SUPREME COURT OF CANADA

CITATION: R. *v.* Cornell, 2010 SCC 31

DATE: 20100730
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BETWEEN:

Jason Michael Cornell
Appellant
and
Her Majesty The Queen
Respondent
- and -
Attorney General of Ontario, Attorney General of Alberta,
British Columbia Civil Liberties Association and
Canadian Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 45)	Cromwell J. (McLachlin C.J. and Charron and Rothstein JJ. concurring)
DISSENTING REASONS: (paras. 46 to 153)	Fish J. (Binnie and LeBel JJ. concurring)

R. *v.* CORNELL

Jason Michael Cornell *Appellant*

v.

Her Majesty The Queen *Respondent*

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Attorney General of Ontario,
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British Columbia Civil Liberties Association and
Canadian Civil Liberties Association *Interveners*

Indexed as: R. *v.* Cornell

2010 SCC 31

File No.: 33186.

2009: November 20; 2010: July 30.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Search and seizure — Private home — Use of force — Police informed that two individuals believed to be members of violent criminal gang were running "dial-a-dope" cocaine trafficking operation — Police obtaining search warrants following investigation — Tactical team conducting unannounced, forced entry into accused's residence believed by police to be used in drug operation — Tactical team using hard entry to avoid destruction of evidence and to protect safety of police and public — Police finding cocaine in accused's room — Accused convicted of possession of cocaine for purpose of trafficking — Whether lawfully authorized search was conducted reasonably — Whether search unreasonable because tactical team members did not have copy of search warrant with it when entering residence — Canadian Charter of Rights and Freedoms, s. 8.

Criminal law — Search and seizure — Search warrants — Police tactical team conducting unannounced, forced entry into accused's residence — Tactical team members not having copy of search warrant with them when entering residence — Investigator who was physically present and close to accused's residence had copy of warrant — Whether police complied with requirements of s. 29 of Criminal Code, R.S.C. 1985, c. C-46.

The police received information that N and T — two individuals the police believed to be members of an organized criminal group — were running a "dial-a-dope" cocaine trafficking operation. Following an investigation, which included surveillance, the police also believed that the accused's residence was being used in the operation and they applied for warrants to search T's

residence, a motor vehicle used by N, and the accused's residence. The Information to obtain the warrants indicated, *inter alia*, that the activity at the residences of T and the accused was consistent with their being used as stash locations, that N had been observed making four brief visits to the accused's residence over a period of approximately two weeks, and that two months before the search was executed at the accused's residence, a mobile phone registered to the accused had been found in N's car. The Information also indicated that the tactical team would be required to enter the residences in order to avoid the destruction of evidence by potential occupants and for the safety of both the public and the police because of N and T's history of violence and their association with a violent criminal gang. Warrants were issued pursuant to s. 11 of the *Controlled Drugs and Substances Act*. Shortly before executing the warrant to search the accused's residence, the police observed the accused's mother and sister leave the house and drive away. The other search warrants relating to this operation had already been executed and N was in police custody. The tactical team rammed open the front door of the accused's residence without knocking or announcing their presence and nine police officers wearing balaclavas and body armour entered the house with weapons drawn to secure it. The only person in the house was the accused's brother, who was mentally challenged. He was taken down and handcuffed. His emotional distress became apparent and the handcuffs were removed within minutes. The brother was comforted by one of the officers and received the help of a paramedic. The tactical team members did not have with them a copy of the search warrant when they entered. The warrant was in the hands of the lead investigator who was posted down the block. During the search, which caused damage, the police discovered cocaine in the accused's bedroom. He later admitted possessing cocaine for the purpose of trafficking, but argued that the cocaine was obtained by the police as a result of an unreasonable search and therefore should not be admitted into evidence. The accused was convicted and the Court of Appeal,

in a majority decision, upheld the conviction. The trial judge and the majority of the Court of Appeal held that the accused's rights under s. 8 of the *Canadian Charter of Rights and Freedoms* had not been infringed because the search had been lawfully authorized and reasonably conducted.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Charron, Rothstein and **Cromwell** JJ.: The only issue is whether the lawfully authorized search was conducted reasonably. Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. Ordinarily, they should give: (1) notice of presence by knocking or ringing a door bell; (2) notice of authority, by identifying themselves as law enforcement officers; and (3) notice of purpose, by stating a lawful reason for entry. While the "knock and announce" principle is not absolute, where the police depart from it, there is an onus on them to explain why they thought it necessary to do so. If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police had reasonable grounds to be concerned about the possibility of harm to themselves or occupants or about the destruction of evidence. The police must be allowed a certain amount of latitude in the manner in which they decide to enter premises and, in assessing that decision, the police must be judged by what was, or should reasonably have been, known to them at the time. On appellate review, the trial judge's assessment of the evidence and findings of fact must be accorded substantial deference.

In this case, the trial judge made no reviewable error in concluding that the search was conducted reasonably. The police had well-grounded concerns that the use of less intrusive methods

would pose safety risks to the officers and occupants of the house. The police reasonably believed that the accused's residence was being used in a drug dealing enterprise carried on by members of a violent criminal gang and that the accused had some association with at least one gang member. The police were entitled to draw reasonable inferences from these facts and attempts to consider the accused in isolation from them are highly artificial. The suggestions that the police had no basis for their concerns about the risk of violence are contrary to the trial judge's findings and to the evidence in the record.

The police also had reasonable grounds to be concerned that the evidence to be found would be destroyed having regard to the fact that there were reasonable grounds to believe that cocaine would be found in the premises and that it is a substance that may be easily destroyed. Notwithstanding that, by the time of the search, N was in custody and the police had observed the accused's mother and sister leave the house, the trial judge found, as a fact, that the police had no means of knowing who, if anybody, was in the residence or whether there was any person in the residence who would destroy the cocaine, if there was any, upon learning of the presence of the police at the door. The fact that the occupants of the house had no prior criminal record did not affect the reasonableness of the police concern that evidence could be destroyed. Even the accused conceded in the Court of Appeal that the destruction of evidence was a realistic concern.

The trial judge also found that the police had done what could reasonably be expected in formulating their decision to use a forced entry. These conclusions, which mainly concern matters of fact, are well-supported by the record. The police did not just show up at a previously uninvestigated residence and barge in. Considerable time and effort were expended by the

investigators in order to determine who and what was in the residence before the search, including ten hours of surveillance of the accused's residence. The suggestion that the decision to make an unannounced hard entry into the accused's home was simply a rote application of a general police practice is not supported by the evidence. There is no evidence of such a practice let alone of its application here.

The fact that the tactical team did not have a copy of the warrant with it when it made the entry did not make the search unreasonable. The purpose of s. 29(1) of the *Criminal Code* is to allow the occupant of the premises to be searched to know why the search is being carried out, to allow assessment of his or her legal position and to know as well that there is a colour of authority for the search, making forcible resistance improper. These purposes are fully achieved by insisting that the warrant be in the possession of at least one member of the team of officers executing the warrant. While it is a better practice for someone among the first group of officers in the door to have a copy on his or her person, the officers had the warrant with them because a copy was in the possession of the primary investigator who was in charge of the search and immediately at hand. In this case, there is no evidence that anyone ever asked to see the warrant.

Per Binnie, LeBel and **Fish** JJ. (dissenting): The search of the accused's residence was not carried out in a reasonable manner. The police had no reason to believe that a "dynamic" entry was necessary to protect the safety of the officers. Neither the accused nor any other occupant of the house had a history of violence or a criminal record, there was no suspicion that the accused was a member of any gang, and the police had no reason to believe that there were firearms or any other weapons on the premises. The violent nature of the intervention caused extensive damage to the

house, leaving it in a shambles. In the absence of exigent circumstances or other particularized grounds, the police were obliged by law to make reasonable inquiries, before conducting that search, to ascertain the nature of the premises they intended to enter, the identities and background of its occupants, and the real risk, in executing the warrant, of resistance by force. In this case, the police made no attempt to obtain any information regarding the accused's home or its occupants. Nor did the Crown provide any evidence or any reasonable explanation for the failure of the police to make the requisite inquiry. While the police had reasonable grounds to believe that N and T were gang-affiliated drug traffickers, the record indicates that they had no reasonable belief that either N or T would be at the accused's residence at the time of the search. T had never been seen to enter that residence and N was already in police custody. Finally, there was no possible link between the evidence gathered by police and the violent method of entry into the accused's home. The risk analysis, which was designed to identify potential risks for execution of the search warrants and to inform the tactical team about the investigation and its targets, did not mention the accused or any other occupant of the residence, and was never shown to the tactical team. The unannounced and violent entry appears to have been driven more by general practice than by information regarding the accused's home and its occupants.

Nor did the police have any basis for a particularized and reasonable belief that, in the absence of a swift and violent entry, evidence would be concealed or destroyed by anyone present or likely to be present at the time. It is true that illicit drugs are easily concealed or discarded, but that alone is insufficient to justify a violent entry by masked officers brandishing loaded firearms. The police must make some attempt to ascertain whether there is a real likelihood that, without a sudden and violent entry, the occupants would have time and would proceed to conceal or destroy

the evidence that is the object of the search. It is well established that generic information about the potential presence of drugs in a home is insufficient to warrant so drastic a violation of its occupants' constitutional rights.

Other aspects of the search contribute to its overall unreasonableness. There are reasonable justifications for a police tactical team to wear balaclavas, but the Crown's own evidence is that the police wore the balaclavas because that is what they always did, not because of the particular circumstances of the case. In this case, they were worn to intimidate and psychologically overpower those inside. Gratuitous intimidation of this sort — psychological violence entirely unrelated to the particular circumstances of the search — may in itself render a search unreasonable. Moreover, anonymity in the exercise of power, particularly state power, invites in some a sense of detachment and a feeling of impunity. The wearing of masks by intruding police officers creates an unjustified risk in this regard where, as here, it is based on nothing more than an ill-considered police "policy" that has been judicially condemned on more than one occasion.

Finally, the police did not comply with the requirements of s. 29 of the *Criminal Code*. The warrant was in the hands of the lead investigator who entered the residence between four and nine minutes after the tactical team. The members of that team were bound by s. 29 to have with them, where feasible, the search warrant under which they were acting and to produce it on demand. The Crown led no evidence that it was not feasible in this case. This is not a technical or insignificant breach of the law. It is a violation of a venerable principle of historic and constitutional importance.

The police violated the accused's rights under s. 8 of the *Charter* to be secure against unreasonable search and seizure and, in this case, the evidence should have been excluded pursuant to s. 24(2) of the *Charter*. The infringing state conduct involves an armed, sudden and violent assault by masked intruders on a private residence without reasonable justification. This constituted not only a violation of s. 8, but also an unnecessary and egregious departure from the common law "knock and announce rule". The *Charter*-infringing conduct is serious because it also constitutes a violation of s. 12 of the *Controlled Drugs and Substances Act* which provides that the police, when executing a search warrant, must use only "as much force as is necessary in the circumstances". In addition, the officers did not comply with the requirements of s. 29 of the *Code*. The privacy interest protected by s. 8 is most actively engaged in the context of a private residence, and society's interest in the adjudication of this case on its merits does not outweigh the interests of society, in the longer term, in discouraging routine disregard by the police of constitutional, statutory and common law safeguards designed to protect the sanctity of a person's home.

Cases Cited

By Cromwell J.

Referred to: *R. v. Collins*, [1987] 1 S.C.R. 265; *Eccles v. Bourque*, [1975] 2 S.C.R. 739; *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Gimson*, [1991] 3 S.C.R. 692; *R. v. DeWolfe*, 2007 NSCA 79, 256 N.S.R. (2d) 221; *Crampton v. Walton*, 2005 ABCA 81, 40 Alta. L.R. (4th) 28; *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3; *R. v. Lau*, 2003 BCCA 337, 175 C.C.C. (3d) 273; *R. v. Schedel*, 2003 BCCA 364, 175 C.C.C. (3d) 193; *R. v. Patrick*, 2007 ABCA 308, 81 Alta. L.R.

(4th) 212, aff'd on other grounds, 2009 SCC 17, [2009] 1 S.C.R. 579.

By Fish J. (dissenting)

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Schedel*, 2003 BCCA 364, 175 C.C.C. (3d) 193; *R. v. Lau*, 2003 BCCA 337, 175 C.C.C. (3d) 273; *R. v. DeWolfe*, 2007 NSCA 79, 256 N.S.R. (2d) 221; *R. v. Collins*, [1987] 1 S.C.R. 265; *Eccles v. Bourque*, [1975] 2 S.C.R. 739; *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Stillman*, [1997] 1 S.C.R. 907; *Semayne's Case* (1604), 5 Co. Rep. 91, 77 E.R. 194; *R. v. Silveira*, [1995] 2 S.C.R. 297.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 11, 12.

Criminal Code, R.S.C. 1985, c. C-46, s. 29.

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British Columbia. Policing in British Columbia Commission of Inquiry. *Closing The Gap: Policing and the Community — The Report*, vol. 2. Victoria: The Commission, 1994.

Hutchison, Scott C., James C. Morton and Michael P. Bury. *Search and Seizure Law in Canada*, vol. 1. Toronto: Carswell, 2005 (loose-leaf updated June 2010, release 4).

APPEAL from a judgment of the Alberta Court of Appeal (Ritter, O'Brien and

Slatter JJ.A.), 2009 ABCA 147, 454 A.R. 362, 6 Alta. L.R. (5th) 203, 65 C.R. (6th) 130, 243 C.C.C. (3d) 510, [2009] 7 W.W.R. 579, [2009] A.J. No. 448 (QL), 2009 CarswellAlta 580, upholding the accused's conviction. Appeal dismissed, Binnie, LeBel and Fish JJ. dissenting.

David G. Chow and *Michael Bates*, for the appellant.

Ronald C. Reimer and *Robert A. Sigurdson*, for the respondent.

Susan Magotiaux, for the intervener the Attorney General of Ontario.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Ryan D. W. Dalziel and *Daniel A. Webster, Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Christopher A. Wayland and *Sarah R. Shody*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Charron, Rothstein and Cromwell JJ. was delivered by

Cromwell J. —

I. Introduction

[1] The appellant was convicted of possession of cocaine for the purpose of trafficking. He admits he committed this offence. He says, however, that the cocaine, which was found in a search of his room when he was not at home, was obtained as a result of an unreasonable search and therefore should not have been admitted into evidence. The police, who had a valid search warrant, used a "hard entry" — they rammed open the front door without knocking or announcing their presence — and nine masked officers of the tactical team secured the house. The trial judge and majority of the Court of Appeal held that the appellant's under s. 8 of the *Canadian Charter of Rights and Freedoms* rights had not been infringed because the search had been lawfully authorized and reasonably conducted. However, O'Brien J.A., dissenting in the Court of Appeal, would have held that the search, while lawfully authorized, had been conducted unreasonably and that the evidence concerning the cocaine should have been excluded because its admission would bring the administration of justice into disrepute: 2009 ABCA 147, 454 A.R. 362, at paras. 138-47. The appellant's further appeal to this Court, which comes to us as of right, raises two issues:

1. Did the trial judge err in finding that the search was conducted reasonably?

2. If the search was conducted unreasonably, should the cocaine found in the appellant's room be excluded by virtue of s. 24(2) of the *Charter* because its admission would bring the administration of justice into disrepute?

[2] In my respectful view, the trial judge made no reviewable error in concluding that

the search was conducted reasonably. The police had well-grounded concerns that the use of less intrusive methods would pose safety risks to the officers and occupants of the house and risk the destruction of evidence. The suggestions that the police had no basis for their concerns about the risk of violence or destruction of evidence are, with respect, contrary to the findings of the trial judge and to the evidence in the record. Both the police and the reviewing judge are entitled to draw reasonable inferences from the established facts. Only a failure to do so could lead one to the conclusion that there was no basis for reasonable concern about the risk of violence and the destruction of evidence in this case. Even the appellant conceded in the Court of Appeal that the destruction of evidence was a realistic concern. Similarly, the suggestion that, before the search, the police could easily have discovered (by unspecified means) what they learned during it, is contrary to an express finding of fact by the trial judge. Finally, the suggestion that the decision to make an unannounced hard entry into the Cornell residence was simply a rote application of a general police practice is not supported by the evidence. There is no evidence of such a practice let alone of its application here.

[3] There being no breach of the appellant's rights, it is not necessary to address the second question relating to the exclusion of evidence. I would dismiss the appeal.

II. Overview of the Facts

[4] It is important to look at the facts about the search in issue here in the broader context of the investigation of which it formed a part. It is also important to remember that the

decisions made by the police as to how to conduct the entry to the residence must be assessed in light of the information reasonably available to them at the time the decision was made. There is no question here that, had police known what they would in fact encounter in the residence, the approach would have been different. However, as the trial judge wisely observed, "the [appellant] cannot attack the police decision on the basis of circumstances that were not reasonably known to the police": A.R., vol. I, at p. 16.

[5] The police obtained three search warrants on the morning of November 30, 2005. Two of the warrants related to dwelling houses and the third to a motor vehicle. The appellant was not and never had been a target of the investigation. Rather, the police were investigating what they believed to be "dial-a-dope" operation run by two members of a violent criminal gang. Based on surveillance and other evidence, the police thought that the appellant's residence was being used in that operation. This investigation was not about someone like the appellant who was previously unknown to police and who was keeping a little cocaine in his bedroom. The police nonetheless were entitled to draw reasonable inferences about the risks the search of the Cornell residence posed to them and in relation to the destruction of evidence from the activities and people involved. As I shall outline in a moment, the police had good reasons to believe based, among other things, on their surveillance of the premises, that the Cornell residence, which the appellant had given as his address, was being used in a drug dealing enterprise carried on by members of a violent criminal gang. They also had good reason to believe that the appellant himself was associated with at least one of these gang members who, through police surveillance of the Cornell residence, appeared to be welcome there. Attempts to consider the appellant in isolation from these facts are, in my respectful view, highly artificial.

[6] In 2005, the Calgary police received information from a confidential informant that Henry Nguyen and Tuan Tran were running a "dial-a-dope" cocaine trafficking operation. They were believed by police to be members of an organized criminal group known as the "Fresh Off the Boat" gang. Police also believed that this gang, in the time leading up to the events in issue in this appeal, had been engaged in a violent war with another criminal gang that had resulted in a number of shootings and deaths. As one of the investigators said in his evidence at trial:

> ... it was a real concern for police officers having to attend any residence that may be frequented by persons from these groups, in that they could pose a real threat to the police. We would not want them to react to our presence, take hostages, to fight the police to try to gain their escape, to try to fend off the police while the evidence was destroyed. So it became a very, very real security risk for the police officers that would be attending these residences. [A.R., vol. II, at p. 103]

The trial judge accepted this evidence.

[7] As mentioned, the police applied for, and obtained, search warrants for two residences which they believed were being used in the operation — the Tran residence and the Cornell residence — and, in addition, for a motor vehicle frequently used by Nguyen. Detective Barrow of the Calgary Police Service swore an Information to Obtain A Search Warrant "ITO" relating to the Cornell residence that, among other things, included the following details:

- An informant had told police that Nguyen and Tran ran a cocaine dial-a-dope operation (para. 11).

- This information was substantiated by investigation which included surveillance of Tran and Nguyen, checks in various police and other databases and by the opinion of a police officer with long experience and expertise in the investigation of drug trafficking.

- The activity at the two residences was consistent with them being used as stash locations where Nguyen would reload his cocaine supply for the dial-a-dope business. In particular, the ITO stated that Nguyen had made brief visits to the appellant's residence on four occasions over a period of approximately two weeks. On the last visit, an unknown male accompanied Nguyen back to the vehicle for a short time and then returned to the residence.

- The Cornell residence was owned by Phuong Kim Thi Le and was occupied by Lorraine Cornell.

- Nguyen had been taken into custody two months before the search and released. A mobile phone registered to the appellant as subscriber was found in the car Nguyen was driving at that time. The subscriber information for the telephone showed the appellant's address as the Cornell residence. The appellant had also given the address of the Cornell residence when he had been involved in a car

accident about five months earlier.

- The tactical team would be required to enter the residence in order to avoid the destruction of evidence by potential occupants and for the safety of both the public and the police because of Nguyen and Tran's history of violence and association with the organized crime group Fresh Off the Boat.

[8] A judge of the Alberta Provincial Court authorized warrants to search the Cornell residence as well as the other residence believed to be Tran's and a motor vehicle operated by Nguyen. The Cornell residence was placed under surveillance from the morning of November 30 until the search warrant was executed shortly before six o'clock that evening.

[9] The situation was complicated by the fact that the police felt that it was important to execute the three warrants as closely in time as possible. As Constable Smolinski explained in his trial testimony, the police were concerned that if a person inside one residence was able to make a phone call, it might lead to loss of valuable evidence at the other. A tactical team was to be used at both residences and in the stop of the vehicle. Its job was to secure the site and then turn it over to the investigators who would conduct the search.

[10] At the Cornell residence, the tactical team conducted an unannounced hard entry, sometimes referred to as a dynamic entry, by nine police officers with weapons drawn and wearing balaclavas and body armour. Entry involved battering the front door and entering the house while yelling "Police — search warrant". The only person in the house at the time was the appellant's

brother, who was 29 years old and mentally challenged. He was taken down and handcuffed with his hands behind his back. His emotional distress became quickly apparent and the officer dealing with him removed the handcuffs, took off his balaclava, called the accompanying paramedic to assist and facilitated a call by the man to his mother Lorraine. According to the evidence, from the time of entry to the time that this individual was out of the handcuffs and seated on a couch being comforted by one of the officers was about four minutes: C.A., at para. 40, *per* Slatter J.A. As noted by Slatter J.A. in the Court of Appeal, there was some damage to the premises during the entry, but Ms. Cornell testified that she was able to repair it with material she had around the house without incurring any expense: C.A., at para. 31.

[11] The tactical team did not have the warrant with them when they entered the house. Detective Bent, who was in charge of the investigation and of the search that started as soon as the house was secured by the tactical team, had a copy of the warrant. He entered the residence approximately four minutes after the tactical team went in. The lone occupant present in the house at the time of entry did not ask to see the warrant and neither did Lorraine Cornell, although she was shown a copy when she came back to the house not long after Detective Bent's arrival.

[12] The investigating officers discovered 99.4 grams of cocaine in the corner of the basement bedroom of Jason Cornell, in a box marked "Jason's stuff". Mr. Cornell was later arrested at his place of employment. He formally admitted that he possessed this cocaine for the purposes of trafficking.

III. Analysis

A. *Introduction*

[13] The appellant submits that the critical issue on appeal is whether the manner of entry by the members of the police tactical team was reasonable in the circumstances. The focus is on the decision to use a forced, unannounced entry with masked officers who did not have a copy of the search warrant with them. In the appellant's submission, the most aggravating component of the search flows from choices made by the police with respect to the manner of entry.

[14] While the conduct of the search as a whole must be assessed in light of all of the circumstances, it will nonetheless be helpful to look separately at the individual matters on which the appellant relies: the police decision making leading to the choice of a forced entry while masked, and the failure of any member of the tactical team to have the warrant at the time of entry.

[15] To address the appellant's submissions, it will be helpful first to briefly summarize the relevant legal principles about reasonable searches, resort to unannounced, forced entries and judicial review of the reasonableness of a search. I will then turn to the police decision to use a hard entry and the failure of the tactical team to have a copy of the warrant.

B. *Legal Principles*

(1) Reasonable Search and Seizure

[16] To be reasonable under s. 8 of the *Charter*, a search must be authorized by law, the

authorizing law must itself be reasonable, and the search must be conducted in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278. There is now no dispute that the first two of these conditions are met; the only issue is whether the lawfully authorized search was conducted reasonably.

[17] The onus is on the appellant, as the party alleging a breach of his *Charter* rights, to prove that the search contravened s. 8 of the *Charter*.

(2) Knock and Announce

[18] Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: "(i) notice of presence by knocking or ringing the door bell; (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry: *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at p. 747.

[19] Neither the wisdom nor the vitality of the knock and announce principle is in issue on this appeal. Experience has shown that it not only protects the dignity and privacy interests of the occupants of dwellings, but it may also enhance the safety of the police and the public: Commission of Inquiry into Policing in British Columbia, *Closing the Gap: Policing and the Community — The Report* (1994), vol. 2, at pp. H-50 to H-53. However, the principle, while salutary and well established, is not absolute: *Eccles v. Bourque*, at pp. 743-47.

[20] Where the police depart from this approach, there is an onus on them to explain why they thought it necessary to do so. If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police had reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence. The greater the departure from the principles of announced entry, the heavier the onus on the police to justify their approach. The evidence to justify such behaviour must be apparent in the record and available to the police at the time they acted. The Crown cannot rely on *ex post facto* justifications: see *R. v. Genest*, [1989] 1 S.C.R. 59, at pp. 89-91; *R. v. Gimson*, [1991] 3 S.C.R. 692, at p. 693. I would underline the words Chief Justice Dickson used in *Genest*: what must be present is evidence to support the conclusion that "there were grounds to be concerned about the possibility of violence": p. 90. I respectfully agree with Slatter J.A. when he said in the present case that "[s]ection 8 of the *Charter* does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present": para. 24.

[21] Although *Genest* sets out the correct legal test, it is important to note that the facts in *Genest* are not similar to those in this case. Whereas in this case, the search was conducted pursuant to a valid search warrant, in *Genest*, the evidence did not support the issuance of a search warrant. Accordingly, the search in *Genest*, regardless of how it was conducted, was unreasonable because it was not authorized by law. Furthermore, there was no factual foundation presented to account for the means used by the police during the search. In the case before us, there was a valid warrant and an extensive evidentiary basis for the manner of search.

(3) Judicial Review

[22] The main question is whether the police had reasonable grounds for concern to justify use of an unannounced, forced entry while masked in this case. The trial judge is required to assess the decision of the police to act as they did and the appellate court is required to review the trial judge's conclusions. Three things must be kept in mind throughout these reviews.

[23] First, the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. Just as the Crown cannot rely on after-the-fact justifications for the search, the decision about how to conduct it cannot be attacked on the basis of circumstances that were not reasonably known to the police at the time: *R. v. DeWolfe*, 2007 NSCA 79, 256 N.S.R. (2d) 221, at para. 46. Whether there existed reasonable grounds for concern about safety or destruction of evidence must not be viewed "through the 'lens of hindsight' ": *Crampton v. Walton*, 2005 ABCA 81, 40 Alta. L.R. (4th) 28, at para. 45.

[24] Second, the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 73; *Crampton*, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

[25] Third, the trial judge's assessment of the evidence and findings of fact must be accorded substantial deference on appellate review.

C. *The Police Decision to Depart From Knock and Announce in This Case*

[26] The appellant's position is that the police had inadequate information to support the decision to use a hard entry, that they ought to have taken further investigative steps and that their internal decision-making processes were either inadequate or not followed. I will examine these points in turn.

(1) Sufficiency of Information

[27] The appellant submits that the police had no reason to suspect violence in the residence and had no evidence to support the conclusion that any occupant had made provisions for destruction of evidence. Therefore, says the appellant, there was no information to support any grounds or necessity to deviate from the standard knock and announce principle. Respectfully, the trial judge's reasons for decision provide a complete answer to this submission. He correctly set out the applicable legal principles. In finding the police conduct of the search met the required standard, the judge made the following findings of fact which support his conclusion:

- It was reasonable for the police to be concerned about their safety and the safety of other occupants given their experience that those who traffic in cocaine frequently

are violent and the fact that a cocaine trafficker who associated with violent people was welcome in the residence. The ITO also disclosed that in a dial-a-dope operation, the dealer usually has a place from which to operate which could contain drugs, money, weapons and score sheets. As detailed in the ITO, the whole point of having a location such as the Cornell residence at which to "reload" is to reduce the risk of losing large amounts of drugs or money in the event of a police stop while making deliveries. The Cornell residence was suspected of being such a place.

- The police had reasonable grounds to be concerned that the evidence to be found would be destroyed having regard to the fact that there were reasonable grounds to believe that cocaine would be found in the premises and that it is a substance that may be easily destroyed.

- No circumstances arose before the search warrant was executed which might remove the exigency of the situation.

- Notwithstanding that, by the time of the search, Nguyen was in custody and the police had observed Lorraine Cornell and her daughter leave the house, the police had no means of knowing who, if anybody, was in the residence or whether there was any person in the residence who would destroy the cocaine evidence upon learning of the presence of the police at the door. As the trial judge noted, the evidence showed that the police had reasonable grounds to believe that a cocaine

trafficker who associated with violent people ... was welcome in the residence" : A.R., vol. I, at p. 18.

- The fact that Lorraine Cornell and Jason Cornell, who were thought by police to be occupants of the house, had no prior criminal record did not affect the reasonableness of the police concern that evidence could be destroyed; as the trial judge observed, "[a] person without a criminal record could destroy evidence as easily as a person with a criminal record": A.R., vol. I, at p. 18.

[28] Having correctly stated the legal principles and made findings of fact untainted by clear and determinative error, the judge concluded that

> the evidence demonstrated a reasonable explanation by the police for conducting a forceful entry to ensure the cocaine was not destroyed and ensure the safety of the police and the public in all of the circumstances. [A.R., vol. I, at p. 18]

[29] In addition to this finding, the judge also concluded, on the basis of the testimony of many of the police participants, that both the investigative team and the tactical team "possessed a genuine belief that only a forced tactical entry into the residence would lessen the possibility of the illicit substance being destroyed and would enhance the possible safety of the police and the possible occupants of the house": A.R., vol. I, at p. 19.

[30] I see no reviewable error in these conclusions that the police view of the need for a hard entry was both reasonably based and genuinely held. These conclusions are also supported, in my view, by other evidence in the record to which the trial judge does not specifically refer but relates to matters known to the police at the time of entry. The day before entry, the vehicle often driven by Nguyen was observed with Hans Eastgaard as a passenger. Eastgaard had an extensive criminal record which included weapons and drug charges. About two hours before entry, the vehicle often driven by Nguyen was observed to pull up to the rear of the Cornell residence. The driver, described by an officer conducting surveillance as an Asian male, left the vehicle and appeared to retrieve something from the yard of the residence near the fence. The car was stopped about an hour later. At the time, it was driven by Nguyen, who was wearing body armour. His passenger was Eastgaard. Nguyen was in possession of cocaine and cash. There was good reason to be concerned about violence on the part of Nguyen, Tran and Eastgaard. As Slatter J.A. observed, if Nguyen thought his business was dangerous enough to justify wearing body armour, it can hardly have been unreasonable for the police to think the same thing: C.A., at para. 23. At the time of the entry into the Cornell residence, Nguyen and Eastgaard were in custody, but Tran's whereabouts were unknown. These additional facts strengthen the grounds to believe that cocaine would be in the residence (and therefore liable to be easily destroyed) and that a violent reaction to entry might be encountered.

[31] The appellant objects to the use of masks by the police. My view, however, is that the question for the reviewing judge is not whether every detail of the search, viewed in isolation, was appropriate. The question for the judge, and the question the judge in this case answered, is whether the search overall, in light of the facts reasonably known to the police, was reasonable.

Having determined that a hard entry was justified, I do not think that the court should attempt to micromanage the police's choice of equipment. I should add that *R. v. Lau*, 2003 BCCA 337, 175 C.C.C. (3d) 273, and *R. v. Schedel*, 2003 BCCA 364, 175 C.C.C (3d) 193, are of no assistance to the appellant. In neither case was there any mention of the police wearing balaclavas. Both cases concerned police reliance on a blanket policy (one that did not involve balaclavas), of which there was evidence in those cases, always to use a hard entry for the search of suspected marijuana grow operations even in the complete absence of evidence of risk of violence or destruction of evidence. There is no such "blanket policy" in evidence here and the record shows that there were ample grounds for the police to be concerned about violence and destruction of evidence in this case.

(2) <u>The Need for Additional Investigation</u>

[32] The appellant submits that the police should have known more about the residence and its occupants and that, if they had, they would have made a different decision concerning the type of entry to be made. I cannot accept this contention.

[33] The trial judge found as a fact that the police had no means of knowing before executing the warrant who, if anybody, was in the residence or whether there was anyone in the residence who might destroy the cocaine, if there was any, upon learning of the police presence at the door. The judge also found that the police had done what could reasonably be expected in formulating their decision to use a forced entry. These conclusions, which are mainly concerning matters of fact, are well-supported by the record.

[34] At trial, defence counsel suggested to Detective Barrow that the police did not make efforts to try to determine the activities of individuals inside the residence. Detective Barrow denied this and the evidence before the trial judge supports the fact that considerable time and effort were expended by the investigators in order to determine who and what was in the residence before the search. The police did not just show up at a previously uninvestigated residence and barge in. The Cornell residence had been under police surveillance on three occasions before the day of entry for nearly 10 hours. On the day of entry, the house was under constant police surveillance from the morning until entry was made shortly before 6:00 in the evening. Thus the police conducted approximately two full working days of surveillance on this residence before going in. At the time of applying for the warrant, the police had consulted various sources, including: the Police Information Management System; a City of Calgary computer system that contains records with respect to the City of Calgary waterworks customers including the address to which service is supplied and the name of the subscriber; the City of Calgary's online database which provides ownership data for addresses in the city; and subscriber information for Telus Mobility. These sources indicated that the property was owned by Phuong Kim Thi Le, occupied by Lorraine Cornell, that Jason Cornell had given the address of the Cornell residence as his address and that Jason Cornell was the subscriber for a cellular telephone found in a car driven by Nguyen the previous September.

[35] Respectfully, the assertion by O'Brien J.A., dissenting in the Court of Appeal, that "the police made no separate assessment of the Cornell dwelling in terms of determining whether the execution of the warrant for its search would give rise to a real threat of violence" is not supported by the record (para. 103). His conclusion that a "sense of proportionality" would have

led police to conclude that there was little risk of the destruction of evidence is similarly not supported (para. 103). In my view, O'Brien J.A.'s reasoning is based on an erroneous, artificial approach of isolating the appellant from what the police reasonably believed was going on in his house. The police reasonably believed that the appellant's residence was being used in a criminal drug dealing enterprise carried on by members of a violent criminal gang and that the appellant had some association with at least one gang member. The police were entitled to draw reasonable inferences from these facts. Justice O'Brien's conclusions also in my respectful view represent undue appellate intrusion into the findings of fact by the trial judge, findings which, as I have mentioned, do not disclose any clear or determinative error.

[36] Faced with all of this evidence, the appellant makes only one concrete suggestion as to what the police ought to have done but did not. The appellant says they ought to have detained and questioned Ms. Cornell and the young woman with her, who proved to be her daughter, when they left the house not long before the entry. The appellant asserts that, for officer safety, the police would have been entitled to detain these women, incommunicado, so that they would not alert other persons to the police presence and further, that interrogation of the women would have led them to believe that the use of a forced entry was not appropriate. In my view, this line of reasoning is speculative and makes unreasonable demands on the police. As Slatter J.A. correctly points out, at para. 14 of his reasons, the appellant's argument assumes that an investigative detention of these women and that preventing them from any contact would have been lawful in the circumstances. It also assumes that they would have been cooperative, that they would have been truthful and that the police would have decided to take what they said at face value. Even putting aside all of this speculation, the appellant's suggestion, if accepted, would impose on the police the obligation to

completely change their plans, at the last minute, while engaged in a closely coordinated execution of three different search warrants in very close order. In my respectful view, the appellant's suggestion has no basis in the evidence and makes unreasonable demands on the police in the circumstances of this case.

(3) Police Decision-making Process

[37] The appellant submits that the search should be held unreasonable because there was some missing paperwork and lack of communication within the Calgary Police Service. In my view, Slatter J.A. in the Court of Appeal correctly disposed of this contention when he wrote at para. 15 of his judgment:

> On a related point, a lot of argument was directed to whether there was inadequate communication from the investigative team to the tactical team of the risk assessment of the premises. That issue is largely moot on these facts. The real question is whether the type of search that was conducted was reasonable given the facts collectively known to the police. If this type of search was justified any non-communication was inconsequential, and *vice versa*.

D. *Failure of Tactical Team to Have the Warrant With Them*

[38] The appellant makes very brief submissions, without reference to authority, in support of his contention that the search was unreasonable because the tactical team did not have a copy of the warrant with it when it made the entry. This position is based on s. 29(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which reads:

> It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

[39] The trial judge found that this provision had been complied with. It will be helpful to recall the evidence on this subject that was before him. Detective Bent was the primary investigator. He effectively was the manager of the operation and supervisor of the search. The role of the tactical team was to make the entry and secure the premises and then turn the site over to the investigators who would actually perform the search. There were about nine members of the tactical team and five investigators involved in the operation in addition to Detective Bent.

[40] Detective Bent had a copy of the warrant. He had been involved since the morning of surveillance of the residence. His position was south of the house and, although the house was not in his line of sight, he was in a position to cover off somebody coming from the address and leaving via the south. He was of course in radio contact with the other officers. A close reading of the evidence supports the conclusion that he was physically present in the residence within four minutes of the entry: see C.A., at paras. 38-40. There is no evidence that anyone ever asked to see the warrant and of course the appellant was not in the premises at the time. The police did show the warrant to Lorraine Cornell when she returned to the residence shortly after the search began. There was also evidence that at the time of this search, it was not the practice for the tactical team to carry a copy of the warrant but that the practice had been changed in 2006.

[41] The trial judge, relying on *R. v. Patrick*, 2007 ABCA 308, 81 Alta. L.R. (4th) 212, at paras. 49-51, aff'd on other grounds, 2009 SCC 17, [2009] 1 S.C.R. 579, held that s. 29 had been

complied with. The judge reasoned that the warrant was present at the scene and that it was reasonable in the case of a hard entry for the tactical team to secure the premises — something that took only a very few minutes in this case — and for the primary investigator, who was in possession of the warrant, to wait outside with it until informed that it was safe to enter.

[42] As noted, s. 29(1) of the *Code* requires "every one who executes a . . . warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so". The trial judge found as a fact that no one requested that the warrant be produced and that finding of fact is not challenged. There is no issue therefore as to any failure on the part of the police to produce the warrant when requested to do so. The question, therefore, is the meaning of the requirement that "every one" have the warrant "with him, where it is feasible to do so". The trial judge concluded that the section did not require that each member of the police team executing the warrant have a copy on his or her person. This, in my view, is a sensible interpretation of the provision. Otherwise, it would be read as requiring all 15 members of the team executing this warrant to have a copy. The trial judge found that it was sufficient that, as he found to be the case, "the police team had it with them when executing the warrant". This seems to me to be a purposive and appropriate interpretation of the provision in the context of a search conducted by multiple officers.

[43] I agree with the authors of *Search and Seizure Law in Canada* (loose-leaf), at p. 17-5, that the purpose of s. 29(1) is to allow the occupant of the premises to be searched to know why the search is being carried out, to allow assessment of his or her legal position and to know as well that there is a colour of authority for the search, making forcible resistance improper. These purposes, in my view, are fully achieved by insisting that the warrant be in the possession of at least

one member of the team of officers executing the warrant. While I think it is a better practice for someone among the first group of officers in the door to have a copy on his or her person, I would not conclude that the officers failed to have the warrant with them when a copy was in the possession of the primary investigator who was in charge of the search and immediately at hand. Moreover, it cannot in my view be said that the police conduct in relation to the warrant contributed in any respect to making this search unreasonable.

IV. Disposition

[44] In view of my conclusion that the search was not unreasonable, it is not necessary for me to address whether, if it had been, the evidence should have been excluded by virtue of s. 24(2) of the *Charter*.

[45] I would dismiss the appeal.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

FISH J. —

I

[46] Loaded weapons in hand, nine masked members of a police tactical unit smashed their way into the appellant's home in a residential Calgary neighbourhood. They forced the appellant's

brother, who has a mental disability, face-down to the floor and cuffed his hands behind his back. They dented the front door with their battering ram and broke the door frame, destroyed some of the interior doors, pried locks off a garage door and rendered the garage door itself inoperable.

[47] The police were acting under a search warrant issued pursuant to s. 11 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). In virtue of s. 12 of the *CDSA*, the police were authorized to use only "as much force as is necessary in the circumstances". Nothing in the record indicates that the force used in this case was *necessary in the circumstances*.

[48] I hasten to make clear from the outset that officers conducting a search for drugs must be afforded considerable latitude in adopting appropriate procedures to ensure their own safety and to secure the evidence sought. Courts will not lightly interfere in operational decisions of this sort. But those decisions must be reasonable, and to be reasonable they must be informed by a fact-based assessment of the particular circumstances of the search and the force necessary to preserve evidence and to neutralize perceived threats to their safety. No such assessment was made in respect of the unannounced and violent entry into the Cornell residence.

[49] Neither the appellant nor any member of his family had a history of violence or a criminal record of any sort. No one else lived in their home. From their extensive surveillance of the premises, the police were well aware that the Cornell home was neither a gang house nor a drug house frequented by addicts or users.

[50] The police had no reason to believe that anyone at all who might be a threat to their

safety was then in or near the dwelling. More specifically, they had no reason to believe that anyone in the house was armed or dangerous. They made no mention of weapons in their Information to obtain the search warrant. They alleged no grounds to believe that any would be found on the premises.

[51] Nor did the police have any basis for a particularized and reasonable belief that, in the absence of a swift and violent entry, evidence would be concealed or destroyed by anyone present or likely to be present at the time. Generic assertions in this regard are plainly insufficient to justify a violent entry of the kind that occurred here.

[52] Indeed, in the particular circumstances of the present search, the only anticipated violence related to the manner in which it was to be conducted by the police — euphemistically described as a "hard" or "dynamic" entry. It is undisputed that the police, before battering their way into the home, made no inquiry as to the character or background of its inhabitants. Nor has the Crown adduced any evidence whatever to suggest that it would have been difficult to do so, or that the urgency of the matter justified the failure of the police to conduct even a rudimentary investigation in this regard.

[53] The members of the tactical squad were bound by s. 29 of the *Criminal Code*, R.S.C. 1985, c. C-46, to have with them, where feasible, the search warrant under which they were acting. The Crown led no evidence that it was *not feasible in this case*. This is not a technical or insignificant breach of the law. It is a violation of a venerable principle of historic and constitutional importance. And, as we shall see, it is of practical importance as well.

[54] At trial, the appellant contested both the grounds upon which the warrant was issued and the reasonableness of the police conduct in executing the search. In successive *voir dires*, both grounds were dismissed. The trial judge found that the forcible entry and corresponding violation of the "knock and announce" rule were justified in the circumstances. In his opinion, the police had reasonable grounds to anticipate either the use of violence by the residents of the Cornell home or the destruction of evidence.

[55] The appellant was convicted. He appealed to the Alberta Court of Appeal, where Slatter J.A. (Ritter J.A., concurring in the result) affirmed the conviction: 2009 ABCA 147, 6 Alta L.R. (5th) 203. They both concluded that the search warrant was properly issued and that the search itself was conducted reasonably.

[56] In his separate reasons, however, Ritter J.A. found that two of the three reasons given by the police for wearing balaclavas in this case were entirely unsupported by the evidence, and that the third reason raised "several problems" (para. 50). He nonetheless agreed with Slatter J.A. that the search, bearing in mind all of the relevant factors, was conducted reasonably, and concluded with these thoughtful and important observations (at paras. 53-54):

> Since this is the second opinion of this Court raising concerns about the indiscriminate habit of balaclava-clad police conducting searches in private homes, I would expect that police will discontinue this practice. Failure to do so may suggest an attitudinal problem that could, in future, tip the balance in favour of a finding that a search was unreasonable. Of course, if acceptable reasons are given, in any particular case, as to why balaclavas were called for, their use would not be a factor on the unreasonableness side of the scale.

> I close with the observation that the safety of police officers executing search warrants is always a paramount concern. I accept, without reservation, that police must take all reasonable steps to ensure their safety when engaged in such dangerous work. I also accept that reasonable steps may be taken to ensure that the evidence or contraband is not destroyed before it can be seized. That said, police must still assess the circumstances relevant to any particular case and act accordingly. What is reasonable will vary from case to case and, while a cautious approach is always justified, extremely invasive tactics will not always be justified, even under the auspices of a cautious approach. [Emphasis added.]

[57] O'Brien J.A. dissented. In his view, the unannounced and violent entry into a private dwelling by masked police officers, with weapons drawn, and without the search warrant in their possession, could not be justified under the circumstances. He noted that the police provided no information, specific to the residence or its inhabitants, which could justify the manner of the search. And he explained with care why he would have excluded the evidence seized under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. In concluding that exclusion was required, Justice O'Brien did not have the benefit of this Court's decision in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, which in my view would necessarily have led him to the same conclusion.

[58] Like Justice O'Brien, I therefore feel bound to conclude that the search in issue here respected neither the statutory constraints of s. 12 of the *CDSA*, nor the appellant's constitutional right, under s. 8 of the *Charter*, "to be secure against unreasonable search or seizure".

[59] And, again like Justice O'Brien, I am persuaded that admission of the evidence thereby obtained would bring the administration of justice into disrepute and should therefore be excluded pursuant to s. 24(2) of the *Charter*. This result is in my view dictated by the governing principles recently reformulated by the Court in *Grant*.

[60] Accordingly, I would allow the appeal, set aside the appellant's conviction, and substitute an acquittal.

II

[61] Here, then, are the relevant facts in greater detail.

[62] At around 6 p.m. on November 30, 2005, nine men with pistols drawn and loaded rifles in hand, with their faces entirely concealed by balaclavas, smashed their way without warning into a private home in Calgary's Marlborough residential district.

[63] The intruders were all members of the Calgary Police Service Tactical Unit. Their mission was to secure the residence pursuant to a warrant authorizing a search for drugs.

[64] The residents of the home were Lorraine Cornell and her three children: Ashley, 17; the appellant Jason, 21; and Robert, 29, who has a mental disability. None of the Cornells had a criminal record or any history of violent behaviour. No one else lived with them in their home.

[65] Shortly before executing their warrant to search the Cornell home, the police observed Lorraine and Ashley Cornell leave and drive away. The other search warrants relating to this operation had already been executed, and Mr. Nguyen, the only suspected drug dealer or gang member ever observed entering the dwelling, was already in police custody. The police made no

effort to intercept the departing women in order to secure — or at least attempt to secure — a nonviolent, peaceful means of entering the residence to search within. Instead, some 15 minutes later, the tactical team made its unannounced

and violent "dynamic entry".

[66] Upon entering the home, the officers set upon the appellant's brother, Robert Cornell, who has a mental disability. Robert was forcibly "taken down", pushed to the floor, "proned out", and handcuffed with his arms behind his back. With understandable concern for Robert's acute distress, an officer tried, in vain, to soothe him. The police thus found it necessary to summon a paramedic to attend to Robert, and eventually contacted his mother as well to ask that she return home to care for her "distraught" and "very scared" son.

[67] Mrs. Cornell testified that, upon her arrival, she was initially prevented from seeing Robert:

> I wanted to see my son [Robert] because they told me that the paramedics were there, ... and they didn't let me in right away. They told me to sit on the hood of a police car. They also told me I was under arrest.

[68] When she was allowed in, Mrs. Cornell found that her "house was a shambles": "Chaos, doors broken, my stuff was — my bedrooms were destroyed.... They had everything pulled out from my rec room to Jason's room, Ashley's room, my bedroom, Robert's room".

[69] The home sustained considerable damage during the search. The impact of the battering

ram on the front door destroyed the lock, broke the door frame, and left a large dent in the centre of the door. Other areas of the residence were damaged as well:

> Robert's door was broken, the frame. The downstairs door, like if you're to go downstairs and go straight ahead, that door was broken in the frame. My daughter's bedroom is to the – to the right. That frame and door was also broken. If you were to go through the door as you went down the stairs at the bottom into Jason's room, that door was also broken with the frame.... Three doors broken downstairs, one upstairs, and the front door.

The garage door was also broken, and the garage had been "torn apart".

[70] It took Mrs. Cornell and her daughter "five hours to straighten out [the] house". She testified that she tried to fix the doors herself: "I tried to fix them. I'm not very handy with that, but I – I did my best".

[71] The police found 99.4 grams of cocaine in the appellant's bedroom, in a box labelled "Jason's stuff". No weapons were recovered during the search.

[72] The tactical team members did not have with them a copy of the search warrant when they broke into the Cornell residence. The warrant was then in the hands of a lead investigator who testified that he had been posted down the block and arrived four minutes later. Another officer, who entered with the tactical unit, recorded in his notes that the lead investigator in fact arrived with the warrant nine minutes later.

[73] It is undisputed that the warrant was not available to be produced to the home's occupants upon request at the time of entry. It is undisputed as well that by the time the warrant

arrived, the police had extensively damaged the home. They had also knocked or pushed Robert, who was alone in the home, unthreatening and mentally disabled, to the floor, laid him prone and handcuffed him with his arms behind his back.

[74] The police were executing a search warrant that had been obtained the morning of the search. As already noted, the warrant made no mention of firearms or other weapons of any sort. It specified that the items being sought were "cocaine, packaging equipment, score sheets and cash".

[75] The warrant and subsequent searches and arrests were the culmination of a six-week investigation into two known gang members and suspected drug traffickers, Henry Nguyen and Tuan Tran. The Target Enforcement Unit of the Calgary Police Service conducted surveillance of Nguyen and Tran for several weeks.

[76] During this time, Nguyen was observed entering the Cornell dwelling four times: once "for approximately two minutes"; once "for approximately eight minutes"; next, for "a short visit"; and, finally, for "a short stop" (Reasons of O'Brien J.A., at para. 61). Nguyen was never seen carrying anything into or out of the Cornell dwelling. Tran was never observed entering the dwelling at all, but had been seen in the vicinity.

[77] Neither Nguyen nor Tran were ever observed in the presence of the appellant or any member of his family. Two months before the search warrant was executed, however, a cell phone registered to the appellant, Jason Cornell, was found in a motor vehicle driven by Nguyen.

[78] The police suspected that Nguyen was recovering small amounts of narcotics, stashed previously in the Cornell home, in a drug trafficking practice known as "reloading".

[79] Finally, and of particular significance, the police had no reason to believe that anyone at all who might be a threat to their safety was on or near the premises at the time. They had conducted no particularized inquiry to determine whether a violent assault on the appellant's home appeared justified in the circumstances — apart from their surveillance of the premises, which in fact indicated the contrary.

[80] Indeed, there is no evidence that the officers considered that their safety was at risk or that evidence was likely to be destroyed when they executed their search at the Cornell home. The only risk analysis that was prepared covered, indiscriminately, the three related warrants executed that day.

[81] According to the trial judge, the risk analysis "is an internal record of the police designed to inform the duty inspector of any potential risk involved to the public and police when executing search warrants [and is] also created to supply the Tactical Team with information about the investigation and its targets" (emphasis added).

[82] Yet this risk analysis, again according to the trial judge, was in fact "never supplied to any member of the Tactical Team and was thus not relied upon in assessing whether Tactical involvement was necessary".

[83] The risk analysis mentioned neither the appellant nor any other occupant of the Cornell residence. Moreover, according to his own evidence, the officer who not only prepared the risk analysis but was also the affiant for the search warrant, "provided no information to any member of the Tactical Unit other than to advise of the existence of a search warrant" and "did not know what information the tactical team relied upon to justify unannounced, forced entry into [the appellant's home]".

[84] In the same vein, the officer who was charged with briefing the tactical team testified that he "provided them with specifics, as far as the target address, the occupants or possible occupants and a little bit of the history as to who the targets of the investigation were" but that he did not "recall, sir, to be honest what information was provided outside of the location, address-wise". He did not mention Lorraine or Jason Cornell's names at the briefing, and "can't recall if any of the information that brought us to that residence was discussed with the TAC Team or not".

[85] In proceeding with their unannounced and violent entry, the police wore balaclavas. This practice, as noted by Justice O'Brien in the court below, had by then been judicially condemned — in fact been declared unconstitutional — by two separate panels of the Court of Appeal of British Columbia: see *R. v. Schedel*, 2003 BCCA 364, 175 C.C.C. (3d) 193, and *R. v. Lau*, 2003 BCCA 337, 175 C.C.C. (3d) 273.

[86] That wearing balaclavas was a matter of police practice at the time, unrelated to the particular circumstances of this case, is clear from the Crown's own evidence:

> Q. ... Do you always wear this balaclava when you're doing these types of entries, or was it put on for this one for a particular reason?
>
> A. No, typically we always wear the balaclava.
>
> (Evidence of Sergeant Marston)

[87] Likewise, it was a matter of police practice at the time for members of the Tactical Unit not to have the search warrant with them upon entry. This practice was corrected, it seems, shortly afterward.

[88] Finally, with respect to the unannounced and violent entry into the Cornell home, O'Brien J.A. referred by way of distinction to *R. v. DeWolfe*, 2007 NSCA 79, 256 N.S.R. (2d) 221, where the police were dealing with a "residential crack shop" and, unlike the present case, had reasonable grounds to fear counter-surveillance and violent resistance. Absent a particularized basis of this sort, the conduct of the police in this case appears to have been driven more by general practices than by information regarding the Cornell home and its occupants.

III

[89] This appeal raises two issues:

> a) Was more force than necessary used in the execution of the search warrant at the Cornell residence?

b) If the amount of force used was indeed unreasonable, would the administration of justice be best served by the exclusion of the evidence obtained as a result of the search pursuant to s. 24(2) of the *Charter*?

[90] As I have already noted, the search warrant in this case was issued pursuant to s. 11 of the *CDSA*, which provides that a warrant may be issued by a justice who believes, on reasonable grounds, that a controlled substance or other related item is located in the specified premises. Section 12 of the *CDSA* authorizes peace officers, in executing the warrant, to use "as much force as is necessary in the circumstances" (the emphasis, of course, is mine).

[91] The power to search pursuant to the *CDSA* is subject to two additional constraints: the common law and s. 8 of the *Charter*.

[92] Section 8 of the *Charter* guarantees everyone "the right to be secure against unreasonable search or seizure". A search will pass constitutional muster under s. 8 only if it satisfies three requirements: First, the search must be authorized by law; second, the law itself must be reasonable; finally, the manner in which the search is carried out must be reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278.

[93] The first and second requirements are no longer in dispute: The courts below found, correctly, that the warrant was authorized pursuant to a reasonable provision of law.

[94] Accordingly, only the third requirement concerns us here: Was the search *carried out*

in a reasonable manner? And the answer to that question depends on whether the search itself was conducted by the police in accordance with the established requirements of the *Charter*, the governing statutory provisions, and the common law.

[95] For the reasons I have already given, for the reasons that follow, and for the reasons of Justice O'Brien in the Court of Appeal, I would answer that question in the negative.

[96] First, I turn to the common law "knock and announce" rule that governs searches of private residences. This rule recognizes the highly sensitive privacy interest at stake when the state wishes to search a person's home. Absent exigent circumstances, peace officers in executing a warrant must, before entering a home to conduct their search, announce their presence, identify themselves as agents of the state and request admittance.

[97] In *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at p. 746, Dickson J. (later C.J.) explained that this rule protects both the privacy of the individual and the safety and security of the officers carrying out the search:

> An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance.

[98] "Knock and announce" is a fundamental but not an absolute rule. Notably, as already indicated, a departure will be warranted in exigent circumstances, where force and surprise are justified because they appear on reasonable grounds to be necessary.

[99] On this appeal, the Crown advances two grounds to justify the officers' violent, unannounced entry. First, the Crown contends that it was necessary to protect the safety of the officers. Drugs and firearms, says the Crown, go hand in glove. The police therefore had a reasonable belief that they might encounter armed resistance in the Cornell residence. Second, drugs such as cocaine are notoriously easy to dispose of quickly. An unannounced and forcible entry, the Crown submits, was therefore required to prevent the destruction of evidence.

[100] Both submissions fail.

[101] The argument that a "dynamic" entry was necessary to protect the safety of the officers is entirely unsupported by the record. They smashed their way into the appellant's home without any inquiry at all regarding the appellant or any of its other occupants. Mr. Cornell, I repeat, had neither a history of violence nor a criminal record of any sort. There was no suspicion that he was a member of any gang: Reasons of O'Brien J.A., at para. 88. No other member of the household was thought ever to have committed any crime at all. The police had no reason to believe that there were firearms or any other weapons on the premises.

[102] In the absence of any particularized information regarding the home and its occupants — information that might have caused them concern for their safety — the Crown relies on the fact that the police had reasonable grounds to believe, and did believe, that the two primary subjects of the investigation, Nguyen and Tran, were gang-affiliated drug traffickers.

[103] This submission collides with the record as well.

[104] The police had no reasonable belief that either Nguyen or Tran would be at the Cornell dwelling at the time of the search. Tran had never been seen to enter that dwelling, and Nguyen had by then been in police custody for more than an hour.

[105] Second, the Crown contends that the tactical team's sudden and violent entry was justified in order to prevent the destruction of evidence. It is true that illicit drugs are easily concealed or discarded. But as O'Brien J.A. noted in the court below, that alone is insufficient to justify a violent entry by masked officers brandishing loaded firearms.

[106] The police must make some attempt to ascertain whether there is a real likelihood that, without a sudden and violent entry of the kind that occurred here, the occupants will have time — and will proceed — to conceal or destroy the evidence that is the object of the search. It is well established that generic information about the potential presence of drugs in a home is insufficient to warrant so drastic a violation of its occupants' constitutional rights.

[107] This very issue was considered with care in *R. v. Genest*, [1989] 1 S.C.R. 59, where the Court weighed the sufficiency of evidence required to disregard the "knock and announce" rule. If it is demonstrated that the police have departed from the common law standard, the onus is on the state to justify that departure. Moreover, "[t]he greater the departure from the standards of behaviour required by the common law and the *Charter*, the heavier the onus on the police to show why they thought it necessary to use force in the process of an arrest or a search" (*Genest*, at p. 89).

[108] *Genest*, like this case, involved an unjustified departure from the "knock and announce" rule by a police tactical team. There, as here, the Crown sought to justify the "dynamic" entry on the ground that police officers need to protect themselves from violence. This explanation, absent some specific evidence, was rejected by a unanimous Court in these terms:

> I would not wish to be taken to say that the Crown must prove a tendency to violence beyond a reasonable doubt, nor that the Crown cannot refer to past conduct as influencing their decision as to the amount of force thought necessary to carry out a search. The assessment of the amount of force, like the motives for the search in the first place, need not be proven on the same standard of guilt as when proving the elements of an offence. The Crown must, however, lay the evidentiary framework to support the conclusion that there were grounds to be concerned about the possibility of violence. [Emphasis added; p. 90.]

[109] Police forces have limited investigative resources and cannot be expected always to know with certainty what they will face upon executing a search warrant. They are, however, bound under *Genest* to at least make reasonable inquiries to ascertain the nature of the premises they intend to search, the identities and background of its occupants, and the real risk of resistance by force.

[110] Moreover, *ex post facto* justifications are of no assistance in determining whether the police had a reasonable basis for departing from the "knock and announce" rule, or whether the violence of their unannounced entry rendered the execution of their search unreasonable. The conduct of the police in this respect must be judged only on the evidence available to them prior to the search.

[111] I agree with O'Brien J.A. that this will be an inherently flexible standard, since "the

urgency of the situation will affect the amount of information that may reasonably be expected to have been obtained" (para. 113). So, too, will the accessibility of information about the home to be searched and its occupants: Reasonable attempts to investigate, even when largely unsuccessful, may well support a departure from the "knock and announce" rule.

[112] The flexibility of the standard is of no assistance to the Crown here, since the police made *no attempt to obtain any information regarding the Cornell home or its occupants*. Their entire focus, as Justice Cromwell points out, at para. 5, was on Nguyen and Tran. And, as I have already noted, their surveillance of the Cornell home from this perspective provided no basis for an unannounced and violent entry of the premises.

[113] Nor did the Crown provide any evidence — or, indeed, any reasonable explanation — for the failure of the police to make the requisite inquiry. Quite properly, Crown counsel conceded in this Court that the police would have proceeded differently if they had known before the search what they learned during its execution. I reiterate that what matters is what the police knew before the search and not what they learned afterward. But where the police would not have resorted to an unannounced and violent entry if they had known what they made no effort to learn — and could easily have discovered — this alone tends to indicate that the execution of the search was unreasonable in the circumstances.

[114] Other aspects of the search contribute to its overall unreasonableness.

[115] The tactical team members wore balaclavas. At trial, the wearing of masks was not

justified with reference to any situation-specific threat. Balaclavas are sometimes worn to protect the officers' faces in case of a chemical fire — for example, when they raid a suspected drug lab — or when they contemplate the use of flashbangs or pepper spray to overcome anticipated resistance. Alternatively, balaclavas may be worn to protect the identity of officers still involved in an ongoing undercover investigation. This was not the case here either. On the Crown's own evidence, the tactical team wore balaclavas *because that is what they always did.* And their avowed reason for proceeding that way was to intimidate and psychologically overpower those inside, in part by creating an "overwhelming sensory uniformed kind of appearance" (Reasons of O'Brien J.A., at para. 112).

[116] Gratuitous intimidation of this sort — psychological violence entirely unrelated to the particular circumstances of the search — may in itself render a search unreasonable.

[117] Moreover, anonymity in the exercise of power, particularly state power, invites in some a sense of detachment and a feeling of impunity. The wearing of masks by intruding police officers creates an unjustified risk in this regard where, as here, it is based on nothing more than an ill-considered police "policy" that has been judicially condemned on more than one occasion.

[118] At best, hidden faces tend to disinhibit those charged with the forcible penetration and search of a home. Hidden faces also render any culprits among the officers unidentifiable by witnesses, and therefore unaccountable to the victims and to society for any excesses or inappropriate behaviour. Just as anonymity breeds impunity, so too does impunity breed misconduct — which, unsanctioned by legal consequences, tends to bring into disrepute our enviable system of

justice.

[119] Where there exists a reasonable justification for the wearing of balaclavas, the inherent risks and negative effects I have mentioned are outweighed by the need for effective law enforcement. I hasten to add that in close cases, of which this is not one, the police, not the accused, should be given the benefit of the doubt.

[120] Finally, the members of the tactical squad were bound by s. 29 of the *Criminal Code* to have with them, where feasible, the search warrant under which they were acting and to produce it on demand. As I mentioned earlier, the Crown led no evidence that it was *not feasible in this case*. This is not a technical or insignificant breach of the law. It is a violation of a venerable principle of historic and constitutional importance. And it is of practical importance as well in avoiding violent resistance by those present in the home. They may well fear the consequences of the search, but will at least be assured by the warrant that this sudden and unexpected entry into their home is authorized by law — and that they are not the victims of a violent home invasion by bandits in uniform.

[121] The absence of any prior investigation regarding the Cornell home and its occupants; the violence and destructiveness of the entry; the force used to subdue the sole, mentally disabled occupant of the house; the total failure to justify departure from the "knock and announce" rule in respect of the Cornell residence; the use of masks without justification; the use of drawn weapons without any reason to suspect that their physical security was at risk; the failure of the entering officers to have with them, as required by law, the search warrant under which they were acting; and

all the other facts and circumstances I have mentioned leave me with no doubt that the police in this case violated the right of the appellant, enshrined in s. 8 of the *Charter*, "to be secure against unreasonable search or seizure".

[122] I turn in this light to the reasons of my colleague, Justice Cromwell. In his view, the police did not use excessive force in conducting their unannounced and violent entry into the Cornell home. Justice Cromwell finds that they acted reasonably and, therefore, did not violate the appellant's constitutional right, under s. 8 of the *Charter*, to be secure against unreasonable search or seizure.

[123] My colleague's conclusion is best appreciated in the context of the legal framework he sets out with admirable concision and clarity at paras. 18-20. Because of their central importance to my comments that follow, I reproduce those paragraphs here:

> Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: "(i) notice of presence by knocking or ringing the door bell; (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry: *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at p. 747.
>
> Neither the wisdom nor the vitality of the knock and announce principle is in issue on this appeal. Experience has shown that it not only protects the dignity and privacy interests of the occupants of dwellings, but it may also enhance the safety of the police and the public: Commission of Inquiry into Policing in British Columbia, *Closing the Gap*: *Policing and the Community — The Report* (1994), vol. 2, at pp. H-50 to H-53. However, the principle, while salutary and well established, is not absolute: *Eccles v. Bourque*, at pp. 743-47.
>
> Where the police depart from this approach, there is an onus on them to explain why they thought it necessary to do so. If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police had reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the

> destruction of evidence. The greater the departure from the principles of announced entry, the heavier the onus on the police to justify their approach. The evidence to justify such behaviour must be apparent in the record and available to the police at the time they acted. The Crown cannot rely on *ex post facto* justifications: see *R. v. Genest*, [1989] 1 S.C.R. 59, at pp. 89-91; *R. v. Gimson*, [1991] 3 S.C.R. 692, at p. 693. I would underline the words Chief Justice Dickson used in *Genest*: what must be present is evidence to support the conclusion that "there were grounds to be concerned about the possibility of violence": p. 90. I respectfully agree with Slatter J.A. when he said in the present case that "[s]ection 8 of the *Charter* does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present": para. 24.

As Slatter J.A. noted in the paragraph of his reasons to which my colleague refers:

> How much risk to their personal safety are the police required to take in executing a warrant? In *Genest* at p. 89 the Court spoke of a "real threat" of violent behaviour, and "grounds to be concerned about the possibility of violence", with the proviso that a threat of violence does not "amount to a *carte blanche* for the police to ignore completely all restrictions on police behaviour". [para. 24]

[124] My reasons make plain that I accept this exposition of the legal and constitutional principles that govern the outcome of this appeal. And, with this legal framework firmly in place, offer four observations concerning my colleague's reasons for concluding as he has.

[125] First, Justice Cromwell notes that "[t]he appellant was not and never had been a target of the investigation" and that "[t]his investigation was not about someone like the appellant" (para. 5). In his view, since the police were investigating a "violent criminal gang" and not the appellant, the use of force was justified.

[126] With respect, I believe the opposite is true. Though the *investigation* concerned Nguyen, Tran, and the "Fresh Off the Boat" ("FOB") gang, our concern on this appeal is the violent execution of a search warrant relating to *the appellant and his residence*. In the absence of exigent circumstances or other particularized grounds, the police were obliged by law to make reasonable

inquiries, before conducting *that search*, to ascertain the nature of the premises they intended to enter, the identities and background of its occupants, and the real risk, in executing the warrant, of resistance by force.

[127] Nothing in the record supports a finding that they did, or attempted to, conduct even a rudimentary inquiry. Nothing supports a finding that they were unable or prevented from making that required assessment. And there is no suggestion that they were required by exigent circumstances or for any other particular reason to batter their way into the Cornell home unannounced and with violence.

[128] The single-minded focus of the police on Nguyen and Tran may have led them astray in deciding to enter the appellant's residence as they did. This might well explain — but cannot justify — their failure to make the specific assessment required by law. It does not make "reasonable" their apparent reliance on generalizations about the cocaine trade, information about the FOB gang, or "police practice".

[129] Second, Justice Cromwell refers to the "extensive evidentiary basis" for the violent entry (at para. 21). On the record before us, however, none of the evidence assessed by the police — or allegations included in their information to obtain the search warrant — related directly to the Cornell residence or to any of its inhabitants. In addition, when the search was executed, the only violent criminal ever seen entering the Cornell home *was already in police custody*. And, finally, the risk analysis that was prepared for internal purposes was never even shown to the tactical team, thus severing any possible link between the evidence gathered by police and the violent method of

entry into the appellant's home.

[130] Justice Cromwell dismisses the failure of the investigating officers to provide the tactical team with a copy of the risk analysis as "some missing paperwork and lack of communication" (para. 37). In my respectful view, however, this issue goes to the heart of the reasonableness inquiry. If the tactical team lacked even this information (which in any event did not relate specifically to the Cornell residence and its occupants), it is unclear to me how their decision to use such extreme force can be characterized as "reasonable" and "well-grounded" (my colleague's reasons, at paras. 2 and 27).

[131] Third, I agree with my colleague, at para. 42, that s. 29(1) cannot reasonably be read so as to require all 15 officers to carry copies of the warrant. Where, as in this case, a group of officers together execute a search warrant, s. 29(1) only requires that *they* have with them, and are able to produce, a copy of the warrant.

[132] The wording of s. 29(1) is clear. Police officers executing a search warrant are required by that provision to have a copy of it with them upon entry, "where it is feasible to do so". No evidence that it was not feasible to do so was adduced at trial.

[133] Finally, as my reasons make clear, at para. 3, I agree with Justice Cromwell that the police must be granted appropriate latitude in adopting necessary procedures to ensure their own safety and to secure the evidence sought. But in affording police officers the flexibility to which they are entitled, courts are not relieved of their duty to ensure that the police respect the legal and

constitutional restraints by which they are bound in virtue of the *CDSA*, the *Charter* and the common law. This is not a matter of judicial micromanagement of police operations (Justice Cromwell's reasons, at para. 31). It is about judicial enforcement of the rule of law.

[134] The question that remains is whether the admission of the evidence thereby obtained would bring the administration of justice into disrepute, within the meaning of s. 24(2) of the *Charter*. For the reasons already mentioned, and the reasons that follow, I believe that it would.

IV

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

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[136] The appropriate test for the exclusion of evidence under s. 24(2) was recently considered in *Grant* and its companion cases, where the Court reconsidered and refined the analytical framework initially set out in *Collins* and later developed in *R. v. Stillman,* [1997] 1 S.C.R. 607.

[137] In determining whether the admission of evidence would tend to bring the administration of justice into disrepute, the court must now weigh three distinct factors:

(1) The seriousness of the *Charter* infringing state 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.

[138] I turn first to the seriousness of the *Charter* breach.

[139] We are not concerned in this case with a minor or technical infringement of the appellant's constitutional rights under s. 8 of the *Charter*. On the contrary, the infringing state conduct involves an armed, sudden and violent assault by masked intruders on a private residence without reasonable justification — indeed, without any prior inquiry or assessment as to the use of such extreme measures.

[140] This constituted not only a violation of s. 8, but also an unnecessary and egregious departure from the common law "knock and announce" rule. I emphasize that the Court is not invited by the appellant to make new law, but simply to apply a consistent and unbroken line of authority that predates not only the *Charter*, but Confederation itself, reaching back more than four centuries to *Semayne's Case* (1604), 5 Co. Rep. 9, 77 E.R. 194. Nor are the important underlying principles lost in the dimness of time. The Court in *Genest*, barely 20 years ago, forcefully reasserted their contemporary relevance in the clearest of terms.

[141] The *Charter* infringing conduct is serious because it constitutes as well a violation of

s. 12 of the *CDSA*, which authorized the police to use only "as much force as is necessary in the circumstances". I need hardly repeat once more that there is nothing in the record to suggest that the force used was reasonably necessary in the circumstances, or to suggest that even a perfunctory inquiry would not have made this clear.

[142] In addition, upon entry into the appellant's home, the officers were required by s. 29 of the *Criminal Code* to have the search warrant with them, if this was feasible, and nothing in the record suggests that it was not.

[143] Against all this, we are urged to find that the police acted in "good faith" because they were merely conducting the search in accordance with departmental policy. In my view, the fact that the police were acting in accordance with their then routine practices makes their already serious infringement *more and not less serious*: First, because it establishes that the infringement was systemic, and not merely an isolated occurrence; second, because important aspects of the policy, as noted earlier, had by then been judicially condemned at the appellate level.

[144] I turn next to the impact of the breach on the *Charter*-protected interests of the appellant.

[145] This Court has consistently reiterated that the privacy interest protected by s. 8 is most actively engaged in the context of a private residence. As Cory J. observed in *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 141:

> [A person's home] must be the final refuge and safe haven for all Canadians. It is there that the expectation of privacy is at its highest and where there should be freedom from external forces, particularly the actions of agents of the state, unless those actions are duly authorized. This principle is fundamental to a democracy as Canadians understand that term.

[146] And as the Court held in *Grant*, at para. 78, "[a]n unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy ... is more serious than one that does not."

[147] The right to be secure from unreasonable search and seizure is a cherished and constitutionally entrenched right in Canadian law. This guarantee, long established at common law and explicitly recognized in the *Charter*, is not trumped by the issuance of a search warrant. A search warrant authorizes the police to enter and search a private home, but only in accordance with the *Charter* itself, with the statute pursuant to which the warrant is issued, and with the common law. A search of a private home that is conducted in violation of all three and, in the process, causes significant and unnecessary damage to the home, strongly favours exclusion of the evidence thereby obtained.

[148] As required by *Grant*, I turn, finally, to society's interest in the adjudication of the case on its merits.

[149] As the Chief Justice and Charron J. explained in *Grant*, the integrity of the administration of justice is not measured solely with reference to the present *Charter* breach:

> Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. [para. 69]

[150] The issue here is whether society's interest in the adjudication of this case on its merits outweighs the interests of society, in the longer term, in discouraging routine disregard by the police of constitutional, statutory and common law safeguards designed to protect the sanctity of a person's home.

[151] This is not a matter of "punishing" the police, but rather of helping to regulate their conduct in the interests of society as a whole. Nor is it a matter of malice on the part of the officers who conducted the search. It involves a more serious affront to the administration of justice: grossly excessive and entirely unjustified violence, accompanied by psychological intimidation unwarranted in the circumstances, involving a private home, and without consideration of the need or the consequences.

[152] In these circumstances, I believe that admission of the evidence obtained pursuant to the search would not only bring the administration of justice into disrepute, but would also do a disservice not only to police officers, but to trial judges as well, by failing to give them the constitutional guidance this Court is expected to provide. That purpose will best be served by excluding the impugned evidence, giving meaningful effect to s. 24(2) of the *Charter*.

V

[153] For all of these reasons, as stated at the outset, I would allow the appeal and, like O'Brien J.A., dissenting in the Court of Appeal, I would set aside the appellant's conviction and substitute an acquittal.

Appeal dismissed, BINNIE, LEBEL *and* FISH JJ., *dissenting.*

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