested the Respondents.

[4] The Respondents applied to the judge for a determination that the police conducted an unreasonable search and seizure of the crate in violation of the Respondents’ rights under section 8 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). The judge decided that the police violated the

Respondents' section 8 rights and she ordered, pursuant to section 24(2) of the *Charter*, that the cocaine would be excluded from evidence at trial. The judge also invalidated the tracking, general and search warrants because those warrants were obtained on the same information that the police relied on to seize the crate. She found that the police further violated the Parsleys' rights when they entered and searched the home.

[5] Subsequently, the Crown indicated that it would call no evidence and, therefore, the judge entered acquittals. The Crown appeals the acquittals.

[6] The Crown can only appeal an acquittal on grounds alleging that the trial judge erred in law (*Criminal Code*, RSC 1985, c. C-46, section 676(1)(a) (the "*Criminal Code*")). Merely demonstrating an error of law is not sufficient to overturn an acquittal. Rather, "it is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14).

[7] The Crown says that the judge made legal errors in her application of both section 8 and section 24(2) of the *Charter* and that those errors are sufficient for this Court to overturn the acquittals. The Crown also appeals the judge's decision invalidating the tracking warrants.

[8] The Respondents also applied to the judge for a stay of proceedings because they claimed that their rights to be tried within a reasonable time guaranteed by section 11(b) of the *Charter* had been violated. They claimed that undue delay in their cases exceeded the presumptive ceiling for bringing cases to trial that had been set by *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. The judge heard the Respondents' *Jordan* applications at the same time that she heard their section 8 and section 24(2) applications. However, the judge did not decide on the *Jordan* applications. The Respondents ask that if this Court allows the Crown's section 8 or section 24(2) application, then this matter should be remitted to the judge to decide the *Jordan* applications.

[9] I would dismiss the Crown's section 8 appeal and confirm the judge's finding that the police violated the Respondents' rights when they looked inside the crate and later seized it. I would allow the Crown's section 24(2) appeal and overrule the judge's decision to exclude the cocaine from the evidence at trial. I would also allow

the Crown's appeal from the judge's decision invalidating the tracking warrants. I would vacate the acquittals and remit the matters to the judge to continue with the Respondents' *Jordan* applications, and to the Provincial Court to continue the trial if the *Jordan* applications are dismissed.

ISSUES

[10] The following issues arise on this appeal:

1. Did the judge err in law by placing the onus on the Crown to prove how the crate was reopened before the police looked inside?
2. Did the judge make a palpable and overriding error by drawing an inference (that the police were involved in reopening the crate) not logically and reasonably supported by the evidence?
3. Did the judge err in law in assessing whether the police had reasonable grounds to seize the crate in the warehouse?
4. Did the judge err in law by excluding the cocaine from evidence at trial?
5. Did the judge err in law by ruling on the validity of warrants she was not asked to consider?
6. If this Court allows the Crown appeal and vacates the acquittals, should the Court order a new trial or a continuation of the trial?

THE CROWN'S SECTION 8 APPEAL

[11] The Crown relies on three grounds for its section 8 appeal.

[12] In the first two grounds, the Crown challenges the judge's decision that the police conducted a warrantless search when they first looked inside the crate.

[13] In the third ground, the Crown says that, even if the judge was correct in concluding that the initial look inside the crate was a search, she erred in concluding that the police lacked reasonable grounds to later seize the crate.

The first two grounds relating to the police looking inside the crate

[14] The first two grounds raise the same pivotal question: was it the police who opened the crate before they looked inside? The parties agree that if the crate had already been reopened by the freight handler, then the police did not violate the Respondents' section 8 rights when they looked inside it.

[15] The judge answered the question in two different ways. First, she found that she could not decide how the crate came to be open before the police looked inside and, therefore, that the Crown failed to meet its evidentiary onus. Later, without any further evidence, she found that the police were involved in opening the crate.

[16] The Crown's first ground of appeal is that the judge erred in law when she allocated the evidentiary onus to the Crown on the section 8 application. Its second ground of appeal is that the judge committed palpable and overriding error when she drew an inference – that the police were involved in opening the crate – that was not logically and reasonably supported by the evidence.

[17] The judge gave three separate judgments on the *voir dire*. The first was an oral decision regarding her factual findings (the "First Oral Decision"). The second was a further oral decision concerning her legal conclusions on the application of section 8 (the "Second Oral Decision"). The last decision was written and included the judge's application of both section 8 and section 24(2) (the "Written Decision").

[18] In the First Oral Decision, the judge made only findings of fact:

Now based on this evidence, at best, it's all very vague about how the crate was reopened. Having concluded that the crate was sealed before the police arrived, I can only speculate on how it was reopened, and I am not prepared to do so. ... There is insufficient evidence to account for how or when the crate was reopened, so I find that the Crown has not met its onus. So that's my factual findings with respect to the crate.

(Appeal Book, Tab 4, at 767-768)

[19] In the Second Oral Decision, the judge first reiterated her factual findings, and then framed her analysis in the following way:

I found there was insufficient evidence to account for how or why the crate was again unsealed and that the Crown did not meet its onus to show that it was reopened without police involvement or influence. The fact that the crate was open when police arrived

is significant, as it allowed Corporal Emberley to view the contents of the crate and to take measurements of the interior to insist in his development of reasonable and probable grounds. ...

...

Because I have already found that the crate should have been sealed when the police arrived, I will begin my analysis of Corporal Emberley's reasonable grounds by looking at the information he gathered prior to approaching the crate.

(Appeal Book, Tab 5, at 781-782)

[20] The judge excluded the police observations of the interior of the crate from her section 8 analysis. She then discussed the remaining grounds on which the Crown relied to base the seizure of the crate and concluded:

...without anything further, there are no reasonable grounds to believe that the illegal contents were drugs or any conclusive evidence that it contained anything illegal at all. Even if I were to consider the information gathered as the result of the illegal search of the interior of the crate, which I cannot, given my previous finding that the crate should have been sealed when the police arrived, I would not conclude that it elevates the suspicion to reasonable grounds. I, therefore, conclude that this warrantless search and seizure was not reasonable and was conducted in violation of s.8 of the *Charter*.

(Appeal Book, Tab 5, at 797)

[21] The judge later rendered the Written Decision (*R. v. Andreopoulos, Lewis, Parsley, Parsley, Richmond*, 2021 CanLII 95067 (NL PC)), in which she confirmed her conclusion that the police conducted a search when they looked inside the crate. In these reasons, without any further evidence, she moved from a finding that the Crown had not met its onus regarding how the crate was reopened to a conclusion that the police were involved in the reopening of the crate.

The first ground of appeal: misallocation of onus

[22] Allocating onus is a question of law.

[23] The Crown says that the judge erred by misallocating the onus to the Crown to prove who opened the crate. I do not agree.

[24] The Crown relies on this excerpt from *R. v. Collins*, [1987] 1 S.C.R. 265, at 277:

The appellant, in my view, bears the burden of persuading the court that her *Charter* rights or freedoms have been infringed or denied. ... The appellant also bears the initial burden of presenting evidence. ... [T]he allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not.

[25] The Crown says that the judge should have concluded that the Respondents had to prove who opened the crate. The Crown further says that because the Respondents failed to do so, the judge ought to have concluded that their rights were not infringed.

[26] I would reject that argument. The Crown's theory of the case was that all the Respondents were the intended recipients of the crate. Therefore, they all had an expectation of privacy in it (Written Decision, at para. 2). The police admittedly looked inside the crate without a warrant. That evidence met the Respondents' burden to demonstrate a violation of their right to privacy guaranteed by section 8.

[27] The Crown's evidentiary burden flows from the legal maxim that "he who asserts must prove". The Crown says that, because the police did not open the crate, the police lawfully gathered information from their initial look inside the crate. It was for the Crown to prove this assertion.

[28] I would dismiss the first ground of appeal and uphold the decision of the judge, as stated at paragraph 37 of the Written Decision, that the "Crown's onus was to prove on a balance of probabilities that the crate was opened independently of any police influence or involvement".

The second ground of appeal: the inference that the police opened the crate

[29] The judge, in the Written Decision, went further than merely finding that the Crown had failed to meet its onus. She said, at paragraph 38 of the Written Decision, that "the inference drawn by defence counsel that police were involved in the reopening of the crate is correct and consistent with my ruling".

[30] The Crown says that the judge made an impermissible inference that the police were involved in reopening the crate. I agree.

[31] At paragraph 34 of the Written Decision, the judge set out five different scenarios that could explain how the crate came to be open when police arrived. Not all those scenarios involved police opening the crate or directing it be opened. She then recognized that she should not speculate:

[35] ... There is no other direct evidence from the testimony that I did hear to support any of these conjectures. Therefore, it would be legally wrong for me to engage in speculation of this nature. That is what I meant when I said that I was unwilling to speculate and I remain unwilling to speculate now.

[32] The judge noted, in her Second Oral Decision, that the Crown's evidence was at best equivocal, and therefore insufficient to allow her to conclude how the crate came to be reopened.

[33] Nevertheless, the judge went on to infer in her Written Decision that the police were involved in reopening the crate. This was an unreasonable inference in light of the judge's conclusion at paragraph 37 of her Written Decision where she wrote: "To be crystal clear, my finding is that I cannot say at what point the crate was reopened or who actually did the reopening, but the Crown did not satisfy me on a balance of probabilities that it was reopened without police involvement or influence."

[34] The failure of the Crown to prove that the police were not involved in opening the crate does not mean that the opposite – that the police were involved – follows as a logical inference. A court cannot "infer that things happened or did not happen in the absence of facts from which a reasonable inference can be drawn" (*R. v. Furlong*, 2012 NLCA 29, at para. 27).

[35] Unreasonable findings of fact – relating to credibility, to primary or inferred "evidential" facts, or to facts in issue – are reviewable on appeal because they are 'palpably' or 'clearly' wrong" (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 56). The conclusion by the judge that the police were involved in opening the crate was a palpable error.

[36] However, this error was not overriding because it did not affect the result. The judge's conclusion that the police violated the Respondents' section 8 rights when they gathered information from the crate was sufficiently based on the Crown's failure to meet its onus and did not depend on her inference that police were involved in reopening the crate.

[37] This unreasonable inference did affect the section 24(2) analysis, and I will return to it during my discussion of that issue.

The third ground of appeal: reasonable grounds for seizure

[38] The third ground of appeal impugns the judge's assessment of whether the police seized the crate in violation of the Respondents' section 8 rights to be free from unreasonable seizure.

[39] The Crown concedes that the Respondents had sufficient expectation of privacy in the crate to attract section 8 protections. The Crown disputes the judge's finding, at paragraph 63 of the Written Decision, that the Respondents had a "high" expectation of privacy in the crate. However, the judge's section 8 decision did not turn on the stated level of privacy, although her statement as to the degree of privacy is relevant to the section 24(2) analysis.

[40] A reasonable seizure must be authorized by law. The police did not obtain a warrant to seize the crate. The *Criminal Code*, section 489(2), allows the police, without a warrant, to seize anything that the officer believes has been used in the commission of, or would afford evidence of, an offence.

[41] A warrantless seizure is, however, presumptively unreasonable. The Crown bore the onus to show that the police had reasonable grounds to believe that the crate had been used in the commission of, or would afford evidence of, an offence.

[42] The legal test for reasonable grounds has both a subjective and an objective component. The police must honestly believe they have reasonable grounds and those grounds "must actually exist and be justifiable from an objective point of view" (*R. v. Kinsella*, 2022 NLCA 40, at para. 18).

[43] The judge found, at paragraph 61 of the Written Decision, that the police honestly believed that the crate contained drugs, and therefore they had subjectively reasonable grounds to seize the crate. The Respondents do not dispute that finding.

[44] The judge found, at paragraphs 62-71, that the grounds for seizing the crate were not objectively reasonable, for the following reasons:

- many features seen in drug trafficking investigations (such as confidential informants or suspects of known interest) were not present in this case;
- there was no direct evidence that drugs were seen either by the freight handler's staff or the police;
- there was no evidence that an odor of drugs was emanating from the crate;
- there was no verified information indicating that the crate was related in any way to criminal activity;
- most of the lead officer's indicators came from his experience with courier packages, not freight, experience which the judge stated was not automatically, or even easily, transferrable to freight given the discrepancies in the size of the items, the delivery methods used, and the contractual relationship in the Bill of Lading;
- some of the factors that the lead officer said he learned from the freight manager and relied upon in the formulation of his grounds were either unconfirmed or contradicted by the manager's testimony; and
- the police ability to examine the interior of the crate to determine that there was a false bottom came about unlawfully, and the Crown made no submissions regarding what the police could have gleaned from an inspection of the sealed crate that would support objectively reasonable grounds to believe that it contained a controlled substance.

[45] The Crown argues that the judge erred by:

- considering the absence of certain factors and treating those factors as prerequisites;
- assessing the grounds for seizure on a piecemeal basis rather than in total;

- discounting or ignoring the training and experience of a police officer when evaluating the worth of the factors he considered in forming his grounds; and
- failing to address whether the police officer had an honest but mistaken belief that the facts available to him existed at the time he formed his reasonable grounds.

[46] The Crown also says that the totality of the grounds was more than sufficient to conclude that the police had an objectively reasonable belief that the crate contained a controlled substance.

The information gathered from the interior of the crate

[47] The police cannot rely on unlawfully obtained information to support the grounds for seizure (*R. v. Zacharias*, 2023 SCC 30, at paras. 40-41, 107). Consequently, the judge rightly excluded from her consideration the information that the police gained from looking inside the crate before it was seized.

The absence of indicators of criminality

[48] The Crown argues that the judge erred by taking account of the absence of features usually present in drug investigations. By so doing, the Crown says that the judge inappropriately focused on absent rather than present factors and elevated one factor to the status of a prerequisite rather than considering the totality of the circumstances.

[49] The judge in this case did reflect on circumstances that are usually present in similar cases but were not present in the one before her. The Crown did not present any authority that doing so amounts to an error of law.

[50] In *Kinsella*, this Court overturned a judge’s finding that the police grounds to seize a package were not objectively reasonable because the sole basis for the judge’s decision was that there was nothing about the seized package that pointed specifically to drug activity. This Court held that the totality of the circumstances must be considered in assessing reasonable grounds and that “to require that a factor pointing specifically to the criminal activity in issue must exist in order for grounds for arrest to be adjudged reasonable not only sets the standard well above that which is well established in the jurisprudence, but it defies common sense” (at para. 36).

[51] Unlike the trial judge in *Kinsella*, the judge did not base her decision solely on the absence of usual features associated with drug trafficking, nor elevate the presence of such features to a prerequisite for finding reasonable grounds. Had she done so, her analysis would have concluded when she noted that those features were not present. The judge clearly only considered the absence of these features as part of the totality of the circumstances. It was not an error for her to do so.

Piecemeal assessment of circumstances

[52] The Crown argues that “in paragraph 68, the trial judge fell into error by demonstrating that she was analyzing each ground individually”. In paragraph 68, the judge said that the only significant information that the police had was that the crate appeared to have a false bottom which would not have been perceptible without looking inside the crate. The Crown says that the judge ignored other grounds relied on by the police.

[53] A judge must consider the totality of the circumstances considered by the police. However, that does not mean that the judge must merely aggregate the factors without considering each critically to determine whether it should be part of the total circumstances. This is the exercise in which the judge was engaging in paragraph 68. It was not an error to do so.

Discounting or ignoring the training and experience of a police officer

[54] RCMP Corporal Emberley was the lead police officer on this investigation. He testified that he had served 18 years as a police officer in this province. For 10 of those years, he was a drug investigator. He had been declared an expert in 37 different court cases. He explained that in Newfoundland and Labrador, drugs are often brought in by mail and courier. He testified that he had developed special expertise in courier interdiction.

[55] The judge described Corporal Emberley’s evidence derived from his expertise in her Second Oral Decision (Appeal Book, Tab 5, at 793-794). He testified that “it’s common for drug traffickers who send drugs through couriers to send it from a courier company instead of sending it from a business or house as a way to hide the identity of the shipper.” He also said that, although most people have courier packages delivered to their homes, “it is common for drug traffickers to have packages as hold for pickup at a courier company.” Finally, drug traffickers

commonly omitted listing the sender on courier packages or listed fictitious senders. Corporal Emberley said that each of those common features was present in this case.

[56] The judge, at paragraph 66 of the Written Decision, said: “most of Cpl. Emberley’s indicators came from his experience with courier packages, not freight. I am not satisfied that his expertise with couriers is automatically or even easily transferrable to freight given the discrepancies in the size of the items, the delivery methods used and the contractual relationship in the Bill of Lading.”

[57] The Crown says that the judge erred in law by discounting Corporal Emberley’s experience. The Crown relies on this explanation of the value of police experience in *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250:

[62] Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. And because of that, “a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police” (*Yeh*, at para. 53). Sights, sounds, movement, body language, patterns of behaviour, and the like are part of an officer’s stock in trade and courts should consider this when assessing whether their evidence, in any given case, passes the reasonable suspicion threshold.

[58] The Supreme Court in *MacKenzie* however cautioned:

[64] That is not to say, however, that police training and experience must be accepted uncritically by the courts. As my colleague Karakatsanis J. notes in *Chehil*, “hunches or intuition grounded in an officer’s experience will [not] suffice”, nor is deference necessarily owed to a police officer’s view of the circumstances because of his or her training or experience in the field (para. 47). Reasonable suspicion, after all, is an objective standard that must stand up to independent scrutiny.

[59] In *MacKenzie*, the Supreme Court decided that the trial judge erred in law by failing to credit the police officer’s experience while assessing the objective reasonableness of his grounds for employing a sniffer dog. But the Court noted that the trial judge “made no finding of fact as to the probative value of the factors on which” the officer relied, and that the officer was never challenged by cross-examination regarding some of the factors (*MacKenzie*, at paras. 58-59).

[60] Corporal Emberley’s evidence regarding the transferability of his expertise with courier packages to investigation of freight deliveries was challenged on cross-examination (Transcript, at 104-126). Counsel highlighted material differences

between courier and freight handling practices, including the manner of packaging, the nature of documentation required, and the mode of delivery. These differences undermined the police reliance on the plywood construction of the crate, the lack of a shipping label with sender and receiver, and contact telephone number, listed on the crate, that the crate was to be collected at the freight dock rather than delivered by the freight handler, and that the freight would be paid on acceptance at the dock.

[61] The judge did not simply discount Corporal Emberley's experience by saying in conclusory fashion that his experience with investigating drug deliveries by courier was not transferable to freight deliveries. At paragraph 66 of her Written Decision, the differences between freight and courier shipping that she referenced were the same as those highlighted in the evidence elicited by counsel on cross-examination.

[62] It was for the judge to decide which evidence she would accept. The judge subjected Corporal Emberley's experience to critical analysis and concluded that some of the factors that were derived from that experience were not appropriately considered in informing his grounds for seizing the crate. The Crown failed to demonstrate that the judge's decision in that regard constituted a legal error.

Mistaken but honest belief

[63] Corporal Emberley testified that he had personally looked up the consignee on Google and found no listings for any business of that name, that he did a reverse postal code lookup and found that the sender's postal code was not legitimate, and that he looked up the sender's street address and found that it did not exist.

[64] The judge did not accept this evidence. The Crown says that the judge did not consider those grounds because Corporal Emberley was mistaken about some of the information he used to investigate these factors, and that the decision to reject this evidence was an error of law because, in assessing the reasonableness of grounds for seizure, the court should not exclude facts about which the police have a mistaken, but honest belief (*R. v. Robinson*, 2016 ONCA 402, at para. 40).

[65] I agree with the Crown's position on the law. However, the judge did not reject the evidence relating to the shipper and consignee's addresses because Corporal Emberley was mistaken, but because she found that the factors referred to could not have been known to Corporal Emberley at the time that the decision was made to seize the crate (Second Oral Decision, Appeal Book, Tab 5, at 797). She based this

conclusion on evidence from another officer and the freight manager. The judge's factual findings are entitled to deference absent a finding of palpable and overriding error. No such error has been demonstrated.

The totality of the circumstances

[66] The Crown says that as a matter of law, the grounds for seizure, even after excising the information police gained from looking inside the crate, "easily meet" the objective standard for reasonable grounds.

[67] The judge found in her Second Oral Decision (Appeal Book, Tab 5, at 797):

... when I look at Corporal Emberley's grounds from both a subjective and objective point of view, the only conclusion that I can draw is the same conclusion Mr. Heffernan drew before calling the police; the crate was suspicious and possibly contained something illegal. However, without anything further, there are no reasonable grounds to believe that the illegal contents were drugs or any conclusive evidence that it contained anything illegal at all. Even if I were to consider the information gathered as the result of the illegal search of the interior of the crate, which I cannot, given my previous finding that the crate should have been sealed when the police arrived, I would not conclude that it elevates the suspicion to reasonable grounds. I, therefore, conclude that this warrantless search and seizure was not reasonable and was conducted in violation of s. 8 of the *Charter*.

[68] The existence of reasonable and probable grounds is grounded in the factual findings of the trial judge but whether the facts as found by the trial judge amount to reasonable and probable grounds is a question of law (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20). Therefore, in considering the question whether reasonable grounds were established on the facts, "an appellate court must *always* engage in a *de novo* analysis and thereby substitute its own view of the correct answer for a trial judge's legal conclusion" (*MacKenzie*, at para. 54).

[69] I have already found that this Court should uphold the judge's refusal to consider many of the grounds relied on by the Crown. This includes information gained by police from looking in the crate, the information police obtained by investigating the addresses of the sender and consignee of the crate, and factors derived from Corporal Emberley's experience with drugs shipped by courier.

[70] After we excise those factors from our consideration, we are left essentially with the information provided by the freight handler to the police: that it appeared

the shipper was fictitious; that the crate was supposed to contain auto parts but instead held ceramic tiles; and that the crate appeared to have a false bottom.

[71] We must consider whether those grounds support a reasonable belief that the crate was being used to commit, or would provide evidence of, an offence. We do not consider the reasonableness of the grounds from the perspective of appellate judges, but “through the lens of someone who has the same experience, training, knowledge and skills as the officer who is making the observations” (*R. v. Luong*, 2010 BCCA 158, at para. 24). “The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience” to the officers conducting the seizure (*R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at para. 24).

[72] We also must be cognizant that the context for police action often does not allow for reflection or significant consideration, and police may be required in some circumstances to act quickly (*R. v. Golub*, 1997 CanLII 6316 (ON CA), leave to appeal to SCC refused, 26298 (4 May 1998); *R. v. Shinkewski*, 2012 SKCA 63, at para. 16).

[73] In the Written Decision, at paragraphs 73-78, the judge addressed Corporal Emberley’s testimony that he believed exigent circumstances required immediate seizure. He said delay could have created the potential for a tip-off by a freight handler employee, and employees could have been exposed to dangerous substances or robbery if the crate had been left in the warehouse. The judge rejected that characterization of the circumstances. She noted that the crate had sat unclaimed in the warehouse for two days prior to police involvement without incident and that it was too big and cumbersome to be easily moved. She decided that urgent action without a warrant was not required. I agree with her assessment.

[74] In *Kinsella*, this Court described the standard against which the reasonableness of grounds must be assessed:

[23] The “reasonable grounds to believe” standard can be difficult to describe. In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100, the Supreme Court of Canada described it as “something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities” (para. 114). In *R. v. Chehil*, 2013 SCC 49, the Supreme Court of Canada stated that the reasonable grounds to believe standard engages the probability of crime (para. 27). See also *R. v. Sanchez*, (1994) 93 C.C.C. (3d) 357 (Ont. Ct. (Gen.

Div.)), 20 O.R. (3d) 468, wherein the standard of reasonable grounds was described as grounds “of reasonable or credibly based probability [which] envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted” (367), quoted with approval in *R. v. Vu*, 2013 SCC 60, [2013] 3 SCR 657, on a related matter (para. 16). While probability is engaged, the jurisprudence does not require, nor suggest, that reasonable grounds must be proved on a balance of probabilities.

[75] In *R. v. Fry*, 1999 CanLII 18945 (NL CA), this Court, at paragraph 50, decided that an x-ray search of a courier package was based on “no more than a suspicion or hunch that the package contained drugs” and, therefore, not on reasonable grounds. The grounds for the search on which the Crown relied in *Fry*, at paragraph 5, were:

1. The shipping charges had been paid for in cash;
2. A check of Alberta telephone books and “police information records” did not disclose any residential listing for [the sender];
3. The package was sent for pick-up at the courier’s office rather than for delivery to a local residential address;
4. The telephone number for the consignee was the courier’s fax number rather than the consignee’s proper telephone number;
5. A search of police computer information systems indicated that a [person with the same name as the consignee] had “a lengthy record for drug related activity”.

[76] In *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, bus station security guards told police that because of a smell emanating from a rented locker, they opened a duffel bag and found marihuana inside. The security guards replaced the duffel bag in the locker and opened it again with the police present. In *R. v. Washington*, 2007 BCCA 540, a courier alerted police that, because of suspicions regarding the shipper and the manner of shipping, it had opened a package and found white powder that looked like cocaine. The courier resealed the package and then reopened it in the presence of the police. The Supreme Court in *Buhay*, at paragraph 35, and the BCCA in *Washington*, at paragraph 58, both decided that the information provided to police did not establish reasonable grounds for a warrantless search.

[77] I would find, like the courts in *Fry*, *Washington*, and *Buhay*, that the information the freight handler gave to police did not amount to objectively reasonable grounds and, therefore, the police violated the section 8 rights of the

Respondents when they seized the crate. I would dismiss the Crown's section 8 appeal.

THE CROWN'S SECTION 24(2) APPEAL

[78] The judge held that police violated the Respondents' section 8 rights when they searched and seized the crate at the freight warehouse. She also held that the warrants to enter and search the Parsleys' home were invalid because they were issued on the same objectively unreasonable grounds as the initial search and seizure.

[79] The Respondents applied to the judge for an order excluding the cocaine from the evidence at trial on the basis that admitting the evidence would bring the administration of justice into disrepute.

[80] The judge granted the application. She applied the methodology set out by the majority of the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paragraph 71: balancing the effect of admitting the evidence with societal confidence in the justice system, having regard to three factors:

- The seriousness of the *Charter*-infringing state conduct;
- The impact of the breach on the *Charter*-protected interests of the accused; and
- Society's interest in the adjudication of the case on its merits.

[81] The Crown appeals the judge's section 24(2) decision to exclude the cocaine from the evidence at trial. The Crown focuses on the judge's assessment of the seriousness of the police conduct but also raises the judge's treatment of the impact on the Respondents

[82] The Supreme Court of Canada explained the principles underpinning the *Grant* analytical framework in *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paragraphs 139-142. Those principles were summarized by a majority of the British Columbia Court of Appeal in *R. v. Reilly*, 2020 BCCA 369, aff'd 2021 SCC 38, [2021] 2 S.C.R. 1078, at paragraph 88, as follows:

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

[83] The trial judge reached the following conclusions in the Written Decision in balancing the *Grant* factors:

[125] The actions of the police in this matter involved entry into a shipping facility at the request of the general manager for the purposes of examining a suspicious crate.

[126] I ultimately rejected the clumsy attempt to dissociate police involvement in the opening of the crate and determined that the privacy interest of the accused was violated when police inspected the interior without warrant or reasonable and probable grounds.

[127] One of my concerns is the somewhat random identification of the crate as suspicious by the shipping company, followed by the zealous endeavours of police to access its contents.

[128] Privacy interests in the crate appeared to account for little to nothing in this case and the evidence heard on the *voir dire* confirmed that at least one other crate with similar indicators had been searched and seized by police, yet contained nothing illegal.

[129] This practice of investigating crates on suspicion and then bootstrapping to justify reasonable grounds when something is discovered is exactly the type of state conduct that the *Charter* protects against.

[130] Although the identification and prosecution of drug traffickers is in the public interest and the amount of cocaine seized in this case is significant, a reasonable person is unlikely to condone the methods employed, as everyone who ships a crate through a private company is potentially at risk of state invasion if this is to be the standard.

[131] Nine kilograms of cocaine is serious and reliable and its exclusion would gut the Crown's case, but reliability is not the most important factor to consider. When the evidence has been obtained in a situation where police have lost sight of *Charter*-protected values, the end does not justify the means.

[132] If I were to admit the evidence obtained in this case, I would be sending the message that *Charter*-protected rights account for little in the context of shipped freight and I would essentially be endorsing a police state approach in these situations. This would clearly be contrary to the public interest.

[133] With respect to the search of 511 Empire Avenue, this action was merely a continuation of the events that began at the Midland warehouse. As a result, this search was also unreasonable and in violation of s. 8 of the *Charter*.

[134] In order to preserve public confidence and ensure state adherence to the rule of law, the court must dissociate itself from this conduct.

[135] Consequently, having regard to all of the circumstances, I am satisfied that the admission of the evidence in the proceedings here would bring the administration of justice into disrepute.

[84] The standard of review of a trial judge's section 24(2) determination is stated at paragraph 44 of *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215: "Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review".

[85] Where the appellate court determines that the trial judge either failed to consider the proper factors or did so based on an unreasonable finding, then it should conduct its own analysis (*R. v. Squires*, 2016 NLCA 54, at para. 82).

The first Grant factor: the seriousness of state misconduct

[86] The judge based her findings on the first *Grant* factor on her inference that the police were involved in reopening the crate before they looked inside it. I have already concluded that this was an unreasonable inference.

[87] Following this inference, the judge went even further in her analysis of the seriousness of state misconduct. She characterized the police evidence as “a clumsy attempt to dissociate police involvement in the opening of the crate” (at para. 126) and “carefully presented in an attempt to absolve [Corporal Emberley] of any involvement in the crate being unsealed” (at para. 109). She described the police conduct as “zealous endeavours of police to access” the crate (at para. 127), “a deliberate circumvention of a *Charter* protected right” (at para. 110), a “practice of investigating crates on suspicion and then bootstrapping to justify reasonable grounds when something is discovered” (at para. 129) and stated “Cpl. Emberley was not only playing too close to the line in this situation, but that he may have crossed it” (at para. 111).

[88] There was no basis in the evidence for these characterizations of the police testimony or conduct. Moreover, these characterizations are completely at odds with the judge’s findings that she could not decide how the crate was reopened and that it was “obvious from [Corporal Emberley’s] testimony that he subjectively believed he had reasonable and probable grounds to search and seize the crate” (at para. 61).

[89] As the judge’s 24(2) decision was based on unreasonable findings, we should conduct the *Grant* analysis *de novo*.

[90] We still defer to the judge’s findings of fact. We should therefore input, under the first *Grant* factor, her finding in her First Oral Decision that there was “insufficient evidence to account for how or when the crate was reopened” (Appeal Book, Tab 4, at 767-768), which she confirmed in her Second Oral Decision (Appeal Book, Tab 5, at 781-782).

[91] The evidence, therefore, did not establish whether police misconducted themselves in the search of the crate at the warehouse. The judge could not decide whether the police did so.

[92] The police lacked objectively reasonable grounds to seize the crate at the warehouse, but they did have a subjective belief that they had reasonable grounds.

[93] The Respondents established a violation of their section 8 rights in the search and seizure of the crate in the warehouse. But there was no evidence of serious state misconduct. This factor pulls toward excluding the cocaine from the evidence, but the pull is not overly strong.

The second Grant factor: the impact on the accused

[94] The Crown says that the judge overstated the impact of the *Charter* violation on the Respondents because she said at paragraph 63: “that there would be a high expectation of privacy on the part of the receiver(s) of the crate”. The Crown says that this description of the *Charter*-protected interests in the crate is not consistent with established jurisprudence.

[95] The judge said this in the context of her assessment of whether the police had reasonable grounds to search and seize the crate in the warehouse. At that point in her analysis, the only thing that mattered was whether the Respondents had privacy interests in the crate that were protected by section 8. The Crown conceded that they did have protected privacy interests.

[96] The degree of that interest did not matter until the judge came to consider the second *Grant* factor. When she did so, she concluded at paragraph 117 that “neither the section 8 breach in relation to the crate nor the section 8 breach in relation to the [Parsleys’] residence can be characterized as either trivial or transient in their impact.”

[97] I do not accept the Crown’s argument that the judge overstated the privacy interests of the Respondents in the meaningful context of her *Grant* analysis.

[98] As this Court is conducting its own analysis, it is incumbent on us to draw our own conclusions on the second *Grant* factor.

[99] “An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not” (*Grant*, at para. 78). The crate was sent through a commercial freight handler. It was a wooden box stated as containing automobile parts. The Crown conceded that the Respondents had a legitimate expectation that it would not be intercepted or searched before delivery. However, there was nothing about the crate or the manner of delivery that engaged the personal integrity or biographical core of the sender or recipient.

[100] The evidence did not establish that either of the Respondents sent the crate or that it was addressed to either of them. The Crown based its concession that the Respondents had a privacy interest in the crate on the theory that it would prove at trial that each of the Respondents was involved in sending and receiving it.

[101] I find that the Respondents did not demonstrate a serious intrusion into their expectation of privacy in the crate.

[102] The Parsleys’ privacy interests were subject to more significant intrusion because their home was entered and searched. However, that search was conducted pursuant to judicial authorization (albeit based on unlawfully obtained information) and the judge determined, in a finding not disputed by the Parsleys on appeal, that the search of the home was not conducted in an unreasonable way (see *R. v. Butler*, 2025 NLCA 24, at para. 140).

[103] This factor pulls only moderately towards exclusion of the evidence in the case of the Parsleys, and only slightly in respect of the remaining Respondents.

The third Grant factor: society’s interest in the adjudication of the case on its merits

[104] The judge noted that the police found nine kilograms of cocaine in the crate and stated:

[122] Clearly, this evidence is highly reliable and crucial to the crown’s case. Exclusion of this evidence would exact a heavy toll on the truth seeking function of the trial and could bring the administration of justice into disrepute.

[105] I agree with this assessment, which the parties did not dispute on appeal. This factor pulls strongly toward admitting the evidence.

Balancing the Grant factors

[106] The judge concluded that she should exclude the evidence:

[132] If I were to admit the evidence obtained in this case, I would be sending the message that *Charter* protected rights account for little in the context of shipped freight and I would essentially be endorsing a police state approach in these situations. This would clearly be contrary to the public interest.

[107] I come to a different conclusion. There was no evidence of state misconduct in the initial search. The police subjectively believed that they had reasonable grounds to seize the crate in the warehouse and to search the crate when it was in the Parsleys' residence. The impact on the Respondents' *Charter*-protected rights was not serious. There was a significant amount of cocaine in the crate. "Drug trafficking leads to other crimes. Illegal hard drugs such as cocaine are widely recognized to be a serious problem in our society. Their use not only fuels organized crime, but can also destroy lives" (*R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 184). Trafficking in cocaine, "in itself, is grave as it preys upon the addiction of others for profit leaving in its wake inestimable individual and social damage and desolation" (*R. v. Oates*, 1992 CanLII 7130 (NL CA), at para. 24).

[108] I would find that a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the administration of justice would not be brought into disrepute by admitting the cocaine into evidence.

[109] I therefore would set aside the judge's decision to exclude the cocaine from the evidence at trial.

THE CROWN'S TRACKING WARRANTS APPEAL

[110] The judge found at paragraph 80 of the Written Decision that "[a]lthough the applicable standard for the tracking warrant is reasonable suspicion rather than reasonable grounds to believe, the *Charter* violations in this matter vitiate any viable suspicion that police could have relied on to obtain the tracking warrants and they must fall."

[111] The Crown conceded that the judge should invalidate the warrants that allowed the police to enter and search the Parsley residence if she decided that the Crown failed to establish reasonable grounds for the seizure of the crate in the

warehouse. This was because the evidence the police used as reasonable grounds to obtain those warrants was the evidence found after the crate was seized in the warehouse.

[112] The Crown did not make a similar concession regarding the tracking warrants, which were issued on the lesser standard of reasonable suspicion.

[113] The Respondents conceded on appeal that the judge was not asked to consider the validity of the tracking warrants.

[114] I would overturn the judge's decision invalidating the tracking warrants.

CONCLUSION

[115] The cocaine should not have been excluded. Its exclusion obviously had a material bearing on the acquittal. We should set aside the acquittal. Our powers when setting aside an acquittal are outlined in sections 686(4) and 686(8) of the *Criminal Code*:

686(4) Appeal from acquittal

If an appeal is from an acquittal ... the court of appeal may

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the verdict and
 - (i) order a new trial, or

...

686(8) Additional powers

Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

[116] It would be problematic in the circumstances of this case if we merely order a new trial.

[117] The Respondents made *Jordan* applications to the judge asking her to stay the charges because undue delay violated their right to be tried within a reasonable time guaranteed by section 11(b) of the *Charter*. The judge heard evidence and argument on the *Jordan* applications before she decided the section 8 and section 24(2) applications. She advised the parties that she intended to render her *Jordan* decision at the same time as her decision on the other applications, but she did not do so. She instead asked the Crown its intentions following her decision to exclude the evidence. The Crown indicated that it had no other evidence to call and asked the judge to enter acquittals. Once the acquittals were entered, the judge decided that the issue of undue delay was moot and she refused the Respondents' request to render a *Jordan* decision.

[118] The judge was *functus* once the acquittals were entered. "Where the accused is acquitted the trial judge will have exhausted his jurisdiction when the accused is discharged and the trial judge cannot then reopen the case." (*R. v. Head*, [1986] 2 S.C.R. 684, at 698). That meant that the judge no longer had the jurisdiction to consider the Respondents' *Jordan* applications.

[119] Further, the Respondents no longer had the status of persons charged with an offence once they were acquitted. The Respondents revert to this status only if the acquittals are set aside and a new trial ordered. Only accused people are entitled to claim the protection of section 11(b) (*R. v. J.F.*, 2022 SCC 17, [2022] 1 S.C.R. 330, at para. 23). Therefore, once acquittals were entered, not only did the judge lack jurisdiction to order a stay on *Jordan* grounds, but the Respondents were no longer entitled to ask her to do so.

[120] Therefore, the judge was right to refuse to decide the *Jordan* applications once the acquittals were entered.

[121] However, this approach by the judge has created a problem for the Respondents. If we overturn the acquittal, then the usual remedy would be a new trial. However, "[w]hen a new trial is ordered, the constitutional clock for calculating delay is reset to zero ...[and] only the retrial delay can be counted when a section 11(b) application is brought in that new trial" (*J.F.*, at para. 60).

[122] An accused person has "a duty to act proactively ... [and] indicate that their right to be tried within a reasonable time has not been respected and, where the circumstances require, bring a motion for a stay of proceedings in a timely manner" (*J.F.*, at para. 36). The Respondents fulfilled that expectation in this case by bringing

their *Jordan* applications in a timely manner. Therefore, it would be manifestly unfair to the Respondents to now order a remedy for the Crown's successful appeal that would effectively deprive the Respondents of the right to have their *Jordan* applications considered. It would also be unfair to the Respondents because they have already expended considerable effort to present their *Jordan* applications.

[123] This predicament would have been avoided if the judge had decided the Respondents' *Jordan* applications, and the section 8 and section 24(2) applications in the alternative. I agree with this comment from the Alberta Court of Appeal in a case that presented a similar predicament: "[w]ith the benefit of hindsight, we do not endorse the trial judge's approach of parsing the two *Charter* applications. While either might have concluded the process ... both were open to appeal. Where such applications are brought together, expediency and the economic use of limited resources favour giving decisions on both (*R. v. Vaillancourt*, 2019 ABCA 317, at para. 52).

[124] The Nova Scotia Supreme Court provides a practical example implementing expediency and the economic use of limited resources. In *R. v. Colpitts*, 2017 NSSC 228, the trial judge, faced with a *Jordan* application and with deciding a case in which he already heard the evidence on the merits, said:

[5] ... My approach will be as follows: If I first decide the delay issue in favor of the Defendants, I would then make a finding on the merits in the alternative. If guilty is the appropriate outcome, no convictions would be entered and a stay would be ordered. Should the delay application fail then I would rule on the merits as I would in any other trial. It is also foreseeable that I could decide the merits first and, if the result was guilty, it would be subject to my ruling on the delay application.

[125] We now must design a remedy that provides for a trial of the case and adequately accounts for the Respondents' applications regarding section 11(b).

[126] The Respondents had asked that we decide the Respondents' *Jordan* applications at first instance. However, in case management, we directed that we would not do so. "A motion for a stay of proceedings brought for the first time on appeal, without the trial judge having had an opportunity to consider its merits, should normally be dismissed ... the trial court is best placed to rule on such a motion, because it is the one that has a complete picture of the proceedings. Indeed, this Court noted in *Jordan* that trial judges are uniquely positioned to categorize various periods of delay" (*J.F.*, at para. 39).

[127] Section 686(8), which allows “any order ... that justice requires”, authorizes an appellate court to order the continuation of a trial – but only where continuation of the trial is what justice requires in the particular circumstances of the case (*R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, at para. 40). Justice requires that result in this case.

[128] The next question that arises is whether the trial ought to continue before the same judge. The judge has already heard the evidence and argument on the *Jordan* application (except of course for any evidence regarding intervening delay that the parties may want to present). But she has not heard any evidence on the merits. The best way forward is alluded to in *R. v. Noftall*, 2018 NLCA 63:

[12] ... the *Criminal Code* does not require that all pre-trial applications be heard by the trial judge. An application under section 11(b) is a discrete issue which would not involve the merits of the case. Accordingly, it would be expected that the judge hearing such an application would not be called upon to make a decision that would interfere with the jurisdiction and decision-making authority of the judge hearing the trial. An application under section 11(b) would simply determine whether the trial will proceed or be stayed. Of course, if as a result of a section 11(b) application, there is reason to conclude that the judge has become seized of the matter, then that judge would be required to continue with the trial....

[129] The most appropriate remedy is to order the continuation of the *Jordan* application before the judge. If she decides that the charges should be stayed, then (subject to further appeal) that would end this matter. If she dismisses the *Jordan* applications, then she should continue with the trial if there is reason to conclude that she has become seized with the matter; otherwise, the trial should continue before her or any Provincial Court judge.

[130] The Crown appeal is therefore allowed in part.

DISPOSITION

[131] In summary, the Court’s concludes that:

- The judge did not err in deciding that the police violated the Respondents’ section 8 *Charter* rights when they searched and seized the crate in the freight handlers’ warehouse;

- The judge erred in the section 24(2) *Charter* decision by refusing to admit into evidence the cocaine found in the crate;
- The judge erred in deciding that the tracking warrants were invalid;
- The judge erred in entering acquittals; and
- The matters are remitted to the judge to continue with the *Jordan* applications, and to the Provincial Court to continue the trial if the *Jordan* applications are dismissed.

[132] The appeal is allowed.

D.M. Boone C.J.N.L.

I concur : _____

K.J. O'Brien J.A.

I concur : _____

G.L.C. Noel J.A.